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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### Select Committee on Constitutional Reform

1987 Constitutional Accord

#### First Session, 34th Parliament

Thursday, March 10, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers

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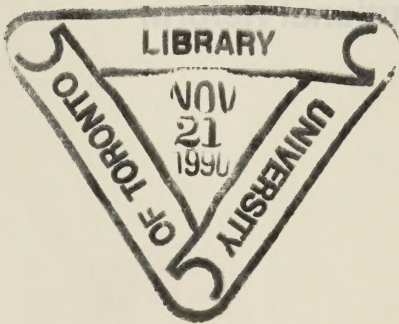
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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, March 10, 1988

The committee met at 10:07 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

(continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin our session, I would like to invite Janet Davis, the vice-president of the Ontario Coalition for Better Day Care. We want, first, to thank you for coming in and welcome you here to Queen's Park. We have a copy of your submission. If you would like to take us through it, we can follow up with questions afterwards.

### ONTARIO COALITION FOR BETTER CHILD CARE

**Ms. Davis:** As I was saying to someone, I am no constitutional expert.

**Mr. Chairman:** Do not worry about that. We are not—

**Mr. Keyes:** Join the group.

**Ms. Davis:** I had hoped to have some additional womanpower with me here this morning in handling it.

**Mr. Chairman:** We keep reminding people that we are not constitutional experts here and so we very much appreciate your coming. Please do not feel at all concerned that you do not think you are either.

**Ms. Davis:** OK. I will try to avoid reading, although I think that I will follow the submission anyway.

The Ontario Coalition for Better Child Care is a broadly based provincial advocacy organization composed of large provincial organizations, provincial branches of national organizations, women's groups, social service groups, early childhood educators and parents. We have a network of groups across the province and we participate in lobbying activities at all three levels of government because child care is a service that is funded by all three levels of government.

The coalition philosophically is committed to the establishment of a universally accessible, publicly funded, nonprofit child care system in Canada. We envision as part of such a comprehensive system the provision of a range of services and benefits that will enable all women

to fully participate in every aspect of Canadian life. We believe that without such services women and children will continue to bear the costs of inequality. I am reading, even though I said I was not going to.

**Mr. Chairman:** That is quite all right.

**Ms. Davis:** Everyone reads. I do not like reading.

**Mr. Breagh:** Not everyone on this committee can read.

**Mr. Chairman:** Please feel free to do that, because you do want to make sure that your arguments are on the record.

**Ms. Davis:** Right.

**Mr. Chairman:** You are also speaking to a greater audience than is here, so please do not worry about that.

**Ms. Davis:** OK. We acknowledge that a universal child care system in Canada requires national leadership, so it will also require that the federal government initiate a national program that would include federal legislation with national public-policy objectives and standards and conditions for shared-cost funding arrangements. But we are also aware that the provision of child care services lies in an area of exclusive provincial jurisdiction and that the establishment of a national child care program would therefore require the use of federal spending power and extensive federal-provincial negotiations.

The 1987 constitutional accord, which will entrench for the first time the federal spending power in the Constitution, has profound implications for future development of child care in Canada. We believe that this amendment, section 106A, if passed, will prevent the establishment of a national child care program that could provide high-quality, universally accessible, publicly funded, nonprofit child care services in every province. In fact, the impending constitutional changes have already jeopardized the possibility of such programs.

In this submission we will first focus on some of the fundamental flaws generally that we see in the proposed amendment. Specifically, we are going to be addressing the spending-power provisions. We do acknowledge that there are some other implications for women's equality



rights in other sections, but we are going to focus specifically on the spending-power provisions.

I would like, first, to illustrate with some examples some of the inconsistencies that currently exist in child care across Canada; second, to address briefly how we see this being resolved; and third, to show how the Meech Lake accord has affected this present federal government's current child care initiatives. We feel that the impending constitutional changes have in fact affected what we have been presented with most recently. Finally, we have some recommendations. I have included the clause, because we use this as an educational tool for some of our members.

There are four main concerns with section 106A and the spending-power provisions. I think initially it will be a disincentive for the establishment of new national programs. It will result in the balkanization of social programs. The ambiguity of language and judicial interpretation will have profound effects on what we eventually see. We are concerned about the increased decentralization that will exist or will develop in the Canadian federal system. I may be able to just go through some of these. I am sure you have heard them all.

**Mr. Chairman:** I doubt that we have heard them in quite this context, quite frankly, focused on a particular program, so please go ahead.

**Ms. Davis:** The initial parts are fairly general, and then I will follow up later.

As I said, I think this section will act as a disincentive for future federal governments and this existing federal government to initiate new national programs. The opting-out provisions will discourage federal initiatives that are not likely to receive provincial consensus, and without guarantees that all or most provincial governments will participate in a new program, the federal government will hesitate to take the political risk of initiating programs that may look ineffective.

Most particularly, the opting-out provision, which gives provinces financial compensation for programs that are "compatible with national objectives," will leave the federal government as merely a broker of federal transfer payments. This cash-register federalism leaves the federal government little leverage for determining the use of federal tax dollars. If provincial governments opt out of new national programs, the federal government will lose its accountability for programs funded with federal dollars and it will receive little political credit for popular programs that are federally funded but provin-

cially initiated. Because of these potential implications, new national social programs will be sidestepped in favour of more-visible federal spending. The tax system will likely be used as the most politically effective route for responding to social issues.

Second is the issue of the balkanization of social programs. The provincial opting-out provision will create a checkerboard of social programs across the country. In fact, the joint committee in its recommendations, I was quite surprised, also acknowledged that that would be the effect, and I will refer to that later. The possibility of future national universal programs may be dashed, leaving the federal government with little ability to ensure that all Canadians are guaranteed crucial social services.

A patchwork of diverse and uneven services across the country will be the norm, creating unequal access, restricting portability and eroding equality and mobility rights. In order to curtail opting out, the national objectives will inevitably be lowest-common-denominator standards, again inhibiting the possibility of consistent, high-quality programs in every province.

A third argument most critics have pointed to is the ambiguity of the language in the section. It is dangerously ambiguous. Most of the terminology in the clause has not been interpreted by courts before. Some of the language, I understand, does exist in some statutes but certainly not in a document that is as fundamental as the Constitution. Inevitably it will mean that there will be judicial interpretation of these clauses.

There are a lot of things that are unclear. Which programs will come under the purview of this act? Will it be amendments to existing programs or will it be only new programs? Those questions are still not answered. What degree of compatibility with national objectives will allow provinces funding if they opt out? Does it mean there will be partial funding or, as I pointed out, possibly funding commensurate with program alignment? Could we see partial funding of programs? Provinces may get some money for this and not for that. In a sense, provincial governments, if they choose to opt out, have no guarantees what kind of funding they may receive anyway.

Most striking is the shift of power from the legislative to the judicial branch and the ability of governments and legislatures to develop social policy and determine federal spending priorities. I do not believe that the judiciary is the appropriate body for developing public policy.



Fourth, there are a number of amendments in the Meech Lake accord that will increase decentralization and give greater power to the provinces. The ability of the provinces to suggest appointments to the Supreme Court of Canada, and entrenched first ministers' meetings, will have an impact on the federal system and a devolution of federal power.

Regular first ministers' meetings will create a de facto third level of government, relegating legislatures to merely a chamber of ratification. I think the Meech Lake accord is fundamentally flawed and the proposed spending-power amendment will detrimentally affect our ability as a nation to respond to changing social conditions and emerging economic challenges.

Generally, it is a reiteration of the arguments that the federal government would have little incentive to initiate new programs, we will have a greater uneven level of services around the country and there will be effective transfer of power to the judiciary.

The Canadian child care system right now is in a state of crisis. We have simply not enough child care. What exists is too expensive. What exists is also uneven in its level of quality. Accessibility across the country is certainly inequitable currently. This hodgepodge of existing services has been acknowledged by politicians and the public alike for many years, and we recognize that there is need for federal leadership to establish a new federal program.

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I give a few examples here of some of the inequities and inconsistencies that exist currently. I have broken it down into subsidy. The maximum income for a one-parent, one-child family eligible to receive a full subsidy is \$27,732 in Ontario, \$11,925 in Manitoba, \$8,964 in Newfoundland and \$10,692 in British Columbia. The percentage of children eligible for subsidy who are actually receiving it right now in Canada: 96 per cent of children in Quebec are receiving care who are eligible, 12 per cent in Ontario and 32 per cent in Saskatchewan. Per capita spending on child care is \$88 in British Columbia, \$134 in Alberta and \$67 in New Brunswick. Expenditures for operating grants are \$16 million in Quebec, \$500,000 in British Columbia and \$8,000 in Newfoundland.

In regard to standards and regulations, I was not able to give you a whole lot. Because child care is in an area of provincial jurisdiction, standards and guidelines are provincial jurisdiction. So there is a range of things that vary. Staff

training, staff-child ratios and a number of other things vary tremendously across the country.

The range of services available also ranges dramatically. I have just given a few examples here. There is no group infant care available in Saskatchewan and Newfoundland. There is no family day care in Newfoundland. Seventy per cent of Alberta's care is commercial day care. British Columbia provides subsidies for unsupervised day care. There only 10 spaces for special-needs children in Prince Edward Island.

The need for new federal initiatives to address the severe inequities has been documented in study after study. In 1986, the Katie Cooke task force tabled its report recommending sweeping changes to the child care system to be phased in over 10 years. With strong federal leadership to encourage the expansion of high-quality services, with clear national standards and federal-provincial cost-sharing criteria, the federal government could initiate the development of a real national child care system, which was recommended in this report. But the report has been overlooked by the federal government.

There are many people involved in the child care field who see the Meech Lake accord as actually having had a dramatic impact on the federal policy that was recently released. In fact, some of the fundamental flaws in the accord that I pointed out, as I am sure you have heard many times, have proved themselves when you look at what has been offered to us by the federal government. Many people see the national child care policy as the first test case of Meech Lake federalism.

In order to prevent provincial disagreement and, at the same time, gain some political credit, the federal government has proposed a plan which will further fragment and limit access to high-quality child care for families in different provinces across Canada.

I say in the brief that political credit equals tax credit, because that is exactly what the federal government has done. Of the \$5.4 billion, almost half, \$2.3 billion, has been allocated to tax credits, or tax measures. There are child care expense deductions, increases and also a new child care tax credit. Instead of directing the funds that are available into developing and increasing the supply of services, the federal government has opted for what we have considered to be probably a more political expedient and politically popular strategy.

Both the Katie Cooke task force and, in fact, the Tory special committee acknowledged that tax measures were not the way to go to develop



national child care policies. The increased tax deductions are regressive. It benefits those who already have a child care space, who are lucky enough to have one, and it gives a bigger tax break to those with higher taxable incomes. So deductions certainly have been rejected by almost everyone as the way to go to deal with child care. The tax credit that they are offering is \$100. It will increase to \$200 in future years. It will do nothing to address the problem for those who need or cannot afford quality child care.

The tax credit also takes up more than half of the \$2.3 billion. It is a pittance, but it is spread so widely it is available to everyone who stays at home or who does not use the child-care expense deduction. It is a huge expenditure and it is not going to do anything for anyone. It is a disaster. But you get your tax refund at the end of the year. It is something that individuals can acknowledge came directly from the federal government.

The second part of the program is positive but what is strictly inadequate is the proposed new national child care act. It is a new federal-provincial, cost-sharing arrangement which will remove child care from the Canada assistance plan, which was the welfare legislation that has funded money to child care all along.

What the new federal-provincial, cost-sharing arrangement is proposing to do is to lump together subsidized day care, operating grants and capital grants. The money that has been targeted is \$3 billion over seven years, which works out to about \$4 million a year. We have costed out what federal spending would have been through the existing Canada assistance plan. It would have been at that level anyway.

It really is actually a sham. The open-endedness of the Canada assistance plan is now gone. This new federal cost-sharing arrangement will be limited. It will place the provinces in competition with each other. There are going to be preferential cost-sharing arrangements for the poorer provinces. It may mean that Ontario in particular will in the end lose out and not get the kind of funding it has had in the past. In fact, I think Ontario has made a very big mistake in accepting so quickly, overnight, at one first ministers' meeting, a program that will inevitably place it in an economic squeeze at the end of the seven-year period.

As I have said here, the initiatives intended to increase the supply of child care are disgracefully inadequate. Rather than targeting sufficient funds to meet the ever-growing demand for service, the federal government has opted for a

more visible strategy for buying political support.

What it has also done, I call "no opting out, no strings attached." They have simply said, "We will cost-share what you want to spend." There are no conditions to the money. It means that Alberta, which has been lobbying like crazy for years and years to get more federal dollars to direct into the commercial sector because it has been picking that up 100 per cent itself, is now going to be able to get federal dollars for that commercial sector.

In order to gain immediate provincial consensus on this program, the federal cost-sharing provisions have no national standards, no objectives and no funding criteria, no funding conditions. While the Minister of National Health and Welfare has stated that these standards and objectives will be developed, they are still negotiating. I hear they cannot come up with a definition of child care. It is unlikely any conditions will ensure equitable access to high-quality services across the country. In essence, we are sure lowest-common-denominator standards will take the form of vague, national objectives.

As I said, for the first time federal funds for operating grants will be available to commercial day care operators. All the most recent evidence has shown that the quality of care in commercial programs is of lower standards. This concession has come as a result of strong provincial lobbying. Without national criteria that directs funds to nonprofit only, the new funding will be a bonanza for private entrepreneurs, compromising the quality of care in many provinces. Federal officials have stated that such flexibility in provincial spending is necessary to meet regional needs, but allowing for provincial discretion will undoubtedly result in further balkanization, a further checkerboard of child care services across Canada.

### 1030

Without conditions on favourable cost-sharing for provincial child care services, the federal government has abdicated its responsibility to ensure Canadians have reasonable access to needed social programs and has become a broker of federal funds. They have jeopardized the possibility of establishing a national system of child care in Canada. We are extremely concerned that the national policy that has been placed before us will move us into a new direction we will not be able to change in the future. It is an example of—I refer to it later—a blank cheque to the provinces.



I know you are sitting here as provincial legislators and it is difficult for me to provide arguments why you should not have more autonomy, but it is an incredibly dangerous precedent. There are provinces right now, British Columbia in particular, that would like to provide vouchers for babysitting. We will never see the creation of a child care system that will ensure any kind of quality if the federal government does not establish standards and criteria for federal transfer payments.

As I said, we believe the constitutional amendments have already affected the current child care policy and we are concerned about implications for the future. We talk about ambiguity of language again.

We are concerned about the effective shift of power to the judiciary. Public accountability for spending priorities must rest with elected officials and not judges if we are to continue to influence the development of public policy.

We also believe that the federal government must not relinquish effective decision-making power to a collective of deal-making provincial premiers and senior bureaucrats. Our experience to date with the secretive process of executive federalism has been frustrating and alienating.

We acknowledge that Quebec's place in the Canadian federation should be unique, but opting-out privileges should not be conceded to all provinces as the price of agreement.

We believe that the proposed 1987 constitutional accord will impact negatively on the future development of a national child care program. It has already had a profound effect.

In order to score a political success and assure Canadians that the accord is workable, the federal government has chosen a politically expedient route for addressing this crucial social policy issue. The future of all social programs in Canada is being threatened by the provisions in the Meech Lake accord. If a Canadian federal system is to respond to the challenges of changing economic circumstances, our national government must retain its ability to determine social priorities and enact appropriate legislation.

We would like to recommend that the Ontario government reject the proposed accord and request another first ministers' meeting to renegotiate the accord, and that the Ontario government show leadership in ensuring that all Canadians have access to programs and services that are equitable and portable by renegotiating an agreement that contains a federal-spending-power clause, but eliminates opting-out pro-

visions with financial compensation for all provinces.

I am sorry I jumped all over the place.

**Mr. Chairman:** That is quite all right. I think it is clear. As I mentioned before, it is particularly helpful because you have looked at a specific program area. It has been mentioned before, but I do not think in quite the detail you have gone into it. That is very helpful. We will turn now to questions.

**Mr. Breagh:** I thank you for doing something that I think we had to do at some point in time. We probably will go through this exercise on more than one occasion, but I think we have to. I appreciate the chance because it talks about a program many of us are really interested in, that has such an increasingly dramatic effect on the people we represent. I do not think you could pick one in quite such a distinctive way. There are no rules at work out there and it is an increasingly large problem for an immense number of people. It is one of those blockading issues. If reasonable child care is not provided, persons cannot work and their whole economic structure is destroyed.

It is also a good example of why there is more than one political party in this country. We look at a common set of facts and come to different conclusions. I agree absolutely with your assessment of the current situation. I believe we got there because there have never been any rules about federal spending. Upstairs in the chamber, we are constantly at one another about, "Why do you not do it the way Manitoba does it, Quebec does it or Saskatchewan does it?" It is not too often you hear cries to do it the way BC does it, but there used to be; it used to happen.

The basic problem is that your assessment of the current situation is absolutely correct. There have never been any rules about federal spending programs. Basically, they are all negotiated on an ad hoc basis. That is why Quebec has a different pension plan from the rest of the country and why medicare is not the same in any of our provinces. We constantly argue about how a little province like Saskatchewan can provide assistive devices and Ontario cannot, because there are no rules to that game.

I read this accord in a much different light than you do. Of all the things I would not want to do in Canada right now, it is to give Brian Mulroney and that group sole jurisdiction on anything. My assessment is that the lousy proposals on child care are my best example of why I do not want the federal government to have clear jurisdiction to set all the rules in there. I think the people in

Canada every once in a while make big mistakes. They made one in the last federal election and we are paying a heavy price for that.

I would agree with all the facts you have stated here and argue just the opposite as to cause. I would argue that the reason we are balkanized now is that we have never had any rules. I would argue that one of the things I want a Constitution for is that I want a person in Newfoundland, BC or Ontario ultimately to have the right to go to court to argue that my government is not treating me fairly and that it is a violation of my constitutional rights that it does not provide me with reasonable, good-quality child care. That is what a Constitution is about. That is a little new in Canada, but that is what constitutional rights are about.

I am perplexed a little bit. I know that a number of people who are very interested in child care programs have come to much the same conclusion you have. I cannot for the life of me understand them. See, here is where you lose me. We do not have any rules now and every one of us agrees that the system is screwed up badly. How does the provision, for the first time in our history, of writing down—whether we call them guidelines or standards or things of that nature; we can get into that argument if you want but I do not think that is the pertinent one here—we have no rules now, but how does putting it into the Constitution, a kind of standardization of federal funding powers, screw up the process? Do you really want all your eggs in one basket? That would be my concern.

I know we have heard this argument before, that you could never do medicare, but medicare came out of Saskatchewan. The poorest province in the country started medicare in Canada and shamed the federal government into extending it into a national program.

**Ms. Davis:** Yes, but the Canada Health Act ensured that there was no opting out in every province.

**Mr. Breagh:** That is not true. That is simply not true. The Canada Health Act did not. The Canada Health Act by itself required provincial legislation in each of the legislatures across the country to see that it was implemented. There are those who would argue that even with a federal act and a provincial act in Ontario, there are still doctors who extra bill, and there are.

It is not that I am arguing at all with your case. I am agreeing with your case. I am agreeing with your assessment, but I come to a different conclusion than you do.

**Ms. Davis:** I guess what we want to see is a national child care system that will guarantee that every person in Canada has access to certain standards.

**Mr. Breagh:** Me too.

**Ms. Davis:** I guess then basically you believe that the judiciary can play that role.

**Mr. Breagh:** Let me stop you there. I believe the judiciary has a role to play, as the Supreme Court did about a week or so ago. It is not going to be a regular thing. It is going to be a last resort. When your political process fails you, you retain the legal right to go to court and challenge whether or not governments are treating you fairly. That is what a Constitution is about in my books. I want that.

I want the right of someone, probably a woman in a small town in northern Ontario, to go to court and say, "The province of Ontario got this money on the premise that it would provide a good child care program with reasonable access and in Kapuskasing it is not doing that." If Ontario will not change its programs and provide reasonable access, and she has a right to go to court, then I believe a judge has a right to say, "You pay the same tax dollars in Kapuskasing as they do in downtown Toronto and you deserve the same access to the same system." I would hope that the judge would be reasonable in how he would assess that, but I think that is a legal right I want Canadians to have.

**1040**

**Ms. Davis:** Then you have greater faith in judicial interpretation—

**Mr. Breagh:** You have more faith in Brian Mulroney than I do. I mean that as an insult; no.

**Ms. Davis:** But at least I can remove Brian Mulroney.

**Miss Roberts:** But then you might have Ed Broadbent.

**Mr. Breagh:** She has me back on side now.

**Mr. Chairman:** The chair will intervene here to calm the waters. The member for Elgin (Miss Roberts) is being argumentative.

**Mr. Offer:** Thank you very much for your presentation. Not only does it deal with the spending power, but it also brings a focus on a particular issue with respect to the child care problems, which you have raised very well. You have brought forward some of the problems your organization is having at both the federal and provincial levels. I think it is extremely important, when we deal with this part of the accord, not only to deal with your particular issue but also



with future issues that might confront not only the provinces but also the country as a whole.

On that point, my first question was going to revolve around your presentation, that it seemed jurisdiction of child care ought to go back or ought to be changed to the federal government as opposed to the provincial government. That was just the way it seemed to be leaning.

**Ms. Davis:** It cannot go to the federal government.

**Mr. Offer:** I really want you to respond, especially from your organization, because this is a coalition that is dealing with a matter at hand that is very topical right now. It is dealing with a matter where you see very large problems. One of the responses you gave in your presentation was that Ontario made a mistake in accepting this program that the feds have with respect to the cost-sharing.

Because there is now a section 106, because there is now the opportunity for you to go to the province—you know that it is a national problem, but each one of the affiliates can go to each province and say, “The principle is good but we think this service should take this direction in this province.” On a provincial basis, you now have the right to use section 106 and say: “We are going to opt out. We are going to receive the reasonable compensation. We are going to comply with the objectives. We might even build upon the objectives.”

This is the problem I have. Why would your organization be especially reluctant to have the extra clout you will now have with all the provinces in the country, saying: “You, province, can now opt out. You can in a very real sense meet the particular problems of your province and we want you to do that.”

I just have a problem in seeing why there is the reluctance. It is going the way it was before and saying, “It is a federal program and we are just going to try to carry it out as best we can,” as opposed to tailor-making it for the particular province.

**Ms. Davis:** You may wish to tailor-make it, but as I said, in the end the interpretation of your programs and how compatible they are with national objectives may mean that you are not able to produce the kinds of programs you have. Also, we have over half of the spending on the tax route. I think that is the concern, that there is an avoidance of producing—I am talking myself into a corner right here, I can see this.

**Mr. Chairman:** If I could just underline that you are sharing with us a problem that we are really grappling with. If we seem to be coming at

you, please do not take it that way. After four or five weeks of hearings, we have realized there is a potential problem here, so we are trying to explore it through different routes and we are sharing our dilemma and our problem with you. So we work together here.

**Mr. Offer:** That is right. We are trying to come to grips with section 106, the spending power, the right of the provinces to opt out and trying to assess the impact of that.

**Ms. Davis:** To go back and negotiate it and tighten up the wording of the agreement probably is the most reasonable thing to do in order to get agreement. Just the way it is now, it is so loose that you could not produce a national program that would guarantee any sort of level of consistency across the country. If this federal government comes up with national objectives that are very vague, we are simply not going to have a system that will have any consistency.

**Mr. Offer:** Thank you very much for that. In dealing with the spending provision, we are certainly going to have to take into account certain examples. The one that you bring today and have discussed with such thoroughness is one that is going to weigh very heavily on our minds.

**Mr. Elliot:** I would like to focus right in on the section of the accord that we are talking about here, because there is a lot of nebulousness about the discussion up to this point with respect to the actual wording and what it affects.

What it says in section 106A, subsections 1 and 2, which are added to the Constitution, is, “The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section,” because it does not apply to cost-shared programs that are presently in place. And it is “in an area of exclusive provincial jurisdiction,” which a number of times this morning we have said is this particular concern. It says, “If the province carries on a program or initiative that is compatible with the national objectives.”

The second part says, “Nothing in this section extends the legislative powers of the Parliament of Canada or the legislatures of the provinces.”

I submit that a group like your own can do a lot in the context of the wording that is there right now in two ways. It is obvious that you are disenchanted with the present agreement. I really think that the coalition, by applying a lot of pressure in this particular year federally, could



come up with an interpretation of "national objectives," for example, that are actually national standards. By clearly delineating to the federal government what the expectation is nationally, you could do a lot of good that way.

The other thing is with respect to the province—because it is still provincial jurisdiction—you could fill in all the gaps that are needed with respect to the province of Ontario so that when a final agreement is perpetrated, it closely reflects what is actually wanted by the people in the province; in fact, in all the provinces.

The comment I would like to make is that rather than going with a recommendation like the one in your paper where it says, "Reject and start over again," I think starting with this point you could very clearly do it through agreements and not constitutionalize. I think what you are saying to me, as I listen this morning, is that you want it all in the Constitution. I submit that in all these areas, if we try to constitutionalize the agreement as well as the fact that we are trying to go after, it is going to be too long and too involved a process and you are going to lose in the long haul.

This is my comment with respect to what I have heard this morning. I think you are trying to constitutionalize something that really should be an agreement between the provinces and the federal government.

**Ms. Davis:** The Canadian Day Care Advocacy Association actually has developed national objectives and standards with various criteria. I think they are modelled on the Canada Health Act standards, criteria, purpose and so on.

1050

**Mr. Elliot:** A supplementary comment I would like to make here is that this is the first time that the federal government could do something like this. Until now there was nothing in the Constitution that allowed them to act at all in this particular area because it was strictly a provincial jurisdiction.

I agree with you completely that if the national standards or objectives were such that there was a good set of standards there, it would certainly add a lot in this particular area, which concerns all of us really. I think this is a political decision, this particular one. Both the province and the federal politicians have to come up with an agreement that is satisfactory to the people who need the day care service.

**Ms. Davis:** I agree. The problem is that right now all of these negotiations are going on behind closed doors with all these various senior

bureaucrats and so on. We have no access to that process.

**Mr. Elliot:** That is another thing that is coming through loud and clear in these discussions; I do not think the people of Ontario are going to stand for that beyond this point in time. Thank you very much, Mr. Chairman.

**Mr. Keyes:** I have a very brief one which follows up exactly on that point. In your brief you make very clear your message of the potential impact on the lack of ability as a result of Meech Lake to have standardized programs for everyone. I see your brief as one clearly expressing your frustration with the process as much as anything else. You say on page 11 that it should not be left to "a collective of deal-making provincial premiers and senior bureaucrats." Yet when you end your brief, your very first recommendation says: Throw out Meech Lake and send them all back again and start the process over. I think that typifies your total frustration with it, because you are saying go back to do it again.

**Ms. Davis:** Yes. I realize; our concerns about the process were not addressed in the recommendations. I think that what is happening here should have occurred a long time ago and should have been more meaningful. In fact, I find it extremely hypocritical to be sitting here doing this when the Premier only two days ago said there will be no changes to the accord.

**Mr. Keyes:** Well, just remember that the committee still has to make a report on this.

**Ms. Davis:** Well, that is wonderful. I am glad. I feel so wonderful that I spent all this time on that.

**Mr. Keyes:** You had some very excellent statistics on pages 6 and 7. I think they could have been much more effective if you had been consistent in carrying through those headings with regard to the same provinces, because you jumped, so that in the one about subsidy you included Ontario but then when you go to funding you do not include Ontario, and so on.

**Ms. Davis:** No. I just wanted to illustrate some of the extremes. They were very inconsistent. I also did not put in the source, which was not very good either, but this was certainly a rush job.

**Mr. Keyes:** I think it still makes a good brief, and you could still put more on it.

**Mr. Davis:** The Ontario Coalition for Better Child Care has probably submitted about 25 briefs and submissions to every manner of select committee, special committee and task force. Over the last two years, we have been consulted

beyond our resources. That is why I say, particularly of this committee, I find it extremely frustrating that it does not appear to be able to have any impact on the provincial decisions.

**Mr. Keyes:** It will have the impact once we get the funding from the national level. Do not give up hope. Your presentation can still bear a lot of fruit once we see the source—

**Ms. Davis:** If you want to get into talking about day care politics and the Ontario government—

**Mr. Keyes:** Not this morning.

**Ms. Davis:** —they have acknowledged very clearly that they have compromised in accepting this national program and have found that over the short term, it enables the Ontario government to do what it had said it was going to do in its New Directions for Child Care policy last spring. So what the feds offered was enough for now, but at the end of the seven years, they acknowledge there is going to be a big problem. I am quite surprised, actually, that there was not a more cautious approach to that federal proposal.

**Mr. Chairman:** Ms. Davis, I want to thank you very much for joining us this morning and presenting your brief. In closing, I want to make a couple of comments. I do not think there is anybody around these tables who appreciates the process to a greater extent—that we have all had to deal with. What is important is that as long there are hearings, it allows time for ideas to come forward, it allows people to review ways of handling problems and we are part, in a sense, of a much broader process. There are other provinces that have indicated they are also going to be having hearings. We have heard from I do not know how many groups and individuals and have a lot to hear from.

I think when we look at the process that was set out and the fact that there is a three-year period, there is a lot of discussion that is still to go on and we are hearing a lot of things that we certainly will have to reflect in our own report. I do not think we know exactly where we are going to be, and I think that is evident in terms of the discussion we have had with you this morning in terms of trying to look at the political process that goes into developing national programs along with the constitutional process and what kind of balancing we want to do there.

What has been so helpful about your presentation is that you focused on the clear, present, now priority—that is, if you like, the medicare of the 1980s. In looking at that program and how we can establish the kind of program we would like

to see—whether we are living in Newfoundland, BC or Ontario, and looking at the Meech Lake accord—I think that is tremendously helpful as a specific example. We appreciate very much that you came today and focused on that. When we do get to the end of this journey, I hope we will have something to say that will be meaningful to that debate. Thank you very much.

**Ms. Davis:** Thank you.

**Mr. Breagh:** Before you go to the next group, I knew this would come some time in my career: I have to admit I made a mistake. I knew there would be shock. Somehow in the reviewing of my notes on how the vote went in the Quebec National Assembly, I was left with the impression that no one had voted against it. Those who are members of the Parti québécois would never forgive me—they probably will not anyway—if I did not recognize this morning that they voted against the accord. I do not know how this happened; computer error, I read the wrong matchbook, something.

**Mr. Keyes:** You cannot count.

**Mr. Breagh:** I was wrong.

**Mr. Chairman:** We appreciate your statement.

I now call upon the representatives of Outreach Abuse Prevention Program—Donna Harris, the executive director, and Maureen Daigle, the founder and program developer—to please come and take a chair.

**Mr. Breagh:** If you note where this group is from, you will know you had better “listen up.”

**Ms. Daigle:** I think he is trying to indicate we are from Oshawa.

**Mr. Chairman:** It is a pleasure, especially after the confession that the honourable member has made, to welcome you. We appreciate your coming. We have a copy of your submission and if you would like to take us through that, we will follow up with a period of questioning.

#### OUTREACH ABUSE PREVENTION

**Ms. Daigle:** I have elected that I will read the submission and that my colleague Donna Harris will field questions. I made that arbitrary decision in the car.

**Mr. Chairman:** Do all people from Oshawa work that way?

**Ms. Daigle:** That is right.

**Mr. Chairman:** Please go ahead.

**Ms. Daigle:** Outreach Abuse Prevention is a nonprofit charitable organization founded in



1983 in response to the tragic rape and murder of a nine-year-old child.

Since its inception, Outreach has been an organization dedicated to the belief that all adults are morally obligated to struggle for a society that recognizes children's rights and respects and protects them from emotional, physical and sexual abuse.

Sexual abuse of children, in particular, has long been ignored, tolerated and dismissed by adults. A child's right to an abuse-free childhood will begin when Canadians as a society recognize that children have the right to truly own their bodies.

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The 1984 Badgley report investigated sexual offences against Canadian children and concluded, "Sexual offences are committed so frequently and against so many persons that there is an evident and urgent need to afford victims greater protection than that now being provided."

According to the Charter of Rights, "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

In our opinion, Canadian children, as individuals, in the most practical sense are not afforded equal protection or benefit of the law. Canadian children are discriminated against solely on the basis of their age. Until such time as children's status as a group is articulated in constitutional documents, children's rights will not ever fully be recognized. Children are not equal.

The Meech Lake accord suggests a hierarchy of rights for adult groups but, again, ignores children's rights. By recognizing Quebec as a distinct society and not clearly articulating or protecting individual equality rights for women, the equality rights for women are in jeopardy.

The federally commissioned Badgley report observed: "What is required is the recognition by all Canadians that children and youths have the absolute right to be protected from these offences. To achieve this purpose, a major shift in fundamental values of Canadians and in social policies by government must be realized."

Social policies which weaken women's equality rights will seriously jeopardize children's rights. Children's rights will only emerge in our society when women's rights are fully developed.

The opt-out clause of the accord works against the hope of comprehensive abuse-prevention education programs ever becoming a reality in

our society. This will make it harder, if not impossible, to promote the major shift in fundamental values and social policies called for in the federally commissioned Badgley report.

**Ms. Harris:** It is our organization's recommendation that you, as a select committee, go to our Ontario government and recommend that the Meech Lake accord not be approved until such time as it includes women's equality rights—as established in the Charter, sections 15 and 28—in clause 16 of the accord. We also recommend that the Ontario government not approve the Meech Lake accord until they delete—or change the wording of—the opting-out provision from the accord.

**Mr. Chairman:** Thank you very much. You have touched on one issue that I do not believe has been raised with us at all to this point, the question of children's rights. The linkage there between children's rights and women's rights is an interesting one, which I suspect we will follow up on in our questions, and we will begin with Mr. Eves.

**Mr. Eves:** I would like to congratulate your association on being here today. I think that any association that has Art Eggleton, Larry Grossman and Bob Rae on its advisory board need not fear any partisan political intervention by anyone.

I want to go to your recommendations. The first recommendation you make is one that has been made to this committee by many groups, as I am sure you are aware. Professor Baines indicates that if section 16 of the accord was amended to include everybody's rights and make it abundantly clear that nobody's rights under the charter would be derogated from, that would be perhaps most satisfactory and include everybody.

Failing that, her bottom line was that this committee at least should suggest a reference to the Ontario Court of Appeal on that one precise issue. I take it you would be satisfied with either one of those solutions to your problem?

**Ms. Harris:** I concur with her that it would be advisable to put that wording in at that point.

**Mr. Eves:** I suppose the other point you make is somewhat more difficult in realistic terms to change, and that is the opting-out provision. We have also heard a few witnesses indicate—although it would not solve your opting-out problem—that if the word "standards" as opposed to "objectives" had been used in the accord, at least then the federal government might be able to establish standards Canada-wide, although



provinces would still have the ability to opt out and have their own programs, as long as they adhered to those standards, whatever they were. Does an argument like that interest you? Do you think that could be a solution to your problem or a compromise solution to your problem?

**Ms. Harris:** I think that the Badgley commission did try to put forth the concept that we do need a standard of prevention education for children across the country that will implement and change social attitudes to the problem of abuse against children. What I am concerned about is that we set a national standard and recommendations that yes, these kinds of programs should be in place, but the opting-out wording is not clear enough that a province cannot choose, because of whatever moral climate happens to exist in that province at that existing time, that it will not want to override that and say that it is not going to be included in its educational system or in its social welfare system.

**Mr. Eves:** Of course the national standard was set. The federal government always has the ultimate threat of withholding funding from a particular province if you do not happen to be living up to their standards.

**Ms. Harris:** But are we always satisfied that all funding is actually directed and funnelled in? I am not totally comfortable that—

**Mr. Eves:** You still have a basic problem with the opting-out part.

**Ms. Harris:** Yes.

**Mr. Chairman:** Mr. Breaugh and then Miss Roberts.

**Mr. Breaugh:** Two of the areas that you talked about we are pretty familiar with. I think there is general agreement in the committee that there has to be at least some clarification of what happened to the Charter of Rights. Did we lose them so quickly?

**Ms. Harris:** Absolutely. Yes. Does it exist or does this document just go into the garbage can?

**Mr. Breaugh:** Yes. I think that major question is one that we are in the process of exploring. It is one of those things where we certainly have different expert opinions and the time has come to sort out the different expert opinions and get what is actually in this agreement and whether there really is any lessening of anybody's rights. We are thinking about that one.

You are aware that we are going through the cost-sharing provisions to see exactly what they mean and how people would opt out. But the one

problem you have brought to us for which I am not sure there is a solution is the matter of children's rights. You have worked in the area; you know that in almost everything you can think of, from getting funding for programs to getting recognition, to getting status—all of it is kind of flying in the wind because no one is quite sure of his ground here. I am not convinced that the Meech Lake accord or anything else that we have got going at the moment gives me very much in the way of hope that we have a clear direction around children's rights.

I would be interested in your comments on this. My view would be that essentially we are in a grey area here, and until the courts or the law get a whole lot clearer, we will live with things like the Young Offenders Act and how it is implemented and we will continue to have programs that we all admit need to be done but are difficult to fund, because no one sees it really as quite his responsibility. Even if they do, they are not quite sure what their legal obligations are.

I would be interested in having you respond for a little bit on some of those kinds of difficulties that I know we are going through and you are too. I am sure programs like yours in every community in the country are having the same problem.

**Ms. Harris:** In terms of equality rights for children, we have felt that they have been best addressed so far by the Canadian government in the Charter of Rights and Freedoms. Basically it has been women's responsibility oftentimes in Canadian society to work towards changing legislation or implementing programs that directly relate to children and their specific needs.

Because women have instituted so many of those programs or tried to implement the changes that we feel are needed in Canadian society to better give children equal rights, the women are clearly stated in that and the kids just seem to fall under the umbrella, under the wing of women being protected in the charter. Another reason for children being sort of the appendages, the responsibility, is especially in terms of the alarming statistics that the majority of children in Canadian society—they are rising constantly—are being raised in families that are being led by single-support women. The children growing up in those families do not have the benefit of the male leadership that might—

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**Ms. Daigle:** They do not have the money.

**Ms. Harris:** Of course, they do not have the money.

**Ms. Daigle:** They do not have the money or access to the same equality rights.

**Mr. Breagh:** Just to pursue this a bit, one of the reasons I feel very strongly about the charter provisions being upheld is that it seems to me that if we are making any headway at all in things like crimes against children, it is under the umbrella that children have some legal entities, legal rights, and that the mothers in those families have some legal rights. I do not see us making quick progress, but we are headed in the right direction.

If, for example, we are going to try to get ourselves in a position to respond to the alarming statistics about crimes against children, which I really think we have to do now, then we have to be sure of our ground here. We have to be able to say, "A child has a legal right, is a legal entity, and the Attorney General or the Solicitor General or whomever has the legal responsibility to fund programs in that area."

Those are all the grey things we are struggling with now. As long as one minister could say, "I am not sure what my legal responsibilities are," it will always be at the bottom of a funding list. It will be an incidental program that they fund if they think of it and if there is some money left over. It is the clarity of who is responsible and the clarity of the legal rights that are involved that make it very difficult to have good progress in this area.

**Miss Roberts:** I appreciated your brief, ladies, and I would like to just carry on from what Mr. Breagh said. As you are aware, the Young Offenders Act sets out alternative measures and not all the provinces have dealt with those alternative measures, so even what is in place with respect to helping children out is not equal across the country, across Canada. That is something I would like to point out at this time. Maybe that is someplace where you could thrust some of your energy, as I am sure you have been doing in the past.

What I would like to do is look at the process with respect to children's rights. Changes have to be made to the charter. The charter is not perfect yet. With respect to section 15, some of women's equality rights have not even been dealt with by the courts and we really do not know how distinctive they are going to be.

We are interested in the process. The process that brought us here is flawed. It is executive federalism and we have been told—I believe yesterday on many occasions—that this is what has happened in Canada over the last 100 and some odd years, that there has been a type of executive federalism. The charter has encouraged individuals and groups of individuals to come forward and put forward their views, their

thoughts and their ideas. I do not think we are going to be satisfied with the type of executive federalism that may have existed or we believe to have existed in the past.

Have you thought of a process? How can your points of view, your interests in the Constitution, in the charter and in the Meech Lake accord be brought to the elected officials prior to them being closeted somewhere, whether it is at Meech Lake or Victoria or wherever? Have you thought of any way to do that?

**Ms. Harris:** Are you talking about the accessibility?

**Miss Roberts:** That is right.

**Ms. Harris:** As members of parliament, all of you probably make your own individual efforts to be accessible to your constituents. I am sure you do your best at that. But whether the voice is heard, especially on children's and women's issues—our experience from being a fledgling organization through to one that has some recognition, both on a provincial and a federal level, funding-wise, has been a long, arduous struggle. It is not easy for the grass roots kind of organization to exist in our country and to get recognition for causes that are everybody's causes and are supported by such a commission as the Badgley commission.

**Miss Roberts:** May I just suggest to you that somewhere down the road children's rights have to be dealt with, as indicated.

**Ms. Harris:** Yes.

**Miss Roberts:** Perhaps one of the things you could do, as they already have had various reports, is to have a conference on children's rights, something to bring forward certain points, something that could be presented to various governments for them to look at. These are the sorts of things. Is that a possibility or a probability? Would that be helpful for you? Would it be helpful to have another royal commission or something to pinpoint children's rights and how that should be dealt with in the charter? We need your input and we need to have your problems brought to public attention. Have you thought of any other ways?

**Ms. Harris:** The truth is, no. Actually, for us, this is a learning process. We recognize that to begin to move the work we do, which is paramount to us at this time, what we need to start thinking about is process, is lobbying government. That is a new step, a new development and a new direction we have to think about taking.



**Miss Roberts:** Perhaps I might just have one more question.

**Mr. Chairman:** You certainly may.

**Miss Roberts:** Victims of abuse: This has become a very important part, especially in the criminal system: how to deal with the victim. You have indicated that you have some concerns with respect to that. You are not suggesting there be anything on a national basis concerning that type of program, but that it should be dealt with by each province, or are you suggesting victims' rights or something like that which is national?

**Ms. Harris:** Basically, what we are advocating is primary prevention prior to people becoming victims, giving children age-appropriate, comprehensive material so they can learn that their bodies are their own and that they have a right in Canadian society to speak up against abuse, whether it be occurring in their family or their outside environment.

**Mr. Chairman:** Thank you very much for joining us this morning. One of the things I found particularly interesting, and it was not meant to be that way, in your submission and the one just before you is that I think that as to some of these things we are discussing in a constitutional context, it would be safe to say, certainly 10 years ago, maybe even five years ago, that I do not think we would have had this same discussion.

I have been struck by our public hearings as a kind of raising of consciousness in a whole series of areas which perhaps in the past we would never have linked to any kind of constitutional discussion or development. I think it is awfully important, therefore, that this kind of hearing take place. Whatever the process, as Miss Roberts mentioned, one of the things we are going to do is deal with the question of process, how constitutional amendments are developed and how individual groups such as yours are able to say: "Wait a minute. We want you to take this area into account."

As I said at the beginning, I think you are the first ones who have dealt with this question of children's rights and how that is impacted by the accord or just where it ought to be and what that means in terms of the charter. I think that helps us greatly in understanding some of the issues here.

In addition to thanking you for coming all the way from Oshawa, we in particular thank you for the points you have raised this morning and for the answers to our questions.

**Mr. Chairman:** I would like to call upon the representatives of the Association of Liberals for

the Amendment and Reform of Meech. Perhaps I might ask the Honourable John Robarts; pardon me, Robarts—getting into constitutional things here.

Interjections.

**Mr. Chairman:** I was doing an interview this morning, I hasten to add, on the Confederation of Tomorrow Conference, so that has got me to Robarts. Perhaps you would be good enough, Mr. Roberts, to introduce the members of your organization. We welcome you all here this morning.

#### ASSOCIATION OF LIBERALS FOR THE AMENDMENT AND REFORM OF MEECH

**Hon. Mr. Roberts:** Thank you, Mr. Chairman. May I just say briefly first, do not be embarrassed about your mistake. At one time, I once received four votes in Bradford 15 years ago because my uncle was doing such a fine job as Premier of the province.

**Mr. Chairman:** Very good.

**Hon. Mr. Roberts:** I am here as the honorary chairman of ALARM which is, unlike some of the groups that have appeared before you, an avowedly partisan group. It is a group of Liberals and the main focus, but not the only focus of our efforts is towards other Liberals. It is a group which developed spontaneously after the Meech Lake-Langevin accord was agreed to, by many Liberals who felt the accord did not correspond to what had been a traditional approach to constitutional issues as developed by the Liberal Party over the years.

From that spontaneous beginning, we have grown to a more sizeable organization based largely in Toronto, but with chapters or affiliates in most of the provinces across the country. I say it is an avowedly partisan organization because our main approach is to deal with other Liberals, but we do not do that exclusively. Since constitutional change is a process which engages both the federal and provincial levels, we carry on at the provincial level the advocacy of the kinds of amendments which were presented by the Liberal Party in Ottawa during the House of Commons discussion of Meech Lake in Parliament.

I am here really simply to introduce the other members. Our chairman is Howard Levitt and we also have Charles Cooke, David Healy and Mark Geiger, who will essentially be making our presentation to you. Howard Levitt, I believe, is going to begin. Please go ahead.

**Mr. Levitt:** If you were to ask your average Canadian whether he or she were to agree with

the vision of Canada articulated in the Meech Lake accord, other than look perhaps somewhat askance or perplexed, even most of those who in a vague way, as Prime Minister Mulroney is so fond of suggesting, have an understanding that Quebec is joining the constitutional family, understand little else.

Canadians are not aware, except for some of those most attuned, how the constitutional framework of their country is being changed and being changed in a way that is contrary to the democratic consultative process and approach to constitutional development which has heretofore characterized Canadian constitutional development.

We analogized the accord at one of our ALARM meetings to that of injecting a little poison into a tree. People look on and do not notice any difference. It is apparently innocuous, but as time, the months, the years go on, certain difficulties reveal themselves. The leaves on the tree begin to wither, but people say that it is still not egregious, that it is still not fundamental. The tree is still there. It is still living. It may not be thriving but we still have a living tree.

As more time goes on, and on this analogy, we develop into a federation of federations, people say: "My goodness, this isn't the vision of Canada that we grew up to believe in. This isn't the vision of Canada that brought us and our case to the Liberal Party. Let's save this tree." But by then it is too late. The tree is already dead.

The accord espouses a narrow vision of Canada, a narrow dual society. What is interesting in that is that it has not reflected reality for several decades. Our Constitution has to promote our Canadian values and our multicultural character, including that of our aboriginal peoples, that of a country where people can live where they wish and have access to universal standards of social security.

The Liberal Party—and we are speaking, as Mr. Roberts suggested, as avowed partisans—has always been a great friend of multicultural groups, women, aboriginals or the disadvantaged, and in fact the party around which they have coalesced and found a home. For Liberals to support this accord is, I am afraid, to abandon this past and this tradition.

Members of ALARM are concerned with the process, which a court arrived at without input from groups across Canada, and it is disturbing that, contrary to normal constitutional amendments, it is up to those challenging this accord to prove egregious errors, not those advancing the initial constitutional reform. To prove egregious

errors at this stage is almost an impossible task in an accord which is, first of all, fraught with ambiguities and, secondly, in a very real way reflective of judicial judgement as well as personal philosophy.

We are disturbed at the concerns raised and characterize them as canards raised in the form of arguments that somehow this accord is sacred, that if any change is made, including the almost motherhood one of the charter being pre-eminent, the whole accord will unravel.

Our reaction to that is twofold. First of all, if it is that fragile in the face of participative amendments, how good is this accord for Canada? Secondly, we are not so cynical as to believe that amendments cannot be developed after full public hearings, especially after analysis of the errors which have come to light in this draft. There is a reasoned way to proceed with constitutional reform. What we have to do as a nation, and speaking as partisans, as a party, is specifically to define and develop a consensus concerning our national objectives.

What we have done in this accord is simply to cross our fingers, shuffle the constitutional tarot deck and trust the Supreme Court of Canada to then render a reading which reflects what should have been articulated in the first instance.

It is my role to discuss the unanimity provisions. I am sure the members of this committee are aware that it was the practice from 1867 and 1981 to require unanimity in a constitutional amending forum in reflecting provincial rights. In those 114 years only four unanimous amendments were made. The main problem with the unanimity provision is that even when these egregious errors reveal themselves through time and through constitutional and, of course, judicial interpretation, even when these egregious errors come to light, they cannot, as a practical matter, ever be rectified.

The one or two errors that are most apparent right now with the unanimity provisions are those impacting—and they are somewhat interrelated—on our aboriginal peoples and on the territories. It prevents those groups or territories from ever attaining a real partnership in Confederation. If I can quote for a moment from John Sheppard, president of the Yukon Federation of Labour:

"This amending formula virtually guarantees that aboriginal people and northerners can never be more than second-class citizens in our own country, a concept repugnant to us all. As a federation and as northerners, we see too many negatives in this amending formula for us to accept it. It is a constitutional straitjacket



denying us a role in our own future and any hope we might have for future provincehood."

Let me quote one more time, this time from the Senate task force report of the committee of the whole:

"Witnesses suggested that premiers might want to annex, at some future point, a portion of the territories in exchange for their vote in favour of the creation of new provinces and what would be left. If the provinces are going to be attaching future conditions to this consent to the further transfer of powers to the territories, then the interest of Canada as a whole will be split among many provincial interests, with northerners the only nonparticipants in this process."

I do not know why there has not been more consideration given to one of the egregious errors in this future federal-provincial conference, where supposedly future amendments are going to be debated and perhaps passed.

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It has to be clear—it is clear from the accord—that, with respect to those future amendments, other than Senate reform and fisheries, no other subject can even be brought up, least of all discussed or voted upon, without unanimous consent. One selfish or even capricious Premier can veto even discussion on anything he or she does not wish to deal with. Further, the Prime Minister can no longer set the constitutional agenda—for example, with respect to getting Senate reform back on the agenda—even in those two areas.

What ALARM has done in our very few months of existence is to make a decision philosophically that the Liberal Party, given our particular history, is the party that has a background that is most antithetical, fundamentally antithetical, to this accord, and that is the basis for organizing. As a result of that decision, we have sent letters to every Liberal legislator across Canada. We have been lobbying on provincial levels in different provinces. We have circulated our petition at the recent Toronto and district convention. We had over 85 per cent of the delegates approached sign our ALARM petition. We have sent letters to the editors of most newspapers. We have been involved in fund-raising and we have, perhaps of greatest importance, co-ordinated with other Liberal groups and individuals across Canada.

We are also supporting the Broadview-Greenwood resolution that is going to be before the Liberal Party of Canada (Ontario) conference on March 25. In our contacts on a very preliminary basis—the resolution itself is only a

week old—the large majority of riding associations we have spoken to have said they are going to be supporting those resolutions, which mirror the ALARM resolutions on the issue.

Thank you for your attention.

**Mr. Cooke:** I thank the members for inviting us.

I would like to turn your attention to page 18 of the brief, which deals with the federal spending-power issue, which I am sure you have heard quite a lot on. I hope I will add some light on this issue as well.

Our primary concerns are twofold with respect to the amending formula. First, we have a concern with the ambiguity of certain words, those being the change from the Meech Lake accord to the Langevin Block and the addition of "initiative" in the spending-power clause. The questions we ask are, why was that added? What is the difference between "program" and "initiative"? Is there any difference? We understand from reports that it was a particular concern of Quebec and Premier Bourassa to add that word, and we have questions with respect to that.

The second ambiguity is "reasonable compensation." What is reasonable and in what terms? Who gets it? When and on what terms do you receive that reasonable compensation? On what basis do you receive that reasonable compensation? The primary focus of my discussion is the basis, as I read it, as we read it as an organization, of a province being entitled to receive reasonable compensation.

The principal concern with respect to that is twofold. I would suggest that it is double-edged sword, a double-edged attack on the federal spending power and on constitutional amendments permitting social programs as well. My concerns are with the two terms "compatible" and "national objectives," and why is that?

First, I will quickly focus on the real-life example of medicare, which I have heard mentioned before. The original medicare legislation as enacted in the mid-1960s was unlike other social programs at the time. Generally what we saw in quite a few examples were cost-shared conditional agreements between the federal and provincial governments, where a federal government, through its constitutional powers and legislation, would enact legislation that would in effect skew provincial priorities, and provinces, to get funding, would be required to match their priorities to those of the federal government. Those provinces would be required to sign their name, their John Henry, to that agreement. It was

a contract. As a result of that signed contract, we got cost-shared programs.

With respect to medicare, medicare was at the time a very controversial federal-provincial issue. Quebec and Ontario were leading the fight against it at the time. If I take the example, for our purposes this morning, of Quebec, at the time Premier Lesage was in favour of medicare—the principle that it meant—but he opposed the program because at its early stages the federal government was proposing to establish medicare nationally by a shared-cost program, which would require the Premier of that province to sign the name of that province to a program.

The secret, the invention which broke the deadlock eventually, was a new creation, an innovation, and that was the establishment by the government through its legislation of four principles: comprehensiveness, portability, accessibility and public administration. The federal government said: "There will be no cost-shared agreement. Province, you will not have to sign your name. What we have is a national program. These are the principles, and they were enunciated as principles in that original medicare legislation. Province, if you want funding, fine; you can set up your own program. You do not have to sign your name, but these are the four principles that you have to comply with."

Subsequent to that, we have in 1983 the Canada Health Act, which in its essence and its ability to do what it did—which was to stop extra billing, the assault on the principle of universality—the ability of the federal government to pass that legislation and to have the consequence it did, which was to force provincial governments to pass corresponding legislation to ban extra billing, was because the provincial governments would not receive funding, dollar for dollar, for every dollar that was given to doctors on the basis of extra billing. The reason for that was that the fundamental idea of extra billing was contrary to the principle of universality.

What does that mean with Meech Lake? What would it have meant in the mid- and late 1960s if we had had that Meech Lake federal spending-power provision? It would have meant that a provincial government would say, "You cannot force me, federal government, to pass legislation by withdrawing moneys, because I have a program that is compatible, which is to say capable of existing alongside your program. It is compatible with the national objectives of your program. What are your national objectives? The establishment of a national day care program.

We as a province have a national health care program. We have medicare in our province. What you are saying to us is that you want us to go beyond that; you want us to step beyond the line of the word 'objective' and you are telling us, federal government, that you want us to comply with your principle of universality." The provincial government will say, "You are behind the times, federal government. We have complied with your national objective, but you are asking us to comply with a principle, and that is beyond what section 106 of the spending-power provision requires."

What we have here is, first, a blow against this federal spending power. The second tool is the constitutional amendment section in the Meech Lake accord. Previously, in the Constitution Act, 1982, amendments were allowed, with reasonable compensation to be given, by provinces for amendments that related to transfer of provincial powers to the federal government in matters of education and related cultural matters. With Meech Lake, we have seen that narrowing removed, and now it is any amendment transferring provincial powers to the federal government. A province could opt out and receive reasonable compensation.

We would suggest that the provision with respect to amending power is even worse than the spending power because, bad as it is, the spending power does provide a condition for the provision of reasonable compensation, that being that the program be compatible with national objectives. The amending-formula provision does not even provide that. It just says a province can opt out and receive reasonable compensation. The question is for what? For anything. They could literally, we suggest, take their money and apply it to any sort of program.

It is those two tools that in the past have allowed social programs—whether they be by constitutional amendment—shared-cost programs through the use of the federal spending power. That will be no longer.

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What is the political fallout of that? Twofold; actually, more than that.

One is—and other commentators, Al Johnson in particular, have mentioned it—that Canadians almost see as a right of citizenship, bound up with the right of citizenship, the ability to go anywhere in this country to receive the same quality-based programs, anywhere. With Meech Lake we fear that that will not be the case. Yes, Canadians move from one part of the country to other parts for reasons of economic betterment,



but they do not move, and they have never had to move, for reasons of social programs. We fear that with the failure of social programs to be national, we will instill in the vocabulary of the country the ability to move from coast to coast on the basis of social program service.

There is much more I could say, but in the interests of having everyone give a fair shot, I will stop at that. I will just say one final thing. The more I read, the more I researched on this topic, the more I became concerned with this particular provision. It has been said that Meech Lake is a concern of constitutional experts and lawyers; that it does not affect, does not concern the man in the street, your voters and your constituents.

We say to you that that is wrong, and I think that, in any event, under all circumstances it is absolutely wrong with respect to the spending power, because there will be no more medicare, there will be no more Canada pension plans, there will be no more old age assistance programs, there will be no more hospital care programs. Why will there not be any more of those programs? Because the program design and the program model which led to those programs will no longer be possible with Meech Lake.

At least I can say to my children, and then to my children's children, that I took a stand, Liberal or not: I came before this committee, I was involved in ALARM, I let my MPP know where I stood. I hope that in your contribution in your report you take that responsibility that you have to your children and your children's children as heavily as I do.

**Mr. Healy:** I would ask you to turn to page 8 of the brief, the "distinct society" clause.

The first question to be noted about the accord is that the term "distinct society" is not defined. Without reading the explanation, Senator Lowell Murray states basically that he did not want to categorize or limit the characteristics of Quebec society. However, my brief does outline a variety of definitions, and they appear from a variety of sources: the first in the Supreme Court of Canada, others from interest groups such as la Fédération des femmes du Québec.

Premier Bourassa also gives us a definition, and I would like to read that one: "The French language constitutes one fundamental characteristic of our uniqueness but it has other aspects such as our cultural, our political, economic and legal institutions."

Another is from Professor G  rald Beaudoin, a constitutional expert, who says that, "Because the language and culture of its population is

French and because it operates under a French-inspired private law, Quebec is a distinct society."

These definitions encompass a very wide area, everything from language to law to culture. A great majority of the definitions proffered define Quebec's distinctness with reference to its French character. Others, however, differ and, in any event, on page 10 of my brief I have highlighted Professor Ramsay Cook's concern that "distinct society" is not clearly defined.

He asked in his brief in front of the joint committee: "What does it mean? And if it does mean something, please tell me what it means, because it is an important term going into our Constitution and ought to be accurately defined. If we don't define it, we are at best going to have a calculated ambiguity with reference to Quebec and at worst a quagmire of unsolvable proportions."

Senator Forsey, another constitutional expert, noted that in all the definitions that have been supplied thus far there are no references to bilingualism, to multiculturalism or aboriginal peoples. Basically, they talk about a French society. There is no mention of multiculturalism in section 2 as a fundamental characteristic of Canada. There is no mention of aboriginal peoples in section 2 as a fundamental characteristic of Canada.

The defenders of the accord tell us: "Don't worry about that. Section 2 is only interpretative. It can't breathe life into a jurisdiction that does not exist." It does not, in other words, give governments more or new powers. Then again, if you look at the references by Mr. R  millard, the comments by Senator Forsey, the comments by former Prime Minister Pierre Trudeau, you see that there is something much more than an interpretative clause there.

If you look at page 11 of my brief, I make references to these quotations. I am not going to read them all, but there is one that I would like read. It is by Yves Fortier, who is very much a defender of the accord; vis-  -vis the charter, he said that if it were decided to exempt the charter from the "distinct society" clause, "that would mean the death of the Meech Lake accord, period."

Senator Forsey concludes: "This is surely a devastating reply to the contentions that the distinct society clause does not really mean much." Of course, the "distinct society" clause means a great deal. It is much more than an interpretative clause. It is defended vociferously

by people or politicians or whomever stands to gain a great deal with it.

We are also told by Professor McWhinney to stop crying about the Constitution, that divisive forces have abated in Quebec and that it is time to rebuild. However, all we have to do is read the newspapers. Mr. Parizeau is on the move. We know exactly what his goals are. We know also that he wants to make a unilingual French society. He has said so clearly. He may have opposition in Quebec as a result of that, but nevertheless we know where he stands. I do not think separation is dead in Quebec at all.

I would like to also talk about the Charter of Rights. In my brief on page 12, I have made reference to a case that I think has a direct link with Meech Lake, and that is the Quebec Protestant school boards case. In that case, the government of Quebec in 1977 tried to provide that, in Quebec, instruction in elementary schools and in secondary schools was to be in French except under certain circumstances.

The government of Quebec argued that sections 72 and 73 of Bill 101 were necessary, that there was a long-term threat to the survival of the French-speaking community and that Bill 101 was established as a collective right in the interest of the collectivity, i.e., Quebec's population. At the very bottom of page 12 is the statement from the government's white paper of 1977 that "the Quebec which we want to build will be essentially French." Individuals, if necessary, had to just take second place in the interest of the collectivity. Mr. Justice Deschênes said no, that kind of argument, of collectivity over individuals, is based on a totalitarian conception of society and human beings are too important.

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I ask you to look at aspects of Canada other than Quebec. We are told that the Parliament and the provincial legislatures outside of Quebec are to preserve a fundamental characteristic of Canada, that being the French-speaking Canadians centred in Quebec and present elsewhere and English-speaking Canadians concentrated outside Quebec and also present in Quebec.

However, the Quebec government is to preserve and promote. There is a difference between the two. If a government is to preserve the characteristics that I just mentioned, could it not be that a group that is very opposed to the advancement of bilingualism could say: "All right, Legislature, we are essentially an English province and it is your job to keep it that way. That is what section 2 of the Meech Lake accord tells you to do"? This idea was advanced by the

dean of Queen's law school, Dean John Whyte, and you can see his quotation on page 14 of the brief.

There, again, is another problem, the problem of whether the charter can affect the Meech Lake accord. My brief makes reference to the much-quoted remarks of Madam Justice Wilson in the Education Act case and these words basically say that the charter cannot invalidate another provision of the Constitution.

Ms. Mary Eberts said that these words could mean that the charter is immune from affecting the accord. Another constitutional expert, Professor Lederman, say no. I say that any words emanating from the Supreme Court of Canada cannot be treated as lightly as Professor Lederman does, although I have the greatest respect for his constitutional knowledge.

In any event, if the charter is ambiguous, we have section 16 of the accord. It makes reference to two sections of the charter, sections 25 and 27. Now Senator Lowell Murray against steps up and says, "Well, here is why we put that in." On page 15, he says that references to aboriginal peoples and multiculturalism refer to collective rights, not to individual rights. Again, we have this reference to the collectivity versus the individual. That is why they put those sections in there. Basically, what we are told is that the collectivity is protected but not the individual.

On page 16, I have some references to the way provincial governments have dealt with the minorities in Canada over the years but I will not go into that in the interest of time.

My conclusion on page 17 is that there are lots of distinct societies in Canada and that multiculturalism and aboriginal peoples are a fundamental part of this country and that section 16 should be amended to include the charter.

**Hon. Mr. Roberts:** I will ask Mark Geiger to conclude.

**Mr. Geiger:** I am doing the last section and if I can find the page for you, I will address you to it. It is page 24, "Meech Lake Accord and National Unity."

I want to do something a little different than what you have heard so far and deal with the future. Hindsight is always 20-20 but foresight seldom is and, in my view, too much of the debate about the Meech Lake accord has been about changes to present powers and what this does now and too little has been about what it will do in the future as this country continues to develop. I want to crystal-ball-gaze 10 or 20 years from now and see what we will get with Meech Lake.



To some extent, where we have been over the last years can direct us as to where we are going and we may have to look at that. It is my submission that the way things are is not always the way they are written. I give you the Constitution of the USSR as an example. If one were to read that Constitution, one would think that was the most free country in the world, yet we all know that is not the case.

Certainly, as a lawyer, I know that collective agreements do not always tell the whole story. If you meet the president of the company, that does not necessarily mean he is the guy with all the power. Power and influence are a lot more than just what is on a written page.

We live in a very large and a very beautiful country, much of it uninhabited. If you look at this country from a demographic distribution point of view, you will see that we are a thin line running across the border from the most powerful country on earth, the United States, our neighbour to the south. Having a national sense of identity in such a country would be a problem in the best of all possible worlds, but it has been exacerbated in Canada by a number of developments which I want to go over briefly.

If you look back to the foundation of this country, what was happening when it was being founded? They had just finished a very devastating civil war in the United States. The Fathers of Confederation of this country clearly looked at the Constitution in the United States and fashioned one in Canada that gave very strong powers to the federal government, to the central government. They did that for a reason, because the debate in the States that led to the civil war was not just about slavery, but about state power versus federal power, and historians, I do not think, would question that.

If you looked at the constitutional documents, the United States Constitution versus the Canadian Constitution, I do not think anyone would argue with the analysis of those documents. Taken on their own and not looking at the facts, one would conclude Canada had a far more centralized society and a far more centralized federation than the United States. Yet very few people, I suggest to you, would argue that that is in fact the case. Canada is far less centralized than the United States. In fact, many have said it is the least centralized federation in the free world. Why is that the case? Because the documents do not tell the whole story.

I want to look at the effect the Meech Lake accord will actually have, not what it does to the powers and all the various interpretations, but

what it will do in fact over the few years that we are going to look at.

To quote Blake on page 24, who was, as you may know, a distinguished parliamentarian and Attorney General under Mackenzie, he said: "The future of Canada depends very largely upon the cultivation of a national spirit. We must find some common ground on which to unite, some common aspirations to be shared, and I think it can be found in the cultivation of the national spirit." The history of the beginning of the country was very much about a real effort to do that, and the building of the railway to develop east-west links so that you could allow this to happen.

I suggest to you that we do have a spirit here in this country. Anyone who watched the Olympics could not help but realize that. But I suggest that is sometimes in spite of politicians and not because of them. This country, because of its demographic distribution and because of its great neighbour to the south and because there are going to be regional differences between various regions of the country, will always have a problem with regional squabbles.

But that has been exacerbated in this country for two reasons: first of all, even though the Constitution established the federal government as the pre-eminent government, in my view, the provincial governments have developed tremendous expertise and now all the provincial governments together spend more money than the federal government does. What has happened too often is that there have been squabbles between various regions of the country.

Anyone who has travelled in this country and has gone out west or to any other part of the country will find that there is almost a visceral hatred towards the central part of the country, specifically Ontario and more specifically Toronto. I soon learned when I went out west to never tell anybody I was from Toronto. That is talking about the people on the street. Why is that? Part of it is because politicians in the provinces have sometimes used the spectre of the federal government to gain their own advantage. This has sometimes been because the federal government has not had representation realistically in a particular province, and that has exacerbated the situation.

Over the years, in my submission, the provincial governments have become the spokesmen for their constituents in matters that were really matters of national importance and had nothing whatever to do, necessarily, with provincial competence. This starts to focus the attention

and the loyalty of the population on the provincial level and not on the country as a whole. So the people start to have loyalty to their province and not to their country.

It is my submission that the Meech Lake accord enhances that and sets up all sorts of areas where that process is encouraged. The reverse process, the one that we should be attempting in this country to encourage, in my view, is discouraged. Now, how does that happen? It happens in a number of ways. I just want to briefly mention, if you think about the problems we have had just in the last 20 years when there have been issues between the national level and the provincial levels where provinces have taken stands—I give you right now free trade—we have the Premier of this province taking a very strong stand on that issue, and other provincial premiers taking a strong stand.

**1200**

What does Meech Lake do to exacerbate the situation? I start this on page 28. The first point is the first ministers' conferences. That is where we got the document we have some problems with right now. You do not need a change in the Constitution to have first ministers' conferences. They have been happening all the time. But we now have legislated in a constitutional document a requirement that there are two of them every year.

Now, premiers are powerful people. They are far more powerful, in my submission to you, and seem to be far more powerful, which is the important thing, than members of the federal Parliament and senators. So interest groups and citizens and other people who want to achieve something in a federal area of competence are going to direct their loyalty, they are going to direct their briefs to the provincial governments and not to the federal government in order to obtain something.

I suggest to you, over time, the conferences that take place with these provincial premiers and the federal Prime Minister will in fact become a super-Legislature and will become a very powerful group. But it is not a federal institution. It is a group of provincial institutions coming together and, to a very large extent, there is a danger that these people will be vying back and forth for their share of the goodies and that their citizens—and this is the crucial issue—will look to the provincial governments to represent them on federal issues. Loyalty and adherence will gradually focus on the province over time.

The Senate amendments are the next issue I want to look at. Here was an area where we could

have addressed the problem, to produce at the federal level an institution which we already have in existence and which everyone has suggested needs to be amended, and which would have been able to give this regional representation. Instead of doing that, we have effectively given the provincial governments the power to appoint their senators and made the Senate then some sort of creature of the individual provinces in their structure, in their position as provinces. I suggest to you that is exactly the opposite direction to the direction we ought to be going in. We ought to be trying to create a federal institution which will focus loyalty at the federal level and give people that ability.

Third is the Supreme Court. By itself, I do not suppose the changes to the Supreme Court would, in and of themselves, be a problem, but together with all the others, they increase the sense of provincialism as opposed to nationalism.

There has been a lot of comment on immigration, the fourth issue. This is the report of the special joint committee of the Senate and House of Commons. There is a lot of discussion in that about what the heck this area of the Meech Lake accord means, and I think there are a lot of questions about it. But clearly, the possibility exists that each of the individual provinces are going to be able to set up its own rules for immigration and that people outside this country are going to start to look at this country not as one country but as a series of fiefdoms with different rules for entry. Again, we are looking to the province for our loyalty and not to the country.

The final point I raise is, what about free trade? The Premier (Mr. Peterson) of this province has come out in opposition to free trade. I suggest that there is a very strong likelihood that despite his opposition, free trade will be passed and will become law in this country. What about Meech Lake and free trade together? What about a situation where we are destroying the national cohesiveness—not purposely—the Meech Lake accord wants to bring Quebec in, that is the goal, to increase the unity of the country. I suggest that over time, in fact, it does the opposite.

With free trade, we strengthen the north-south back and forth between Canada and the United States, and at the same time we weaken. I suggest it is a possibility that in a community of communities, one of the communities might decide that the southern community has more to offer than the northern. I think that is something that ought to be looked at very carefully.



In conclusion to all these things that we have talked about, in my view and in the view of the group that I am here talking on behalf of today, the accord attempted to ensure national unity and enhance this national spirit, but it is inherently flawed and there are egregious errors. The egregious errors are not obvious, although some of them may be.

It is our belief that the various provisions of the accord that we have dealt with and others that we have not had time to deal with will exacerbate a national malaise which has been with us for a long time, this tendency to provincialism, this tendency to focus your loyalty on the province and not on the country as a whole.

Instead of creating a new structure which would encourage all the regions of the country to feel part of a greater whole by assuring them of effective representation at a national level, we have instead institutionalized the concept of provincialism.

Instead of encouraging and fostering a national spirit that Blake spoke of more than 100 years ago, we have, unfortunately in my view, built this system where the natural loyalty and the commitment of the citizens will be directed to their provincial governments and not to their country as a whole.

Instead of seizing on our opportunity to reform the Senate, an existing institution, and change it so that it appropriately enhances the perception of true national representation, we have made such changes effectively impossible.

While we are trying to unify the country by bringing Quebec into Confederation, something that all of us support, we have unwittingly sown the seeds of future disunity and we have planted them on fertile soil.

On behalf of our group, we urge this government and this committee to reconsider its position.

**Mr. Chairman:** Thank you very much. You have covered a very broad range of issues, and we appreciate that those are expanded upon in many parts of the brief.

Just before going to questions, I would like to make one brief comment and ask one question. At the end of the brief you urge this government to reconsider its position and you said the committee should do the same. I just want to underline that the committee is in its hearings process and we have not come to our conclusions. That is why among other things we are hearing you. I just wanted to make that clear.

**Mr. Geiger:** Can I make one comment on that point? This is one of the things that we come back

to about the first ministers' conferences. The first ministers in this case have made a commitment that they are not going to change this. With the greatest of respect to this committee, the Premier was quoted in the Sun talking about whether there were going to be any amendments to the Meech Lake accord. That is one of the problems.

That shows one of the problems, in our view, of the Meech Lake accord. The fact that at these first ministers' conferences, the first minister has to put his name on the dotted line, and it becomes extremely difficult for this House to change that. It is going to be very hard for the Liberal Party, the Liberal majority government in this House, to realistically propose an amendment because of that. That shows one of the problems of the Meech Lake accord.

**Mr. Chairman:** I appreciate the point you are making. I simply underline what I have been saying throughout the hearings, that we are a committee of the Ontario Legislature and we are charged to report back to the Legislature. We are moving along a most interesting and fascinating road and we have not come to the end of it yet. In our view, we should be listening and thinking. There is time and there are many things that can evolve in that context.

I feel it is terribly important, and you are quite right. Obviously, people in all political parties, different areas, are in different kinds of dilemmas, and you are quite right to underline the process. That is certainly one of the things that we plan to address in our report. Whatever happens to Meech, there are going to be other meetings and other amendments presumably. We have to set out pretty clearly how we as legislators would like to be involved in that.

I just wanted to clarify as well, is the document you gave us from the Broadview-Greenwood Liberal Riding Association from ALARM? Just so we understand clearly.

**Hon. Mr. Roberts:** It is not ALARM inspired, but it does represent the views of it.

**Mr. Chairman:** Thank you very much. We will move to questions.

**Mr. Eves:** I guess I should ask permission to ask a question, not being a Liberal.

**Mr. Chairman:** Sure.

**Mr. Eves:** I say that with tongue in cheek.

**Hon. Mr. Roberts:** But you seem so reasonable that we have hopes.

**Mr. Eves:** I would just like to point out that the Liberal Party, in my opinion at least, does not have a monopoly on concern for Canada's future. I agree with many of the points that are made in

your brief. It was pointed out to us by one of your federal colleagues, Don Johnston, that someone by the name of Sir John A. Macdonald had something to do with Canadian federalism as well.

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I strongly feel that this is an issue which is really nonpartisan, although I appreciate the realities involved, such as majority governments especially. I have always felt throughout that this is an issue that is above partisan politics and really should be the subject of a free vote in the Legislature. I wanted to know what your viewpoint on that was.

**Mr. Cooke:** In our drafting exercise we had contained in our brief, in its written form, exactly that prescription. We decided to do it orally rather than in writing but we feel that the provincial government, if it is placing the burden on ordinary citizens and witnesses before this committee to show that there are egregious errors, rather than taking upon itself the burden which it should—because I do not believe it had a mandate to do what it did in 1987 in June; however, despite that fact, we believe that this is becoming increasingly a question of conscience, a question of country.

Constitutions go beyond party loyalty and go beyond provincial boundaries, because what a provincial government in Ontario does with respect to Meech Lake affects minority rights across the country. We think that, given it is a matter of conscience, there should be a free vote in the Legislature.

**Mr. Levitt:** Mr. Eves, as well, our federal leader John Turner—that is, our federal leader, not yours—was quoted last week as saying it is an issue of conscience and, in the context of certain federal candidates in the Toronto area, he has no objection to their taking a different position than he has on the accord because it is an issue of conscience. He would obviously support a free vote for that reason as well as many others.

**Mr. Eves:** Looking at the Broadview-Greenwood resolution, on the second page, I think you make some very good suggestions with respect to changes. The one with respect to the Charter of Rights and Freedoms superseding or taking precedence over the accord in section 16 is one that many groups that have appeared before us have made a point about. They all seem to be unanimous on this one issue.

The other one about national standards has been raised several times by many delegations, as has the one about the unanimous provision and

Canadians in the territories being Canadians as well and aboriginal peoples being shortchanged. There are many other concerns that you touch upon in your brief, and I guess the question I want to ask is one which the chairman touched upon, that is, whether your bottom-line position can be summarized on page 2 of the Broadview-Greenwood resolution.

**Mr. Levitt:** They were all ALARM amendments originally.

**Mr. Eves:** OK. Mr. Johnston and some others who have appeared before us believe that even if issues such as that were addressed by way of amendment, because of the process and because of some of the principles that he thinks are inconsistent with Canadian federalism, we have to start over and no amount of amendments that we can make will make the Meech Lake accord a working agreement. Do you agree with that?

**Mr. Levitt:** The position of ALARM is that if those four amendments are attained, we will be satisfied. We have to deal with politics and reality as they are, not as we might like them to be. At this particular juncture, we will be satisfied with those four amendments.

**Mr. Elliot:** I would like to direct a question to Mr. Levitt with respect to the first ministers' conference format of the accord. Before I do that, though, I would like to make a couple of observations. We are cutting a permanent record here and there are two things, one I would like to clear up and the other I would like to make a comment on.

One of the presenters attributed a statement to the Premier of Ontario that he is against free trade. I have in fact never heard him say that. What I have heard him say a lot—

**Mr. Geiger:** He is against the agreement.

**Mr. Elliot:** —is that he is against the agreement. I really would not want that to be in the record on a permanent basis, that he has ever said, anywhere I have been anyway, that he is against free trade.

**Mr. Geiger:** I am sorry. I did not make it clear. I meant the agreement as it now stands. He is opposed to that.

**Mr. Elliot:** Right.

**Mr. Geiger:** Notwithstanding that, I suggested there was a good chance, in my view, that it might well be passed in any event.

**Mr. Elliot:** The point I want to make there is that a lot of us share that point of view as it is now stated.



The other thing is, I think because something appears in the Sun does not necessarily make it a true fact in its entirety. It may very well be taken out of context with respect to a longer kind of dissertation. I think we should keep that in the right perspective.

**Mr. Chairman:** Are you suggesting that the Sun does not always shine?

**Mr. Elliot:** Clearly. The third observation I would like to make, and I am a part of this as well as you people are, is I would like to compliment the group ALARM for taking the position it has in public the way it did, because I think it is part of a process in the party's system that we are all part of right now that is going to be very helpful and healthy in the long run.

Up until now, if you crossed the party in any situation—any one of the three parties, I am not just talking about the Liberal Party—politically it was not very wise to do that kind of thing. In the climate that we are in these days of honest concern, in a context such as the one we are in, specifically constitutional amendment, it is very necessary that those of us who are opposed to a straight-on party view make that very clear in the forums that are available.

It is in that context that I would like to ask you a question with respect to the first ministers' conferences, because they are set. The first will begin in the fall of 1988, the way I understand it. Senate reform and fisheries are definitely two of things that have been written into the accord. The question I have to ask is with respect to the (c) part of that, clause 50(2)(c), which says "such other matters as are agreed upon."

From the way you referred to that area, I suppose that unanimity was something that was in your mind. I would like you to clarify that a bit if you do not mind. Do you view clause (c) to mean that all of the premiers and Prime Minister have to agree with any other item that would be added to an agenda?

**Mr. Levitt:** That is precisely how I interpret it, particularly in the context of the general unanimity formula for amendments. It appears clear to me and, from reviewing Senator Forsey's remarks in the Senate, it was his view as well. If something is disputed as a subject for discussion by one of the premiers or by the Prime Minister, then clearly it is not agreed upon for discussion. That seemed to me the plain wording of the document and, in particular, the context of the unanimity formula for amendments. It seemed to be the intent of the drafters.

**Mr. Elliot:** The observation I would like to make with respect to that whole unanimity

section is that there are eight sections where unanimity is required at the present time by the Meech Lake accord. The old amending formula of 50 per cent representing at least seven of the provinces is going to apply in the other areas.

To me, Senator Forsey and other people like that who determine that that is read into the unanimity part of that—I think that is a point of view. It should be cleared up. But I do not necessarily share that point of view. I am still not convinced by your quoting him or your interpretation of unanimity, because I am to be convinced on that relative to the accord. Is there any other clarification you can make with respect to that?

**Mr. Levitt:** I am simply quoting him to indicate that it is merely not an errant interpretation or one that is totally idiosyncratic. But this is one of the areas where unanimity is required. My view of particular sections of the accord is that the most fundamental sections, the areas that we have been talking about today where we can see the errors as most egregious, are the areas where unanimity is required for amendment. That is the source of our concern.

**Mr. Chairman:** To note, I have Mr. Harris, Miss Roberts, Mr. Offer and Mr. Cordiano in responses.

**Mr. Harris:** I guess you are telling us to be brief.

**Mr. Chairman:** I just thought it would be of interest to people.

**Mr. Harris:** I will try to zero in on just one area.

I, too, congratulate the group on being here and on its presentation. I would be remiss if one of the Progressive Conservative members did not congratulate you for getting past Ian Scott and making it to the table.

Second, I would like to say that I understand where you are coming from in all of what you presented and I agree with a lot of it. I mention that first in pointing out one exception, the free trade reference. I find that totally irrelevant and I do not know why it was brought up. If it was brought up in the context of federal-provincial powers or what it has to do with Meech, my understanding of all of the thrust is that, when it comes to areas like this and strong federal powers, you would be in favour of the Prime Minister telling the premiers, "We really do not think what you think on this issue is particularly significant." It certainly should not have predominance. If it was brought up in that context, it seems contrary to the rest of your presentation.

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**Mr. Geiger:** Do you want me to answer that?

**Mr. Harris:** If it was brought up in the context of being on top of Meech Lake, the north-south, as you tried to suggest, there are many of us who would argue that the exact opposite is the case. In any event, I find it totally irrelevant to the discussion that is before us on Meech Lake. If you want to comment on that, fine.

**Mr. Geiger:** I said this: This particular government in Ontario right now has expressed—and the correction was quite right—reservations about the current trade agreement with the United States. Nevertheless, it may go forward. If it does go forward, it seems to us that we will be forging stronger links with our neighbour to the south. If you look at the brief, which I did not quote completely, we will be dissolving to some extent the links that hold Canada together as a country while, at the same time, strengthening links with our very powerful neighbour to the south.

I will quote from page 31, “A divided house cannot stand—especially beside a giant—even a friendly one.” The point is that one of the provinces may very well decide to have even stronger links with the community to the south. If you travel out to western Canada, there is a very large group of people out there, although it is a minority right now, that would very much like to secede from Canada and join the United States.

**Mr. Harris:** I understand that. I am not sure how relevant it is to Meech. Many would argue that without a freer trade agreement with the United States, that will precipitate provinces out faster than proceeding with the agreement.

**Hon. Mr. Roberts:** I think the question is really a very good one. We suffered, even though we have taken a long time, from the problems of compression. From the remarks that we made, one could easily have drawn the conclusion that we believe in the federal power and we do not believe in the provincial powers, and I think that would be a mistaken interpretation.

One of your colleagues, Miss Roberts, spoke about the increasing prevalence for executive federalism and the intermingling of provincial and federal responsibilities. Clearly, Meech Lake is the injection into federal institutions of more provincial participation. I think the reference to free trade is relevant in the sense that it shows that that process is or can be a two-way process.

Just as the provinces will become more engaged in federal issues, we see in the free trade

proposals, as put forward by the federal government, an implication that is stated from time to time about the necessity of a provincial government that may be reluctant to go along with the consensus which has been enshrined in the agreement that has been made internationally and with the support of some other provinces.

Your remark is right but, on the whole, we believe that the Meech Lake accord undermines federal power, but I do not want to be interpreted as saying we want to undermine provincial powers. We think that this process at Meech Lake may be damaging to both levels of government by the degree to which it fudges or makes less clear responsibilities for government in Canada by forcing the provincial and federal levels to be in each other's pockets at the same time.

**Mr. Harris:** I see.

**Hon. Mr. Roberts:** I think that is the only real relevance of the free trade issue, as an example of how, whatever one's view of the substance of the free trade issue, we see a federal government that seems to be prepared—and I do not mean this pejoratively—to lean on the provincial government. It leads it through its process in areas which are of concern and it can have some impact on an area which is one of provincial responsibilities as well.

**Mr. Harris:** I want to ask one question, and you kind of led me to it. That concerns the federal spending power. In your remarks you referred to Meech's intrusion of the provinces into federal spending powers. Others may argue that it is there to clarify how the federal government would be able to intrude on provincial spending powers.

All that aside, one of the things that worries me about Meech goes to the question of what should be in the Constitution. Most of us find it appalling that first ministers' conferences are going to be entrenched. Is that the purpose of the Constitution, to say you are going to do this? Is it the purpose of the Constitution to say that this will be the agenda of the next one? Presumably that will be amended after the next one.

What should be in the Constitution? You were talking about federal spending powers. Everybody who has come before us has been talking about them in the context of social policy. Should any of this be in the Constitution? Is that the purpose of a constitution for a country? Is it to talk about social policy and how it is going to be funded and developed and what not? Would we be better off if there were no mention or less mention in the whole area of spending powers?



With regard to there being less than was in there before, history has shown us that federal-provincial programs have been able to evolve. You have pointed out ways in which stumbling blocks have been overcome in the past. Is it appropriate that we start getting this into the Constitution? I have a really great worry. I wonder whether it is appropriate, because I wonder what is going to be next in the Constitution. If we are going to have to put every little thing in there, then we might as well rip it up, start all over again and go back to what a constitution is really for.

**Mr. Cooke:** You raise a very good question. I think there is a tendency among civil servants, politicians and leaders to constitutionalize and put into print everything. Many people have said one of the magics of our Constitution is its flexibility and adaptability over time. Many things were not in it, such as the cabinet or first ministers' conferences; they were created. The British North America Act is in a sense an organic document. One of the philosophical problems with Meech Lake is its tendency to crystallize everything in black and white in a constitutional form. I think there is that danger.

We have made our four points, our recommendations, where we would like changes to the wording of that. We do that in response to the political reality as it is, in response to the fact that this was one of the demands of Quebec. The whole constitutional process was, so to speak, called the Quebec round, and it was one of Quebec's five demands that this be dealt with in the Constitution.

We are working within the context of that political reality. Therefore, we are saying we have problems with certain words. We have problems with "compatible," "objectives," "initiative" and "reasonable compensation." Those things should be changed and improved with other words such as "consistent" instead of "compatible" and "principles" or "standards" for "objectives."

Perhaps the best solution would be that it does not belong in there. I have personally no objection to that idea, but I think we are working in the political reality, and that being so, we are prepared to suggest amendments to certain words. The best and most ideal situation would be to remove it.

**Miss Roberts:** I was interested in some of your comments. Some of them concerned me with respect to the natives, saying that if we let Meech Lake go, they are going to be second-

class citizens or such-and-such, words to that effect.

Right now, if Meech Lake is not dealt with, we already have a second-class government, that is, Quebec, and it is concerned. There can be no changes in our Constitution and no changes in our charter, and we have seen that there can be no meaningful negotiations with respect to the native peoples until we have a government in that is out at this time. Those are things that have to be considered and that is the political reality we are dealing with.

You have indicated very clearly today that you think the Meech Lake accord is not the deal you would have made. That is basically what you said. You have said, "If you change it four ways, it will make it close to the deal we would have made," but that would change the deal completely. It would change certain parts of the deal.

What I am saying to you is, how do we get Quebec in? How do you think we should do it? You can say they are in already, but they do not believe that and they are not acting on that basis. How do we get them in and what is the process? We all understand that what has gone on here might be inappropriate, although that is the way it has been done in the past in most areas with respect to constitution-building. Those are my two questions.

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**Mr. Levitt:** Let me answer the premise first of all. There is far more latitude now in dealing with the aboriginal peoples than there will be under the Meech Lake accord with its amending formula.

To deal with your specific question, how do we get Quebec in? By the same process we have had before. Mr. Bourassa's demands were far fewer, as I am sure you are well aware, than those agreements that were ultimately made. Mr. Bourassa's consent to the accord or to some agreement similar to the accord could have been obtained by giving away far less in the areas we now consider to be egregious errors than had to be done.

In a number of the contexts that we talked about today, Mr. Bourassa, in our view, would not consider it a slap in the face of Quebec, as some defenders of the accord have suggested, to say: "We have problems in those areas. They do not relate to the rights of Quebec necessarily, but they are problems for the rest of Canada and they are problems for national unity. Let us meet again and talk about those areas, because those are areas of real concern and real problems. Desirable as it is to have your signature on this

Constitution, we cannot bifurcate, divide and maybe end the image, view and vision that people have of this country just in return for that signature."

I think Mr. Bourassa, or at least others in Quebec who have already come forward, can understand that.

**Mr. Cooke:** If I can add to that, I think there are real concrete ways with respect to the five demands. If you read the five demands closely and look at the result, there are lots of things in here that not only were not mentioned by him but are farther than where he goes.

I will give you one example, the Quebec "distinct society," a demand of Quebec's. Nowhere that I have ever seen or read did Premier Bourassa ask that it be a mandatory interpretive clause that the whole Constitution, including the British North America Act, the Constitution Act, 1982, and the charter, be subject to it. Nowhere did he say that the "distinct society" provision would be worded as it ended up being. Nowhere did he say that it had to be in the body of the Constitution rather than in the preamble. There are some examples for you.

**Miss Roberts:** But all you are saying is that we do not know that, because that negotiation was behind closed doors.

**Hon. Mr. Roberts:** No. When the responsible Quebec minister presented the proposals originally, the "distinct society" provision was in the preamble, not in the substance of the document.

**Mr. Offer:** Thank you very much for your presentation.

One of the topics you dealt with at some length in your presentation centred on the whole question of "distinct society." Yet when I read the association's resolution, that particular issue was not really dealt with. I am trying to understand what your position is with respect to that.

Is it that there is a philosophical problem with the whole term "distinct society" being in this agreement; or is it that the concept itself needs some definition—and you have spoken about that in your brief—or is it that the whole question of "distinct society" should be amended on an expansion type of basis? I just do not know where you really stand on that particular concept, especially in the light of the resolution you tabled with us, which really does not speak to the "distinct society." On the other hand, almost a full third of your presentation in terms of paper dealt with it. Will you please clarify that position for me?

**Mr. Healy:** I would first of all comment on clause 2(1)(a) of the resolution, which I think seems to deal with it, albeit maybe a little vaguely. I think our position is that when you consider the implications of the words "distinct society," you get an awfully wide perspective. There are Quebec politicians who are quite convinced it means an awful lot.

We are concerned with the minorities in Quebec, i.e., the English, women, the native peoples, aboriginals and any other minorities. What is going to happen when a Quebec government tries what it did in Bill 101? Will a charter provision such as subsection 2(3) be able to be used to stop this, in other words, to protect individuals and minorities?

I think it is a very deep concern when you look at the wording of section 2. It indicates, "Quebec preserve and promote your distinct society." This is a guidance to a legislature, and it is the only legislature in the entire country that can preserve and promote if you want a strict reading of section 2, whereas the others are different. Ontario, the federal Parliament and all the other legislatures are different. We can only preserve what we have. It freezes things, as I think Mr. Cooke mentioned. It crystallizes things. The Constitution should not do that. It should allow things to evolve. We have an initiative of bilingualism by the federal government and we have MPs who are resisting it. This kind of thing is stopping a free flow of bilingualism across the country. A distinct society can do that.

**Hon. Mr. Roberts:** Can I make some comments in 30 seconds? Subsection 2(1)(a) does cover it. The concern about the "distinct society" provision is that it will have an impact on the interpretation of the Charter of Rights, and, second, the "distinct society" provision will provide a different jurisdictional responsibility for the province of Quebec to the jurisdictional responsibilities which are held by each of the other provinces. In a federal structure, it is undesirable to have one province as a constituent element of that federation which has different jurisdictions and responsibilities from the other provinces.

**Mr. Offer:** I notice there are people who are waiting to ask questions.

**Mr. Chairman:** I appreciate that knowledge.

**Mr. Offer:** The chairman usually brings that forward just when I am asking questions.

**Mr. Chairman:** You probably have just a very brief follow-up.



**Mr. Offer:** As it turns out, that was not the case. I have another point with respect to clarification as opposed to what I was really going to ask. In your discussion, talking about the preservation and promotion aspect, your presentation seems to say, I think even in the reading of your submission, that the preservation of a fundamental characteristic of Canada, as shown in the accord, is that of the federal government and the provinces other than Quebec. Is that your interpretation?

**Mr. Healy:** I think section 2 bears that out.

**Mr. Offer:** Are you saying, in other words, that the role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristics of Canada excludes Quebec?

**Mr. Healy:** No, no. I do not have a copy of section 2 right in front of me. I am sorry. I could not say that, of course not.

**Mr. Offer:** That is what I took from your presentation.

**Mr. Healy:** I just moved to the specific. That is all I am trying to do. *Vis-à-vis* Quebec, it has its own special role. Yes, it has to preserve the fundamental characteristic of Canada. At the same time, it has to preserve and promote its distinct identity, whatever that means.

**Mr. Cordiano:** I will try to be brief. I just want to deal with one particular subject area. I note the association's memorandum where you say the groups most concerned by the provisions of the accord are native Canadians, multicultural groups, linguistic minorities, women, etc., and that they looked to the Liberal Party traditionally for leadership and support.

I note page 15 of your brief, and I want clarification on this because I do not want to take it out of context, but want you to further define what you mean by this. You make mention halfway down the page, and I will quote from the section: "What do we make of section 16 of the accord? Why are certain charter rights—for example, section 25, aboriginal rights, and section 27, multicultural—not affected by section 2 of the accord?" In that you seem to imply that the Charter of Rights encompasses multicultural rights.

When I look at the Charter of Rights, and I have had some discussion with legal experts, they seem almost always to agree on this point, that section 27 of the Charter of Rights is an interpretative clause. It does not bestow or guarantee rights to individuals, and section 27 clearly has in the language the word "interpreted" and "preservation and enhancement of multicul-

tural heritage of Canadians;" that is the charter will be read in such a fashion as to be interpreted in a manner consistent with that. I am reading and paraphrasing from the charter, section 27.

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Many other groups that have appeared before us concerned about minority rights and about multiculturalism, have put forward the notion that this is a multicultural country and that our official policy, at the very least, is one of multiculturalism. Are you concerned at all about what may happen to multiculturalism, given your concern for section 2 of the accord and various other elements in the accord, or do you feel that section 16 of the accord addresses those concerns?

**Mr. Healy:** I would say, sir, in response, if you want to define the fundamental characteristics of Canada, you have to be realistic. Statistics Canada will show you that, yes, we are a multicultural country. Even in the city we have quite a few pockets of different nationalities. We are well aware of that. If you want to be accurate and say Quebec is distinct, and of course it is distinct, then let us say that Newfoundland is distinct. You are getting into a hodgepodge of distinctions. You are going to have a war and peace on your hands for a Constitution. I agree with your interpretation of section 27. I apologize that I just made reference to it; I did not mean to be overtly technical, and I agree.

**Mr. Cordiano:** That is why I say I did not want to take it out of context. Is the Broadview-Greenwood Association's memo a policy statement it is going to be advancing at the next convention?

**Mr. Levitt:** It is a resolution.

**Mr. Cordiano:** A resolution, okay. This is the basis on which you feel that the accord should be amended and you would agree with this. Having heard from a number of groups that feel very strongly about the fact that somewhere in the Constitution multiculturalism should be enshrined in a much more forceful way than simply leaving it as a charter provision, as an interpretative clause in the charter, I just wanted to know if you would agree with that view. Certainly it can be addressed, perhaps not now, perhaps not with this accord, but certainly it can be addressed in the future.

**Mr. Levitt:** We are afraid that very many things cannot be addressed in the future because of the amending formula.

**Mr. Cordiano:** An amending formula would not affect that situation. I do not think that the

amending formula would preclude someone from bringing an amendment making multiculturalism part of the Constitution, as opposed to part of the Charter only, which it is now.

**Mr. Levitt:** Let me put it in this respect. The fundamental characteristic of Canada is referred to as essentially a linguistic dual one. That has not been the fundamental characteristic of Canada for 70 or 80 years, and that is apparent as soon as one walks around these halls, least of all walks outside. We might as well have a Constitution, and we should have a Constitution, that reflects our view of ourselves, not something which was a political tradeoff in a particular context, and fundamentally creates an interpretative dynamic which vitiates the vision of Canada that we as Liberals have and that we as a province have. That is as succinct a way as I can put our concern.

**Mr. Cordiano:** But I do not see in your resolution a call for an inclusion in the Constitution in the most effective manner to make multiculturalism a fundamental characteristic of this country in a constitutional context.

**Mr. Cooke:** I just point out that it is not our resolution. We endorse it. It is the Broadview-Greenwood resolution.

**Mr. Cordiano:** OK, I am sorry; I mistook it to be your resolution. I gather that you agree with the resolution and that is why I pointed out that you have put forward similar proposals or similar amendments that you would like to see, and these constitute the basis on which you would put that forward.

**Mr. Levitt:** This is the Broadview-Greenwood resolution, which we will be supporting along with many other Liberals at the Liberal Party of Canada's Ontario convention on March 25. It is true that one of its amendments is not that which I specifically proposed just now. If the Association of Liberals for the Amendment and Reform of Meech was to draft a perfect Constitution, of course section 2 would be radically redrafted, but we are dealing at this point with the art of the possible. We as an organization have to propose amendments we think have some real chance of succeeding. You as a committee, and ultimately as a government, have to propose amendments that are not going to alienate all of the other provinces and have some hope of succeeding as well. In that spirit, we are supporting the Broadview-Greenwood amendments, which are generally very good amendments. In that spirit, we are addressing that today.

**Hon. Mr. Roberts:** Perhaps I can just say one brief thing in clarification. The effort of ALARM and these resolutions are pointing out the things in the present accord which should not take place, but we did not take it as our function to draft a new Constitution for the country and, therefore, respond to what I think is a very legitimate concern by listing all of the things that we thought ought to be put in. That would be a much longer, much more complex and much more difficult exercise.

**Mr. Chairman:** As our history has shown.

**Hon. Mr. Roberts:** In a sense, if I can put it bluntly, we are trying to point out that this is a \$3 bill that we have not replaced with our own \$10 bill.

**Mr. Cordiano:** The only reason I raised it is the context of section 16, which you have mentioned throughout your brief and which I gather gives some concern about the Charter of Rights vis-à-vis the accord.

**Hon. Mr. Roberts:** Right.

**Mr. Cordiano:** That is why I mentioned the fact that multiculturalism is brought in in that section. It fits in the context of all that.

**Hon. Mr. Roberts:** It does. I was just trying to explain we were not putting forward the positive suggestions of what should be added, and that is why we did not go on and deal with this issue more explicitly.

**Mr. Chairman:** Mrs. Fawcett with the last question, after which we will exercise our constitutional right and have lunch.

**Mrs. Fawcett:** Very quickly, gentlemen. I would like your thoughts on the idea that if—I do not know whether to say if or when—this dangerous free trade or bilateral agreement goes through, and Quebec is not in the Constitution, is that not a real chink in Canada's armour, or even a hole? Would not Quebec then be ripe for the picking because of several things that they have that the United States very much wants? Would not Canada be in a very weak position when that free trade agreement goes?

**Hon. Mr. Roberts:** Are you talking about with a free trade agreement?

**Mrs. Fawcett:** Yes.

**Hon. Mr. Roberts:** If that agreement goes forward, the impact that will be—

**Mrs. Fawcett:** If that goes in and the Meech Lake accord is not passed and Quebec is not in?

**Hon. Mr. Roberts:** Perhaps I could comment that I am not sure whether it is entirely in order, but let me try to respond.



**Mrs. Fawcett:** OK.

**Hon. Mr. Roberts:** Those of us who were very much involved, both in the constitutional changes and the fight against the referendum, found, I think, that the strongest argument, or I should say one of the strongest arguments, for Quebecers was the sense that if they do separate from Canada they would be losing the advantages which Quebec had from being part of the economic union of Canada.

**Mrs. Fawcett:** Right.

**Hon. Mr. Roberts:** Once the free trade agreement goes through and goes into effect, if it does, then that argument loses its potency because under a free trade arrangement in North America, Quebec would not lose any economic advantages which it has from the free trade area by leaving Canada. This is a point which has been made very clear by many of the PQ intellectuals and by Mr. Parizeau himself, that the entry into free trade removes one of the strongest arguments in a practical way that Quebecers had for being part of the Canadian federation. There used to be a phrase that Quebecers were for a profitable federalism, profitable because it guaranteed them the economic advantages of being part of a larger

market. That argument for staying in Canada disappears once, and if, we move to a North American free trade agreement.

**Mrs. Fawcett:** Thank you.

**Mr. Levitt:** If I could make one remark to the chair. Your natural right to go to lunch now is not a constitutional right at all. It is in the Ontario Employment Standards Act, just showing that all inherent and important rights need not be in a Constitution.

**Mr. Geiger:** But he is not an employee, so he does not have it.

**Mr. Levitt:** Good point.

**Mr. Chairman:** The collective agreement we have is a little different as elected members. Gentlemen, on behalf of the committee, I would like to thank you very much for coming and sharing your thoughts with us. I suppose for some of us it has been perhaps a little more poignant, given our political backgrounds, but I think, as was mentioned by Mr. Elliot earlier, it is important in something like this that these views are aired and they aired in public. We appreciate you coming today. Thank you.

The committee recessed at 12:51 p.m.

## AFTERNOON SITTING

The committee resumed at 2:07 p.m. in room 151.

**Mr. Chairman:** I apologize; the chair is a bit late today.

We want to welcome George Corn, the president of the Canadian Ethnocultural Council; Mila Eustaquio, the chairman of the women's committee; and Andrew Cardozo, who is the executive director. We thank you very much for coming and being here with us this afternoon. The submission is being circulated. Our procedure has been simply to let you proceed and make your presentation, after which we would follow it up with questions. I will turn the mike over to whoever among you is going to lead us on.

## CANADIAN ETHNOCULTURAL COUNCIL

**Mr. Corn:** Mr. Chairman and honourable members, I would like to express first our thanks for inviting us to participate in one of the most important discussions for all the people of Canada, the Meech Lake accord, the Constitution Amendment, 1987. I am pleased that we can express our views to the Ontario Legislature, the biggest and most important province in Canada.

Let me first introduce our members. As you mentioned, ladies first, Mila Eustaquio. Mila is the chairperson of the Canadian Ethnocultural Council women's committee and a former board member of the United Council of Filipino Associations in Canada. She is the manager of marketing analysis in one of the big private corporations in Canada.

I also introduce Andrew Cardozo, the executive director of our office in Ottawa, who will explain our submission more in detail. Mr. Cardozo is a graduate of York University and of Carleton University, where he received the degree of master of arts in public administration.

Finally, I am George Corn. I am a chartered accountant. I am a retired partner of Dunwoody and Co., one of the biggest firms of chartered accountants in Canada, with its head office, of course, here in Toronto, Ontario. I am also immediate past president of the Czechoslovak Association of Canada after serving as secretary general for 10 years and as president for 15 years.

I am quite proud to serve as the president of the Canadian Ethnocultural Council. I have been on the board of directors from the inception of CEC in 1980 and now as president following the founder of our council, the first president and a

member of your assembly, the member for Downsview, Dr. Laureano Leone.

With this short introduction, I would like you to allow me to touch two historical events in the development of multiculturalism in Canada and its entrenchment in the Canadian Constitution. The Right Honourable Pierre Elliott Trudeau, in his effort to repatriate the Constitution, presented in 1980 the Charter of Rights and Freedoms as a constitutional amendment which had 24 sections. It did not cover one of the most important and fundamental characteristics of Canada, multiculturalism, and did not guarantee equality to male and female persons.

In the fall of 1980—actually, November 26, 1980—the CEC prepared a lengthy report on multiculturalism in Canada and requested Prime Minister Trudeau to include the preservation of the multicultural heritage of Canadian minorities in the charter. Many other organizations followed suit and, as a result, more sections were included in the charter, including section 27, covering multicultural heritage, and section 28, guaranteeing the equality of men and women. That was in the Constitution Act, 1982.

Last year the Right Honourable Brian Mulroney, Prime Minister of Canada, and the premiers of all Canadian provinces agreed to bring Quebec as a full partner into the Canadian Constitution, which we honestly welcome. The Meech Lake accord was struck at the end of April 1987. It contained 15 sections but again did not cover multiculturalism, one of the most fundamental characteristics of Canada. As the president of the Canadian Ethnocultural Council, I immediately sent a lengthy letter to the Prime Minister and to all the premiers on May 15, 1987, and quoted a few things which were, in our opinion, not properly covered under these 15 clauses.

In the meeting held in Ottawa three weeks later—actually, on June 3, 1987—the Prime Minister and all the premiers agreed to add to the accord section 16, which attempts to strengthen and firmly entrench section 27 on the multicultural heritage of Canadians in the Canadian Constitution Act, 1982.

We have studied the Constitution Amendment, 1987, and prepared our report, which we have presented, first, to the special joint committee of the Senate and the House of Commons on August 13, 1987, then to the official opposition committee on the Meech Lake accord in the province of Alberta in September 1987. On



January 26, 1988, we presented it to the Senate committee of the whole on the Meech Lake constitutional accord in Ottawa, and now we are presenting it to your committee.

We believe that improvements can and will be acceptable, and therefore we suggest several improvements to the accord and express our views on other measures, such as the Senate, the Supreme Court of Canada and so on.

I want specifically to mention our first recommendation. We believe that this country is fundamentally bilingual and multicultural. I believe that all members of this committee agree with that. We therefore believe that both these fundamental characteristics should be given equal protection in section 1 of the accord. Section 16 is not a satisfactory guarantee, although it was meant to be. What section 16 does is to clarify that only the charter will recognize multiculturalism, our cultural diversity, whereas the whole Constitution will recognize bilingualism. Our linguistic duality is, at this rate, above the multicultural aspect.

We know that the Supreme Court does make a distinction between the charter and the rest of the Constitution. As noted on page 4 of our brief, we therefore urge that a new clause be added, clause 12(1)(c), which will say, "The recognition of the multicultural heritage of Canadians also constitutes a fundamental characteristic of Canada," and that subsection 12(2) be improved to say, "The role of the Parliament of Canada and the provincial legislatures to preserve and promote the fundamental characteristic of Canada referred to in clauses 1(a) and 1(c) is affirmed."

As we note in our second recommendation, representatives of the aboriginal people should be consulted to make changes to ensure that their concerns are met, especially in self-government.

Last, I would like to mention that section 16, in its present form, can cause problems for other sections in the charter, especially with regard to the equality of women, minorities and the disabled, and we recommend in recommendation 3 that section 16 simply be rewritten as follows: "Nothing in this accord affects the Canadian Charter of Rights and Freedoms."

I want to stress that these are not changes; these are improvements, because we are trying, as I say, to change only by taking a few words from one section and putting them into another section.

I would like to touch some of the other concepts mentioned in the accord. We support and endorse the concept of the distinct society in principle and we recognize its necessity and

importance with respect to the inclusion of Quebec within the agreement. We also recognize the distinctiveness of Quebec, primarily in its use of the civil code and in its being the main centre of French language and culture in Canada. We submit, however, that the distinctiveness of Quebec should not preclude the distinctiveness of other societies within Canada.

Second, we submit that it should not exclude Quebec from its obligation to maintain its own policy on multiculturalism. Where it is recognized that it is not the intention of the accord, as it is written, we recommend, to offset the possibility of these problems occurring, that the accord define the term "distinct society" to clarify that the government of Quebec has a responsibility to preserve and promote the multicultural heritage of the province.

I do not intend to read our submission exactly, because you all have it. Now I would ask you if you would give the floor to our distinguished lady here to continue our presentation.

**Mr. Chairman:** Please.

**Ms. Eustaquio:** Distinguished members of the committee, thank you for inviting us here. I would like to speak on behalf of the ethnocultural women, who are doubly disadvantaged by gender and by ethnicity, and if they do not have fluency in either English or French, they are triply disadvantaged by virtue of language as well.

First, let me reiterate our hope that the members of the provincial Legislature keep an open mind and really listen to us with an open mind, regardless of what their respective leaders tell them, and vote according to their conscience.

**1420**

I would like to address our recommendation 3. It is on page 4 of our brief. There is a further problem that arises in that, by ensuring the sanctity of two clauses of the charter in section 16 of the accord—namely, sections 25 and 27—the other sections do not have the same protection and could be overridden.

Of special concern to us is section 15 of the charter, which disallows discrimination on the basis of race, national or ethnic origin, colour or religion. We are concerned that this could adversely affect gender equality as guaranteed in sections 15 and 28. We therefore recommend, as Mr. Corn has said earlier, that section 16 of the accord be rewritten as follows: "Nothing in the accord shall affect the Canadian Charter of Rights and Freedoms."

We believe there are some schools of thought that say the charter is not weakened but

strengthened by this accord. There is also another school of thought that says it is weakened by this accord. Why could we not just say so and write in clear words an amendment to section 16 of the Meech Lake constitutional agreement as such so that in future years there could be no ambiguity?

The Constitution is a fundamental law of the land, one that should guide laws 50, 60 or even 100 years from now. As such, it should be a strong, solid and an unambiguous foundation. By writing this guarantee of the supremacy of the charter in this accord, we feel that that is not asking too much. We hope, at least, that this amendment be considered.

**Mr. Corn:** Mr. Chairman, I would appreciate it if you give the floor now to Mr. Cardozo, the executive director of the CEC. He will give more details about other sections.

**Mr. Chairman:** Please go ahead.

**Mr. Cardozo:** In the rest of our few minutes, I will try to take you through the rest of the brief as fast as I can.

I will start at the end of page 5, with our recommendation with regard to the Senate. In the past and, in fact, presently, the percentage of senators from minority ethnic communities is around the 15 per cent mark. Our hope is that in the process of appointments to the Senate, the premiers and the Prime Minister will be sensitive to the need to increase that percentage and bring it closer to 33 per cent or, in fact, according to our latest statistics, more like 38 per cent, as is the situation in Canada at large, the ethnic minority population being around 38 per cent in Canadian society.

Our next two recommendations on immigration have to do with section 3 of the accord, unfortunately a section of the accord that has received very little attention. Our prime concern here is that a lot can happen with immigration policy and immigration law. Powers that are presently given to Parliament can be circumvented because of the clauses and the way they are currently worded. Our concern is that Parliament not be circumvented and that in changes to immigration policy there be full public discussion on them.

The next recommendation, at the bottom of page 6, has to do with the Supreme Court of Canada, and as in the case of our recommendation regarding the Senate, we would like to see an increased level of ethnic appointments to the Supreme Court, especially when you are dealing with issues such as sections 15 and 27 of the charter or section 16 of this accord, although we would like to see that changed.

As the Supreme Court assumes a greater role in lawmaking in Canada, it is our hope that the bench will be reflective of Canadian diversity. With the death of Chief Justice Bora Laskin in 1984, there have been no replacements from minority ethnic communities on the Supreme Court.

When we met with the Prime Minister in June of last year, I am pleased to say that he was quite sensitive and was fairly close to giving us a commitment that the next appointment would be, let us say, sensitive to our ethnic diversity.

With regard to shared-cost programs, and you have heard a lot about this, our preference would be to have the words "national objectives," which are rather general, replaced by the words "national standards," so that we are more specific as to what the role of the national government and the national Parliament is.

On page 8, with regard to conferences on the economy and other matters, as you are aware, there is a federal multiculturalism policy and several provinces, including Ontario, have various forms of multiculturalism policies. Unfortunately, there is really a difference—I do not want to say of standards, but of different sorts of policies across the country, some of them reflecting the diversity of the particular province and some being really quite insensitive to the diversity in each province.

Our hope is that one of the meetings of the first ministers in the near future will deal with various aspects of multiculturalism. We have talked here of economic and social as well as cultural aspects of multiculturalism. That does not require, of course, any amendment to the accord, but we hope that you would agree in recommending that to the first ministers. We are pleased that the report of the special joint committee did make that recommendation with regard to the need for multiculturalism to be discussed at the first ministers' level.

Regarding section 9 of the accord, the unanimous-consent section, while we do see the value of unanimous support and unanimity in constitutional amendments, this clearly cannot happen all the time. Our hope is that the accord would allow for a somewhat more flexible approach to constitutional amendments, especially as they relate to the territories becoming provinces.

Section 13 of the accord deals with the constitutional conferences that will take place. We hope we will not see the process of constitutional amendment that has taken place over the past year take place again. The federal



special joint committee recognized that the present process was flawed and we hope all legislatures and all premiers will be very vigilant in the future so that there is plenty of time for public input before constitutional amendments are signed.

The next point we make is that we have noted our continuing concern with the nonobstantive clause in the Canadian Charter of Rights and Freedoms; namely, section 33. We would have hoped this constitutional accord could have used the opportunity to do away with that section.

Many recommendations we have apply to the preamble of the accord, primarily the agreement between Canada and Quebec. We would like to see a more flexible system of immigrant determination, or at least a more flexible system ensured for Quebec. We recognize the need for Quebec to attract francophone immigrants, French-speaking immigrants from wherever they are in the world, but we hope that would not be exclusive and that people who speak languages other than French would not be disallowed from immigrating to Quebec.

With regard to immigrant integration, there is a clause in the preamble part of the accord that gives Quebec the primacy in the process of immigrant integration and development of citizenship and this privilege can be given to any other province should it request it.

We suggest it is a bit dangerous when citizenship classes and integration services are provided by a province rather than the national government. When people immigrate to this country, they do not immigrate to a particular province; they tend to immigrate to Canada. It would be more suitable for citizenship services especially to be provided in the Canadian context as opposed to any provincial context.

#### 1430

Last, I just want to refer you to the last page of the brief called "addendum." We have here excerpts from the minority report of the special joint committee from the Liberal Party and from the New Democratic Party, which talked about the need for multiculturalism to be included in section 1. The Liberal Party had specific amendments dealing with multiculturalism, namely, clause 2(1)(d), and the New Democratic Party talked about the need for the ethnocultural diversity or ethnocultural reality to be addressed at an early time.

We include this here for you to see that the federal committee did give this matter fairly serious attention; we would submit not serious enough because it did not feel the need to amend

the accord at this point. But we hope you might look at these particular minority reports and see the wisdom of recommending actual improvements to the accord itself.

**Mr. Corn:** Let me say a few words on the Canadian Ethnocultural Council. We call it the CEC. It is a coalition of 36 ethnic national organizations which in turn represent over 1,000 provincial and local groups, branches and clubs and tens of thousands of volunteers from coast to coast.

We address the needs or concerns of about eight million Canadians from all ethnic minority communities. We are a nonprofit and nonpartisan coalition dedicated to working together for the purpose of furthering the multicultural reality of Canada, recognizing the bilingual and multicultural Canadian society, aiming for equal opportunity rights and dignity, thus ensuring equality for all Canadians in a united Canada.

We are here today to endorse the need for the accord, especially as it is related to Quebec. We believe the people of Quebec were protected by the terms of the 1982 Constitution Act, but the lack of their voluntary signature was a most unfortunate absence in an otherwise positive historic development of the country.

As I mentioned, we believe the accord can be improved. This short summary of our suggested improvements for consideration of your committee is presented. I urge you, Mr. Chairman, and members of the committee to include at least some of our recommendations in your recommendation to parliament.

Specifically, I will mention that the recognition of multicultural heritage as a fundamental practice of Canada should be included in section 2 rather than in section 16, and that the term "distinct society" should be clarified by Quebecers because they know why they are distinct, and they would like to know, and multiculturalism as a fundamental characteristic of Canada should be included in this section for future consideration.

With these recommendations, I agree that the Ontario parliament will be serving not only Ontario but Canada as well.

**Mr. Chairman:** Thank you very much for your presentation and for the specific recommendations you have set out in the front of your paper. I think it is a very clear statement of the changes you would like to see. I also thank you for your overall views in terms of the place of the accord and the approach you would like to take. We will begin our questions with Mr. Allen and Mr. Harris.

**Mr. Allen:** I am very pleased to have the Canadian Ethnocultural Council before us with a brief to which it obviously gave a good deal of thought, one which reflects its special perspective on Canadian federalism and constitutional matters.

Perhaps I could ask you first off with respect to your advice to us, should it be impossible for us to secure any significant amendments to the accord or any co-operation from the premiers in seeking that, would you advise us, none the less, to support ratification and then to seek the things you want after that point in the ensuing process of constitutional debate and reform?

**Mr. Corn:** That is correct.

**Mr. Allen:** I raise that in particular because, on the one hand, you point out some things that are desirable to see in a Constitution with respect to the affirmation of the multicultural character of Canada. I think there is no doubt that has become a fundamental characteristic of Canada. In that respect, I am happy to see the language of section 2 which does not speak of the linguistic dualism as "the fundamental characteristic"; it says it is "a fundamental characteristic." I think it is important from the point of view of adding on to that and building on it that it does say it is "a fundamental characteristic" because it opens up the option then to delineate in our wisdom, and as we see appropriate, other fundamental characteristics. I think it is important that you strive in the direction you are moving in that regard.

It does strike me that we have been searching for ways to describe just how Quebec, as a province which is the only province that rests on another majority language and functions principally in that language, can be described in constitutional terms. Our efforts to date with regard to what multiculturalism means for Canada are in that sense a fairly new enterprise. We have been experimenting with many things from heritage languages to your council, for example, and organizations in communities and cities across the country and so on. We are building up a fabric of multiculturalism that quite clearly at some point is going to have to be described in its proper place in Confederation, acknowledged and recognized.

I really wonder whether your principal recommendation is not the one we ought to carry forward; namely, that the first ministers within five years—or did you say within three?—in any case within that foreseeable future, make the multicultural issue a central focus of their constitutional debate. Would you say that from your perspective that would be the most impor-

tant single accomplishment you could get out of this, if you get a commitment to that?

**Mr. Corn:** We have a little bit different view. I was saying we do not consider this as a change. We consider it an improvement to take it from section 16 and put it in section 2. If this can be achieved, it would be wonderful. If it cannot be achieved, then what do we suggest? It is, the next time, to make it a multicultural round; if this is Quebec's round, then have a multicultural round.

**Mr. Allen:** OK. Could I ask you a further question with regard to the immigration matters you raise? You have a number of concerns about what might happen with respect to the reception and designation of immigrants by Quebec in the context of the "distinct society" power, whatever that power may be. Nobody is very clear what that is, but do you not find that subsection 95B(2) is sufficient protection where it says that no province may embark on practices in the field of immigration which are inconsistent with any federal statute?

That seems to me, in the first instance, to provide a political remedy, that in fact any of the provinces taking up immigration jurisdiction and signing agreements with the federal government could always be pressed at the federal level, through the passage of a federal statute, to ensure a certain conformity to standard, whether it be reception style or whether it be designation of sources of immigration or what have you.

**1440**

**Mr. Cardozo:** I assume that is the intention of subsection 95B(2), to overcome the concern that a province might head off in a different direction, but I come back to our concern with regard to clause 95C(2)(b), that the words "in such other manner as is set out in the agreement" leave things a little bit open.

**Ms. Eustaquio:** It could be a confidential exchange of letters between a federal and a provincial minister, and as such it will not be subject to the public process.

**Mr. Allen:** That has to do with the amendment of agreements. I would assume that any amendment to the agreement would have to be in conformity with those things with which the agreement has to be in conformity; namely, the federal statute.

**Mr. Cardozo:** I suggest to you that is not clear.

**Mr. Allen:** No?

**Mr. Cardozo:** It is not as clear as it might be.

**Mr. Allen:** OK. I think it is clear to me, but maybe it is not clear. Those are the problems we are into in this whole business.



**Mr. Cardozo:** Can I just come back to your earlier question for a second in terms of the amending process and submit that there is probably one other route which is not getting attention, and that is that the first ministers could get together one more time and see if they could agree to any of these improvements that have been suggested by numerous groups. If there is no consensus, then they could carry on with the accord, but that discussion of any possible amendments does not constitute the opening up of the accord or the unravelling of the accord, as has been said oftentimes.

They could meet with the explicit understanding that if they did not have any agreement, they would carry on with the accord as is. I firmly believe that if they did make the effort to get together one more time, there would be some improvements they could make. I think that is one option you can be recommending.

**Mr. Allen:** I guess that was the burden of my final question. Would you be happy with the concept, as some have put it to us, of a companion resolution which would imply that we would put the Meech Lake accord before the Legislature as it is, entire and intact, but then pass also a companion resolution which would list those things we wish the first ministers to address before final ratification on their part, if possible, but if not, afterwards? It sounds like it is much the same idea that is being addressed.

**Mr. Cardozo:** It is a sort of second best.

**Mr. Allen:** Yes, surely. Thank you.

**Mr. Harris:** Mr. Allen has covered a couple of areas, but I just want to understand: If everything fails, you are saying to go ahead, ratify Meech Lake and then let us get down to some of the issues we want to talk about. Is that correct?

**Mr. Cardozo:** I think very reluctantly.

**Mr. Corn:** Very reluctantly, yes, but if it is be the only way, yes. We had the same discussion with the Prime Minister. I asked him the question: is there a possibility for you to amend it? He reluctantly said yes. We did not push in this direction, but we still feel there is a big difference between change and improvement. The improvement should be sought, should be pushed by everybody so that, let us put it very frankly, the Quebec government will accept it.

**Mr. Harris:** In spite of what everybody said, I think that if the 10 premiers all sent a letter to the Prime Minister that said, "We would all agree to this if you would," we would be back at the table. It may be that is a route we should be going or

should be trying to achieve. Many of us who feel this is not perfect, and I guess nothing is ever perfect, feel we may be remiss if we do not do everything we can to try to correct imperfection.

You have offered another suggestion we have not talked a lot about, of asking them to go back at it one more time. If we can get some consensus of what various provinces across the country have been talking about and see whether a number of provinces are perhaps saying the same thing, I think we would be remiss as a Legislature if we did not do that. We could say, "We cannot do that because nobody else is doing it," but if we check and find a large percentage of other provinces are all saying the same thing we would be foolish not to pursue it. I think we ought to at least do that.

Do you have any sense that the changes you want to the Constitution will be more difficult to achieve after Meech is ratified as opposed to before, or is your desire let us get it done?

**Mr. Corn:** My personal feeling is that it will probably be more difficult if other provincial parliaments do not put something more strongly, to say that it has to be dealt with. During the committee of the Senate and the Commons they made the kind of recommendation that next time the multicultural problem has to be addressed. It is right in the report. If everybody will at least push it will be dealt with at some point, as soon as possible. I would say our first question will be, let us recognize if it is an improvement and switch it, and if it is not then go the other way.

**Mr. Harris:** There are some areas where because of the unanimity, if you like, or perhaps because of the process, they say, "Look, if you approve Meech, you'll never get to what we want." I guess what I am asking you about is that most of the areas I think you are talking about do not require unanimity for changes. From that perspective, do you see it as being more difficult, having ratified—

**Mr. Corn:** It will be more difficult; but for me, I came as a refugee 35 years ago and I trust the Canadian political system. I escaped from communism. I trust and I know that they will be dealt with. I would like to see it tomorrow, and if not tomorrow as early after as possible, but do not defer it for 10 years, for a generation. I am too old, I am retiring—oh, yes—and I would like to see it, quite frankly.

**Mr. Harris:** I understand. Thank you very much for your presentation.

**Miss Roberts:** I will be very brief. Thank you very much for your presentation. It was very

enjoyable. Your last comment was very thought-provoking as well because I think we all wish to sort of go on that basis too.

What I would like to do is take you to your recommendation 13, which I found to be at least a definite way of dealing with the process. What it indicates is that with the first ministers' conferences, if there are amendments put through there then there would be a debate for at least six months before final approval. I am thinking about it the other way around. How do we get your concerns up to the first ministers' conference?

Is there a need for a committee such as this to be ongoing, maybe meeting once a year or twice a year or something with respect to constitutional concerns of the citizens? As you say, we have to have multiculturalism, but if we have a resolution from all the provincial governments saying multiculturalism is important, when the first ministers get together they have got to consider that very seriously. The process of building from the citizen up is important. You have talked about it from the top down. Is there anything else you can help us out with on that?

**Mr. Corn:** The whole CEC was actually structured exactly as you are saying. We are a free coalition of 36 ethnic organizations in Canada. I can tell you it is like a United Nations. I have my own programs. I do not want to give you those programs, but we are doing it. I know politicians do not like—I am saying we are a pressure group on you, on political parties, on the provincial government, on the federal government, on everybody. We are serving this purpose from the bottom up. When we talk now about multiculturalism, we get lots of kinds of research reports. Seventy-two of our members: we asked for their report and their suggestions. We put it together and then we present it to Parliament. We do it.

From a letter to the Prime Minister, the first one dated May 15, I will read only one sentence, "We therefore suggest a three months' national debate on this before the final accord is signed." We know three months is not enough. We said at least give us a chance. We will do everything possible in the shortest possible time to say what we feel. I would accept the challenge.

1450

**Mr. Cardozo:** Maybe I could just add that on April 29 of last year we had one main concern with the Constitution, and that has to do with the nonobstantive clause in section 33 of the charter. We had no other high priorities. When Meech Lake came along, we had two major challenges

on our hands. The accord caused us certain concerns with the Constitution. We had no way of anticipating those, for one thing. It took us at least two weeks to identify those and write a letter to the Prime Minister and the premiers. That was a fast two weeks and that is no way of providing input on the Constitution.

The point is that we do not have a lot of concerns with the Constitution every day of the year. It is a pretty good document overall. But when you come along with another thing and you start changing stuff around, then we have concerns with that. If you had come to us on April 29, before going to Meech Lake, and asked us what our concerns were, we would not have talked about the concerns that came out of Meech Lake.

**Miss Roberts:** You want to see the amendment and then discuss the amendment, not try to formulate the amendment—

**Mr. Cardozo:** The letter was done in two weeks. We do not consider that to be a brief. It is a serious position but we did it because we saw things were happening very fast. We raced all over the place and tried to put together a couple of main concerns and they were partially—at least there was an attempt made, especially by Premier Peterson and Premier Pawley to respond to those concerns.

**Mr. Corn:** We got responses from all premiers, all of them.

**Ms. Eustaquio:** Can I also add another point here. Your question is: "We have heard you. Do we as a whole, in future, as a body, listen to all that you have to say?" If this committee, for example, ends its mandate and you have finished your hearings, perhaps the provincial Legislature could look into maybe a standing committee on multiculturalism which would look at the issues of multiculturalism and listen to groups like us present briefs on various issues, whether it is about the economy, about free trade, about women's issues, about immigration and all those things.

**Mr. Keyes:** It would be one on the Constitution, not on multiculturalism.

**Ms. Eustaquio:** That is right.

**Mr. Elliot:** I too would like to thank you very much for coming before this committee. I really want to explore a little bit in the immigration area. Before I do that, I would like to attempt to impress upon you that, I think without exception, the people on this committee are sincerely dedicated to answering the concerns of people like yourselves. In this particular context, I say



this with some feeling because my children are half Estonian. While they are Canadian, by decree another nation, namely Russia, has said they are also Russian citizens.

A week ago Sunday night, I had the pleasure of representing the Premier (Mr. Peterson) at National Estonian Day at Roy Thomson Hall where some 2,000 Estonians who now live in Ontario were present. Some people call that a national celebration day, but someone like myself who has been married to an Estonian for almost 30 years knows very well that the Estonians still do not consider it as really a celebration day; it is a national day. They declared their nationhood in 1918 and fought for two years to have the right before real freedom was sanctioned for them by both Russia and Germany some time late in 1919. Then they were overrun in 1940. That is nearly 50 years ago and they still feel very strongly about their nation. I think a lot of the multicultural groups who are at present in Canada feel exactly the same way.

The other half of my children is a mixture of Irish and Scots. The Irish branch came out here because of religious conflict and the Scots came out because they were branded as horse thieves by the English, so in going back to our roots I think a lot of us share the concerns.

The most impressive thing really is the fact that if we do a real fight with respect to what we have in front of us now and have to accept what is there, you understand that might be one of the possibilities. All I am trying to do is give you some background from myself so that you know that these things are going to be talked about at length before any final decision is made.

In the context of immigration, which is really what I want to expand upon a bit, the kind of thing that is in the accord, and I call it the accommodation of Quebec partly at this point, I have learned a lot with respect to what is actually happening in practice by hearings in this committee.

That really makes me feel there is a great deal of hope for your point of view in this kind of thing because, in the way I understand it, because of the decreasing birth rate in Quebec they are in really serious trouble relative to the rest of the country. Their birth rate is far lower than anywhere else in the country and they are really concerned about their culture. To accommodate that kind of concern, my understanding is that Quebec has been allowed to open up a number of centres in places such as Paris where logically they could promote its culture and get immigration into Quebec.

In researching this, my understanding also is they are working in close proximity with the federal agency that is really finally charged with immigration to Canada. The other information I got in this committee for the first time was that six other provinces have agreements with the federal government at the present time. The accord to me says that any provincial government that wants to could perpetrate such an agreement with the federal government.

I think our concern, yours and mine, is that the federal government is paramount in immigration to Canada. The second step that happens—I was raised for a good part of my youth in Kitchener-Waterloo. A lot of refugees came to the Kitchener-Waterloo area. We had a brief from the Young Men's Christian Association from that city. Their concern is that people are coming to Quebec to get into the country and then are moving to places like Kitchener-Waterloo and it does not have the money to teach them English as a second language. There is a whole complex thing there. The accord very definitely says that you cannot stop somebody once he has landed in Canada and been admitted from going to any place in Canada he wants. There is freedom of movement in our country, which is really great.

What I would like you to expand upon a bit, and because of your particular background I think you could do this, is what sort of things would have to be in place in practice, in addition to what is there right now, in order to make your group comfortable with the immigration procedures?

**Mr. Cardozo:** I do not think we are saying we are necessarily uncomfortable with present immigration procedures. Probably one of the signs of the times that was coming about—I do not know what the status of this suggestion is, but in the Liberal Party of Quebec there had been a proposal put forward to the party to have an immigration process whereby French-speaking families in Quebec would be able to sponsor francophones from any other part of the world; which is OK on the surface of it, except that anglophone families in Quebec would not have the same right. Under the "distinct society" clause, I guess it is all fair. The question that raises is does that override any concerns in terms of a discriminatory effect that might have vis-à-vis the charter? Those are the sorts of answers we really do not know.

**Mr. Elliot:** It is still just the uncertainty of what the words actually mean that is causing—future meetings could very well clarify all that.

**Mr. Cardozo:** This is not all that hypothetical. This is a realistic argument which is being put forward by the—

1500

**Mr. Elliot:** I realize that. I can see the particular concern with an Italian family that wants to sponsor some relatives and that type of thing; very definitely. I did not realize that was the concern. Thank you very much for the additional information.

**Mr. Cardozo:** I should clarify that the point you mentioned earlier, the demographic concerns Quebec has put forward, are something we find very encouraging because I think the demographic problem exists across Canada. It is probably more severe in Quebec, but the population growth of Canada is so low that I think within about 20 years the population is going to start going down while our ageing population is going to be increasing at a much higher rate, and there is no way we can cover those pensions. I hope one of the things that comes out of this accord is that the other governments of Canada will realize that they, too, need increased rates of immigration.

**Mr. Elliot:** If I could just add one comment—

**Mr. Chairman:** Sure.

**Mr. Elliot:** I am glad you mentioned that last point because I think, historically, our country has been most buoyant when immigration has been really much more numerous than it is at the present time. I think a recognition of that, Canada-wide, is something that should be part of this record.

**Mr. Cardozo:** You just have to look at Metropolitan Toronto. It is probably the most successful part of the country and has the highest rate of immigration.

**Mr. Elliot:** That is right.

**Mr. Chairman:** We want to thank you very much for joining us this afternoon, for your presentation, for the recommendations and for your answers to our questions. I think it is clear we are wrestling with a great number of issues and problems with the accord and the future steps we will take as a committee. I think it has been particularly helpful on a number of fronts in dealing with different aspects of the accord and we thank you again for joining us this afternoon.

**Mr. Corn:** Can I have one more word?

**Mr. Chairman:** Certainly.

**Mr. Corn:** I would like to express again my thanks to you for allowing the Canadian Ethno-cultural Council to present to your committee our

suggestions for potential improvements to the constitutional accord which will enable, in my opinion, Quebec to become a full partner in Canada, a positive element in the further growth of a free and equal Canadian society, a society of aboriginals, francophones, anglophones and of course other ethnic minorities which are about eight million people.

Let us all build together a prosperous and economically sound Ontario—I have lived here for 37 years—which is a stronghold of Canadian industrial development and centre of Canadian progress. Ontario is one of the pillars of the future free, democratic and wealthy Canada.

**Mr. Chairman:** I now call upon our next witnesses, Mike Charette and James Conrad of Can-Ad. Perhaps you can come forward, gentlemen. We have a copy of your submission and I believe a scroll. We are getting into some new ground here, I gather, with an audio-visual presentation. Perhaps the way to present it—the clerk is demonstrating just some of her many talents. We will pause for a moment so we can get this all together. It is good for committees to strike new ground.

As I say, perhaps the best thing is that I leave it to the two of you to direct us through. If you would like to make your presentation, we will follow it up with questions.

**Mr. Charette:** Thank you very much. I think Jim Conrad will speak first.

#### CAN-AD

**Mr. Conrad:** Thank you, Mr. Chairman and ladies and gentlemen. We appreciate very much this opportunity to appear before this select committee of the democratically elected representatives of the people. I have been in and out today and listened to some of the presentations and questions. I am certainly aware of, and we are deeply sensitive to, your serious and thoughtful consideration of the issues involved in the Meech Lake accord. I think it is very heartening and impressive.

What we want to do is just very briefly summarize what Can-Ad is about for one or two minutes, have a presentation by Mr. Charette for about 10 or 12 minutes, return to a brief summary and overview, and then open it for questions.

**Mr. Chairman:** Fine.

**Mr. Conrad:** Can-Ad is an organization whose mission is to promote national unity and a strong Canadian identity. Its objectives are to support Canadian-owned business, especially small, family-owned enterprises and to promote democracy and freedom. Can-Ad was founded in



1980. Mr. Charette is basically at this full-time and has visited over 2,000 communities across Canada.

He is selling the trademark, of which you have a copy, and you will be interested to know there are over 20,000 businesses in these 2,000 communities across Canada which have this trademark. You can go to parts of downtown Ottawa and see the trademark on something like one out of every two businesses. These are the small businesses, of which there are some 800,000 across Canada which have less than 100 employees and they have created 84 per cent of the new jobs in the last 10 years. So that trademark is seen daily, we estimate, by nine or 10 million Canadians.

I would like, just briefly, to introduce Mr. Michael Charette, whom I would style as a Canadian patriot. I would like you to sit back and relax and enjoy this presentation. It will be peaceful. It will be articulate. I am sure you will be interested. It will be educational. It will be entertaining. It will be passionate. Above all, we very sincerely hope that it will be helpful in your deliberations. Mr. Charette.

**Mr. Charette:** Thank you very much, Mr. Conrad. I want to thank the committee. This is probably the best demonstration of a tolerant society, to have a demonstration and a presentation such as this. I think it is the essence of democracy. On the video screen you will notice several news clippings that will be running as I am speaking. These clippings have been taken across the country, from coast to coast, from Halifax to Victoria. We have been getting a lot of coverage with this national-unity effort and this effort to distinguish Canadian businesses.

My experience with the Constitution in particular and in dealing with Canadian business people, is that the Constitution does not provide us the opportunity even to entrench private property in our Constitution, something so basic in a society such as ours. One of the things that I wanted to point out to the committee is that we seem to be up against an establishment.

I am holding the number one, best-selling book of all time in Canadian history in my hand. It is called *The Canadian Establishment* by Peter C. Newman and I just wanted to open my presentation with a direct quote: "You will meet, in this book, the men of fabulous wealth, super-rich, who run Canada—1,000 men who form an invisible government. Inbred, secretive, puritanical, tough-minded, iron-willed, they are dedicated to preserving the status quo, their status quo."

It is with that, that I describe the Meech Lake accord as a backroom deal on behalf of these 1,000 men. I believe that we have witnessed a very desperate Brian Mulroney and a colonial collection of power-hungry premiers. Meech Lake is a sly scheme to swindle a youthful, unsuspecting nation out of its very birthright. It is such a totally undemocratic process as to warrant the title of a sinister, machiavellian plot. Therefore, I feel it my most patriotic duty to warn King Brian Mulroney and his provincial barons with the very words from Niccolo Machiavelli, that there is nothing more difficult to arrange, more doubtful of success and more dangerous to carry through than trying to change a nation's constitution.

## 1510

The British North America Act was not written overnight. The Constitution Act of 1982 was the product of 52 years of debate, countless people, party and provincial conferences, a task force on Canadian unity, a unanimous vote in the House of Commons under miraculous leverage of history's most democratic referendum, a Supreme Court challenge, plus several first ministers' conferences covered with such intense media scrutiny that equal rights for women were expertly lobbied into the historic mantle of humankind.

It was followed then by passage in both Houses, the Commons and the Senate, and by sober second thought. It was packaged by the Governor General for its historic 6,000-mile journey through the British House of Commons and House of Lords, only to return before 100,000 celebrants, thus giving birth to a totally independent nation, by the nation, for the nation.

Trudeau had used the ultimate threat to force nine premiers to agree—a referendum; power to the people; the slightest hint of real democracy. All of this came to pass because every single citizen in Quebec was granted the right to vote on our future as a nation. I know so well, because I was there. I moved to Quebec. I was granted the extreme democratic pleasure of voting "No" for my country. As a Quebecker—60 per cent of us said, "We are Canada," and 40 per cent of us said, "We demand independence from the British Empire and equal opportunity for all entrenched in a true constitutional democracy."

So when the Queen of Canada signed the Constitution on April 17, 1982, it was the largest transfer of real estate in the history of all mankind: 3.8 million square miles of gold, silver, tungsten, molybdenum, copper, iron ore, paper products, sulphur, wheat, titanium, jade,

oil and much, much more was transferred from London, England, to Ottawa, Canada, and not one single shot was fired. Not one single person died.

Through all of this greatness and celebration, does the name Bill Yurko come to the mind of any of the members of this committee? He was that mild-mannered, western Canadian who, for love of country, against all odds, in a flash of brilliance, seized the golden opportunity that comes once in a lifetime of even a planet such as ours. As a Progressive Conservative member of Parliament, against party lines, he proposed, the night before a referendum, in a private member's motion that requires unanimous consent of the House, that we, as a nation, patriate our Constitution.

His victory was as bittersweet as it was unanimous, for, as the truly Canadian word "patriation" first appeared ever in a dictionary, Bill Yurko was being ostracized from Brian Mulroney's Conservative Party. He was defeated by fellow Conservatives for the nomination of his own riding and subsequently buried politically in an anonymous grave by Conservatives, as an independent candidate, for what I consider to be the absolutely greatest democratic political achievement in the history of our time.

I repeat, not one single shot was fired. In God's name, in all that is decent and fair, I beseech this committee, that if you were to indulge in any wisdom from this presentation before you, it would be the proposal that we recommend to Governor General Jeanne Sauv  that Bill Yurko be inducted into the Order of Canada, in honour and respect of his great constitutional initiative and service to the people of this beloved country, in the hope that we may all follow this shining example of excellence.

Herein now shines the excellence of our business. It is such that, of all this incredible power and glory, it was seized in the dead of night by only 11 people with the vested interests of the backroom Canadian establishment. We know now that 25 million people slept and as they slept on the vacation of a midsummer's night, dictatorial lust for power and political possessive greed slipped into our house like a thief in the night and stole away our dream of equal opportunity for all and true democracy forever.

Power corrupts, and as a case in point, absolute power corrupts absolutely. To underline this point, I must emphasize that it was the unanimous intention of the first ministers initially that absolutely no public hearings, including

these here and now, be allowed at all. While the media stirred the nation to the sheer horror of that fact, our country tossed and turned in the cold sweat of a bad dream. Illegal immigration, free trade and capital punishment served as sufficient smokescreen to cloud the nation's collective thought. Pierre Trudeau and the group of 43 were just shadowy whispers of the past in the still of the night. We had a torch. They had held it high. We had found an enlightened way but democracy's torch was falling fast and there was no break of day.

Listen carefully, because this awakes in me the spirit of those who have fallen. With all due respect to this valiant, gallant legion of Canadians, I summon their presence into this room. For with what I have to say to you, I cannot stand alone. I hear their cries of anguish amidst the crack of gunfire. The thunder and the lightning of cannon and bombs are in me. Let it awake my country to the sheer horror. My God, the horror of what they had to do for us.

It was not just Oliver Cromwell or storming the bastille. It was we the people, by the people, for the people. Revolution after revolution, they keep marching in my mind. I see Joseph Papineau, Louis Riel, Laura Secord, Joseph Brant, William Lyon Mackenzie. They keep coming, wave after wave. There are so many I cannot recognize their faces any more. In one great war after another they died, millions upon millions, crying out their sacrifice to us. "Pick up the torch. Pick up the torch. For God's sake, man, pick up the torch."

So, I picked up the torch. In that light of their hope I felt such courage that we decided together, within this distinct society, to hold a very free Canadian public hearing of our own. When I mention "distinct society," I would like to point to this poster sitting on that chair, that Canada, after my 18 years of experience in dealing with this country, is a nation of every nationality, race, colour, creed and religion. We are living together under one roof, relatively peaceful. I think our only missing link is that we are not quite working together. But there, my friends, is a distinct society.

It just so happens that the dictionary definition of my last name, Charette, in the literal sense, is "an intensive final effort to finish a project before a deadline." It has a special architectural meaning and in the case of framing a Constitution, the very structure of a nation, even Machiavelli would agree that on June 1, 1987, Brian Mulroney and the premiers were in the



Langevin Block having an exclusive, private and very intense charette.

Now, lo and behold, it just so happened that at the very same moment, I, in the person of Michael John Charette, was standing just below their office window reading the plaque on the parliamentary statue of Sir Galahad. It says, "I lose myself, I save myself." It reminded me of a picture, an old poster I once saw in the National War Museum, a magnificent archangel stood over a fallen young soldier sacrificed on the battlefield for us and with an idyllic combination of grace, love and courage, beckoned, "Come, you knights of liberty, fight for freedom and democracy."

There is only one word that can corrupt one's allegiance to such a high ideal as this and that word is "treason." I will quote it to you from virtually every news media in Canada. Whether we like it or not, 11 people were dictating to 25 million people just across the street from Sir Galahad and me. Whether you believe me or not, I could feel the words of that archangel burning in my body, mind and soul, directing me in absolute disgust away from those nice dictators towards the Peace Tower, the House of Commons and the Speaker's mace. The rest is history. With the national spirit of the largest, richest free country in the world, we in the Canadian nation together held a very intense public democratic charette of our own.

I would like to give you a short demonstration of what a real charette is.

[Audio-visual presentation]

1522

**Mr. Charette:** I would like again to thank you for your tolerance in understanding this type of presentation.

My sole objective in this case was to wake the nation from a bad dream and "treason" was just the word to do it. It appears underlined in red in the poster you have received, titled Meech Lake Madness. Not just on these front pages, but on hundreds more, radios and televisions echoed the disturbing alarm from 2 p.m. until the morning news the very next day. As the premiers were besieged by worried establishment bureaucrats with front-page treason in their hands, I wrote all night long, as a political prisoner, the words to Meech Lake Madness and the explanation of this patriotic reason you have before you.

There is absolutely no doubt in my mind that with Pierre Trudeau's excellent constitutional critique and the public lobbying of the group of 43, my dramatic protest was the crack in the wall,

the coup de grâce, the thin edge of the wedge that allows us this precious period of grace today.

Let us not waste even one of these lives whose spirits hover over us this very moment. Now we stand on guard together with this ultimate warning that we are lucky to have 11 nice dictators today. Tomorrow, with this very dangerous Meech Lake precedent, we leave the door wide open for 11 people, possibly with tyrannical intent that we cannot even imagine, never mind foresee, to ultimately declare themselves dictators for life and at the very minimum play havoc with the lives of our children and, God forbid, our children's children as well.

It is their curse that will be on our heads if we fail them now. I myself have been charged with the crime of their defence. Eight and a half months later, those charges have been changed and the preliminary hearing has been set for March 30.

So faithfully synchronized is my determination that on the very same day, in the very same town, the Right Honourable Joseph Philippe Pierre Yves Elliott Trudeau speaks on the very same Meech Lake madness in a very different way. He faces the Senate committee of the whole. I face two years in prison for the very same intent.

I embrace this challenge as much as I urge you to embrace yours. Premier Peterson's position is clear: no free vote, no fair debate, a majority partisan government and a crystal-clear dictate on our Constitution. Ego is a brass ring in a politician's nose. I know this all too well, for I have been humbled by handcuffs, leg irons, paddy wagons and holding cells, all because I have secured this very dramatic place in Canada's history.

But by far nothing was more egotistical, hypocritical and, as an Ontarian, more totally embarrassing than to watch the rookie Premier of Ontario, David Peterson, say to the veteran Premier of Canada's largest and oldest province, Mr. Bourassa, "Welcome to Canada." I deeply apologize to Quebec for this condescension.

If Mr. Peterson, whom I know well, love, admire and respect, wants to be remembered by history as a father of this Confederation, he had better act fast and he had better act democratically, because as it stands now, history has him already pegged, in the truck-driving vernacular, as being more akin to a real mother in the wrong gender. For women and equal rights, which are threatened by the Meech Lake accord, I would like to imagine a mother of Confederation. It is a concept that deserves to be explored.

Newfoundland had a referendum twice around 1949 to join Canada, Quebec had a referendum in 1980 and even Prince Edward Island had a referendum in 1988 for a fixed link. Now, before this committee, with patriotic reason, I am calling for a referendum on an amended Meech Lake accord.

Surely the pen is mightier than the sword, and therefore all these electronic media certainly are more powerful than all the modern weaponry combined. Then most assuredly we do not have to violently oppose this kind of dictatorship, and so it is with all the patriotic passion I can muster that I urge you to pick up the torch. Do not take this job lightly. As a person who has taken a great risk, I can only refer you to those who have taken far greater risks. In the words of John McCrae from Guelph, Ontario, and the most famous poem in the world:

Take up our quarrel with the foe:  
To you from failing hands we throw  
The torch; be yours to hold it high.  
If ye break faith with those who die  
We shall not sleep, though poppies grow  
In Flanders fields.

In Switzerland, everyone votes on every constitutional change. In Australia, everyone votes on every constitutional change. Even in South Korea, everyone voted to ratify their new constitutional democracy, ironically on October 27, 1987. On the very same day, once again impeccably synchronized, Frank McKenna was sworn into office in New Brunswick with a very special kind of unanimity for Brian Mulroney.

I met with Frank McKenna at the Connors fish plant in New Brunswick. He set aside, in a very busy campaign, five minutes to speak to a very radical, patriotic, passionate Canadian such as myself with what I had to say to him. What I found from his experience as a criminal lawyer, as a potential Premier and, finally, as a Premier-elect, is that he does not like this Meech Lake accord one bit at all. I have no bones to pick with him on his content. I told him point blank that his content was 100 per cent agreeable with me in his criticism of the Meech Lake accord. I just wanted to add to his work some fire, and probably that is what I would like to add to yours.

The final thing I said to Frank McKenna when I left that day was, "I want to hear Canada say, 'Thank God for New Brunswick.'" With the blessing of this committee, I would like to hear Canada say, "Thank God for Ontario," as well.

1530

**Mr. Conrad:** Just to wrap up, if you look at the last page of our presentation, we have a quotation there and a tribute to Oliver Cromwell:

New times demand new measures and new men;

The world advances, and in time outgrows  
The laws that in our father's days were best.

What we have also put on that page is a list of Canadian characteristics. We as a people are a very distinct society in the family of nations, as Mr. Charette has emphasized. We are freedom-loving, we are nonviolent and peaceful, we are tolerant and compromising. But we must have that freedom to evolve in a democratic, and not a judicial manner. The problem with Meech Lake is that it locks in Canadian society at a point in time with, at best, amendments that would be impossible in practice.

Listen to what words are being said here. The group before us gave a very good presentation. The words are, "How do you get at the first ministers?" The assumption there is that the first ministers will have the power and you are centralizing power and authority. That is the danger of Meech Lake, that it centralizes power and authority in the first ministers of this country.

I have a friend who is an Argentinian, and he tells me that Argentina has a US style of democracy, with a House of Representatives, a Senate, a judiciary and a president. But what happened in Argentina over the years is that the Congress did not exercise its democratic power, and so power flowed to the judicial and primarily to the presidential system. If you go to these countries you will find that Congress, the elected houses of the people, is in some back room in the presidential palace.

What you have to do is seize the democracy that is in your hands. You must reject Meech Lake, because it centralizes authority and power away from the House of Commons and away from the elected legislatures. If we need to deal with child care, as was articulated this morning, or immigration or whatever issue there is as this society evolves, deal with it in the legislatures of the provinces, deal with it in the House of Commons of Canada with elected representatives and with the issues as they evolve.

The choice before you is to reject Meech Lake as an exercise in democracy.

**Mr. Chairman:** Thank you very much. I think the presentation, while obviously unique in that we have not had an audiovisual one—and indeed, one could say musical—clearly we felt the strength of conviction and passion in the way in which you presented it and the feelings you had.

I think it is quite clear that what you really want to see is that the accord be rejected and a new beginning be undertaken. I assume that is a



correct interpretation. You do not believe there are any amendments, really, that could change it but that it must be rejected and we must start over. Would that be correct?

**Mr. Conrad:** Yes, because, as Mr. Charette said, we have a Constitution, we have a Charter of Rights, we have a distinct society now coast to coast. Let us deal with the things that we need to do in the democratic process a step at a time, through referendums where those are appropriate; and yes, go back to a new beginning in a mature, confident, democratic way.

**Mr. Charette:** I have a good precedent on that particular situation with our Constitution and the Meech Lake accord. Go all the way back to Runnymede and King John, when he sat down with the barons over the Magna Carta. I did some research into that, and I was quite astounded at the parallel. King John was under actual threat of death at that point. He signed the Magna Carta all right. Within the Magna Carta he signed the right for the barons actually to declare war on the king or the central state. That is awesome, and it puts me in mind of a parallel, with Brian Mulroney in a desperate position signing away all these powers and privileges to the provinces; that would not hold the central state together.

In actual fact, the Magna Carta that we have as legal precedent today is not the same Magna Carta that King John had signed at Runnymede that day. The original Magna Carta was altered three times. Finally, it came up to the Articles of Nine of Henry III, which became the actual legal document, the Magna Carta. It was totally different from the original Magna Carta that King John had signed, and most assuredly it did not allow the barons to declare war on the king.

We have got the Meech Lake accord. It is a nice-sounding word. I think that maybe after three or four revisions, down the road, if we put it to a vote to the Canadian people, they might say: "This is a good document. We are voting for it." It will be called the Meech Lake accord, but it will be totally different from the document we are looking at today.

**Mr. Harris:** If Meech were put to a referendum as it currently exists and if it were approved by the people of Canada, would that be acceptable to you?

**Mr. Charette:** Yes, 100 per cent. A referendum is a way of wiping out these very divisive tactics at which premiers play, dividing and conquering.

Something that is very important in my mind is that we hear all the time that Quebec is not included in our Constitution. There are four

signators to the Constitution that we have. One of them is the Queen. The other three are French-Canadian Quebecers. It can be well argued that there is no English-speaking representation signing that Constitution. They had a vote in Quebec. They voted in a referendum. That is more than we have had in the rest of the country, and I would like to escalate democracy to the point where everybody feels he is a constituent member of his Constitution.

**Mr. Conrad:** Mr. Harris, you are well aware of the problems in drafting an appropriate question for a referendum and, having been brought up in Quebec, Mr. Lévesque skilfully crafted a question, but all you saw around Quebec was, "Yes." You did not see either the question or any explanation. It was just, "Vote yes, votez oui." There are traps and difficulties in a referendum. Are you for or against the Meech Lake accord, yes or no? We have to be much more specific on specific parts of it. You really need a whole series of referendums on each of the articles.

**Mr. Harris:** If you had a referendum that was going to be put to the people, presumably in this case it would be supported by the Prime Minister and the government and the resources of Canada and by 10 premiers and the resources of the provinces all saying oui. Is that not what they would ask for? Is that not what a national referendum on something that all 10 premiers and the Prime Minister had agreed to—

**Mr. Conrad:** We accept the reality, but wait a year or two. There will be changes in the premiers, because our society will evolve. There will be election issues coming up.

**Mr. Harris:** What you are telling me, then, is that the constitutional reform process you want is to wait until the time is right, and you want the referendum anyway.

**Mr. Conrad:** No; not a referendum of 10 premiers but a referendum of the people, not on a total accord but on individual constituent questions. That is the way to amend the Constitution.

**Mr. Charette:** The referendum could go forward saying, "Do you want the status quo, do you want the Meech Lake accord or do you want an amended Meech Lake accord?" Given three choices and an intelligent debate, I trust the Canadian people very much. They would make an intelligent decision.

**Mr. Harris:** Is it a referendum when you have choices, or is a referendum yes or no?

**Mr. Charette:** In the case of Joey Smallwood, he held two referendums to get right down to the

right question. But when we are dealing with something as fundamental as the Constitution, where is our citizenship to Ontario? We have none and we do not own our property, do we, because all the property rights are with the provinces. How can we own property in this country if all the provinces have property rights and we have no Ontario citizenship, or Alberta citizenship?

It begs the question. If we have Canadian citizenship, where is the right of Canadians to say, "This is my country"? It has not been established yet. We have a lot more work to do with our Constitution.

1540

**Mr. Harris:** I do not want to get into details, because you really did not in your presentation. You just said it was no good—

**Mr. Charette:** Yes, that is right.

**Mr. Harris:** —and you want a referendum. That is all I am really talking about.

**Mr. Charette:** I think that if Switzerland can do it, and Australia and many, many more countries, it would be no problem for a country of 25 million people to have a referendum that is fair.

**Mr. Chairman:** Thank you very much for your presentation and for coming this afternoon.

I ask Morris Manning to come forward and take a chair. Welcome this afternoon, Mr. Manning. It is a pleasure to have you here. I understand you do not have a specific text to give out, but you will perhaps make your opening remarks and then we will follow them up with questions, if that is agreeable.

#### MORRIS MANNING

**Mr. Manning:** Yes, it is. Thank you very much for the opportunity to come here both on behalf of the Canadian Coalition on the Constitution, which is a group of concerned citizens in this country who have banded together to deal with this very important accord, and on behalf of myself.

It is very difficult to know how to condense a submission to a committee such as this. One must naturally pare it down in order to make the points and leave room for some discussion and to have other people come forward.

Much of what I am going to say, unlike a lot of other talks I give, will be legalistic, sometimes in the extreme, because I think it is important that we all appreciate that it is a constitution that we are dealing with. It is not an ordinary statutory provision which can be amended easily in the

future, which can be removed and replaced by other pieces of legislation. It is a document which is designed to deal with not only today but also tomorrow, with the future of the country, which in effect makes the people who draft the document the parents, as it were, of the Constitution—not the father of the Constitution or the mother but the parents. That must be kept in mind by a committee such as yours when being asked to consider various aspects of this important document.

I would hope that this committee has not prejudged the issue. That seems to be a fear expressed by others who have appeared here. It is a fear expressed because of the way in which the Premier (Mr. Peterson) of the province and premiers of other provinces have approached the Meech Lake accord. That is disappointing in a sense because, instead of the premiers coming together with the Prime Minister and saying, "Yes, we will agree to have the matter discussed," they have, in effect, agreed to bind themselves to the future.

It is very difficult for me as a constitutional lawyer to accept the concept that any one group in Parliament, in the Legislature, at any one time, can agree to bind their successors in office. That, as a constitutional concept, does not exist in Canada and it never existed in England. One legislature cannot bind another. Therefore, how could the premiers agree, constitutionally speaking, to bind the people who come after them?

I am here today mainly to deal with the impact of the Meech Lake accord on the Charter of Rights. I am not here to engage in any dialogue as to whether Quebec deserves or does not deserve separate cultural and distinct status. I am not here, on the other hand, to be intimidated by the remarks that I read in the papers or see in the media by people from Quebec saying, "If you do not agree with Meech Lake, then you really want us out of the Constitution." I do not think the issue is that simple. I am sure that you, as a committee, would agree.

The problem is that you are dealing with the future of the country and you have to consider both the past and the present in order to determine what kind of future we are going to have. I would hope that the Meech Lake accord would not be acceptable to this committee because of its impact on the Charter of Rights. The Charter of Rights was put into effect, as you know, in 1982. The most important part of that charter was not to come into effect for three more years. That is section 15, the equality section.



That is where the greatest impact can come. There can be benefits given by the Parliament of Canada which can be distributed unequally or denied to people in other parts of Canada and there seems to be no way that there is any recourse if Meech Lake comes through. Let me deal for a few minutes with the technical problems.

In section 16 of the accord, the provision appears, "Nothing in section 2 of the Constitution Act"—the new accord—"affects section 25 or 27 of the Canadian Charter of Rights and Freedoms." Essentially, what that provision provides is that the linguistic-duality, "distinct society" clause, which is being put into effect to protect Quebec, shall not affect aboriginal or multicultural rights as provided for in the charter, nor shall the clause affect Parliament's jurisdiction over Indian and Indian lands.

By making a special provision for certain charter rights and not for other charter rights, the Constitution implies the creation of a hierarchy of charter rights. Some rights will be better protected than others. The principle in law, which in the Latin expression reads *inclusio unius est exclusio alterius* which, translated in legalese as opposed to straight English, means to include the one is to exclude the rest. So where you have a constitutional document which does make specific reference to protecting certain sections of the Constitution and does not make reference to protecting others, our courts have interpreted that kind of provision as meaning that the others that are not protected were not meant to be protected.

It may well be that the legislators or the policymakers or the advisers to the government can put out documents that say, "We meant to protect those rights," but our courts have now held that the rights are not protected just because the legislators thought that they were being careful and thought that the rights were being protected. So the way in which the charter rights specifically are referred to in the Meech Lake accord gives rise to a fear that other rights which are not being referred to or are not referred to will not be protected.

#### 1550

For example, the protections established by section 15 of the charter which protect the right to equality before the law, the right to equal protection of the law, the right to equal benefit of the law could be subordinated, in my view, to government legislation which could be rationalized under the linguistic-duality, "distinct society" clause.

I would argue that concern gains even more credence when one considers section 3 of the accord which deals with immigration agreements, because section 3 purports to amend what is section 95B of the Constitution by saying that, "The Canadian Charter of Rights and Freedoms applies in respect of any agreement that has the force of law under subsection (1)"—the new 95B(1)—"and in respect of anything done by the Parliament or government of Canada, or the Legislature or government of a province."

In other words, not only has the Meech Lake accord made specific reference to a part of the charter that is not affected, but also it says the charter itself applies in whole to an agreement reached under section 95B. Our courts have looked at that kind of reference in documents such as these and they have said that obviously the legislative body directed its mind to the Charter of Rights and where it wanted to include protection it said so, leaving the gap, the big question: Where it does not refer to it, does it mean that they are not to be protected?

In the separate school funding reference to the Supreme Court of Canada, there were passages by Madam Justice Wilson which enforced the view that where you have reference in the Constitution to certain protections and you also have reference to other legislative powers, if the two come into clash, if there is nothing in the Constitution to say that the individual protections override the legislative powers, the legislative powers prevail. In that case, it was held that the provincial Legislature, exercising its jurisdiction under section 93 of the Constitution to expand the system of denominational education, could not be challenged on the basis of charter breaches.

Even if there was a breach of freedom of religion and even if there was a breach of freedom of equality and equal benefit of the law, Justice Wilson said:

"The special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the charter because not available to other schools, is nevertheless not impaired by the charter. It was never intended, in my opinion, that the charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which"—and I highlight this—"represented a fundamental part of the Confederation compromise."

What I believe Justice Wilson is saying is that if you had an individual right to equality overridden by a law which was passed pursuant

to section 93 dealing with separate schools, then unless there was something in the Constitution to indicate that individual rights would take precedence, individual rights do not take precedence, and indeed section 93 takes precedence because it represents a fundamental part of the Confederation compromise. Of course, that is what Meech Lake is all about. The accord attempts to deal with a fundamental part of a Confederation compromise, albeit a new Confederation.

The prospect that one part of the Constitution could override another, in my view, adds further fuel to the notion that the linguistic-duality, "distinct society" clause could override those charter rights not protected by reference in the Meech Lake accord. A great deal will certainly depend upon how broadly the courts will apply that particular passage by Justice Wilson.

That has given rise to some disagreement among academics, but we find that in the disagreement between the two factions, those who say that the Meech Lake accord does not represent a fundamental challenge to charter rights and those who say that it does—I refer you to an article by Professor Baines reported in the *Financial Post*, September 7, 1987, called "Accord Jeopardizes Women's Equality." In that article she replies to an article by Professor William Lederman of the Queen's law school, in which he indicated that he relied on an authority in dealing with interpretation of ordinary documents, that the rule about including one and excluding the rest does not apply to constitutional documents.

That particular view, I am afraid, goes down the drain when one reads what Justice Wilson has said in the Supreme Court of Canada because obviously the Supreme Court of Canada—in a subsequent case, in the Acadian language case, the court has said, "All parts of the Constitution must mean something. There is no redundancy in the Constitution. Everything is there for a purpose." If you read the equality provisions, they are there to protect individual equality. If you read the Meech Lake accord, it is there to protect cultural identity. The two must be separate, and if they clash, you look in the document itself to see whether it was the intent on the face of the document to exclude one or include the other.

By the way in which the drafters of the Meech Lake accord have chosen to go, we are left in the unfortunate position that "some rights are more equal than others," as I have coined it, becomes a reality in Canada. The special joint committee of the Senate and the House of Commons—I want to

deal with that for a moment and then tie this together—released its report in September 1987. I am sure you will either read it or have read it and have grown sick of hearing about it and having it repeated to you, or all three.

About the only thing I can agree with is their statement that the most controversial area explored in the evidence before them was that dealing with the relationship between the accord and the charter. They said, "Nothing in the proceedings has given rise to more searching examination and consideration on our part than this issue," but I caution you. Their so-called searching examination and consideration is rife with inconsistencies and result-oriented reasoning. Their function, it seemed to me, was to provide credibility to the accord. They did not examine critically the full impact of the accord on the charter.

I do not say that to disparage the work or the reputations of the individuals involved, but the report itself is shallow. It takes a lot of thought, a lot of energy, a lot of input from learned people, to look at the intricacies of the interweaving between individual rights in the charter and distribution-of-power rights in the rest of the Constitution and to see how they are going to come together, whether they are going to clash and, if so, in what areas?

The committee itself attempted to address the rationale for why certain sections of the charter were included in section 16 and others were left out. They acknowledge that various "distinguished constitutional experts" appearing before the committee had great difficulty in providing a legal rationalization for section 16. In the end, the committee makes no finding at all as to the basis for the inclusion of section 16 in the accord, other than to allude to the consistently held views of some witnesses that it really existed to serve political rather than constitutional or legal purposes.

#### 1600

One would have thought that the failure to find a rationale in law for a provision like section 16 would have ended the inquiry and that the committee would have said, "Let's eliminate it," but it did not. The committee, unfortunately, seemed to skirt the problem by ignoring it and continued on to other issues.

They next considered whether gender rights should also be protected under section 16, because you will note that in section 16 gender rights are not protected. Reference is not made specifically to section 28 of the charter which begins with the very important lead, "Notwith-



standing anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

One would have thought that if you were going to single out some rights for protection, that right, which was so hard fought for, would have been as well singled out and it was not. The committee rejects such a measure on the basis that section 16 does not pose a threat to gender rights. Rather, it is section 1 of the charter that presents the real problem. Section 1 is the section that allows the government to demonstrate why it is OK to limit your rights.

The committee deflects the inquiry away from section 16 and, in reality, the court performing a section 1 analysis, in my view, will be influenced by the existence of this hierarchy of rights. The charter then becomes relegated to a piece of subordinate legislation in effect. It is not as important, for example, as are certain other parts of the Constitution, except for the sections specifically referred to in it in the Meech Lake accord.

When it was suggested that section 16 be removed so as to make it clear that all rights in the charter were still valid and still gave us all protection, the committee rejected that concept, saying it would be redundant to stipulate that the Constitution ought to be interpreted in accordance with itself. The problem with that, of course, is that the committee assumed that section 16 did not create a hierarchy of rights. If it did, the inclusion of the charter as a whole would clearly serve a purpose.

The reasoning is inconsistent and I would ask that if you are going to take any of it into account, that you examine it carefully to look at the inconsistencies, because they propose to maintain section 16's existence even though they say it is redundant; that is, it serves no legal purpose. But they are opposed to following the redundancy to its logical conclusion by including the rest of the charter in section 16. In other words, either you take section 16 out or you expand it so that all of the charter is included in its protections. That creates a problem.

The committee quoted Professor Hogg, a man for whom I have the greatest of respect and with whose views on Meech Lake I disagree profoundly. He says it is unlikely that the linguistic duality, "distinct society" section 2 of the accord would be interpreted as permitting governments to discriminate directly or indirectly against women, but there is no basis for that. Indeed, our court has consistently held, not just recently but throughout its history, that where something

appears in the document, you have to give some meaning to it.

The rationale is essentially that those who rely on the charter for their own protection may take solace in the notion that the courts will do the right thing; in other words, the courts will protect equality rights. But we must always keep in mind that the purpose of the charter was there, as the Supreme Court of Canada has now established, not to protect the oppressed against a benevolent government but to protect them against an oppressive one.

Equally, the charter ensures that the courts have a duty to respect the rights of citizens and they have given meaning to subsection 24(2) allowing for the exclusion of evidence where those rights are taken away.

The purpose of a Constitution is to provide a clear statement of values and of powers. The charter deals with values. The rest of the Constitution deals with powers, powers to legislative bodies elected by the democratic process, but the charter is there to protect the individuals, to provide, as Justice Dickson has said, for the unremitting protection of the individual against society and what society can do to the individual.

One solution to the problem posed by section 16 may be that the amendment proposed by the official opposition—and I am not carrying any brief for any political party—which says, "Nothing in the Constitution Act derogates from any of the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms," and which affects part 2 of the Constitution Act, 1982, should be adopted because that then shows that Meech Lake is designed to bring Quebec into the Constitution but not at the expense of denying individual rights and freedoms of other Canadians.

We all recognize, and certainly this committee recognizes, political pressure. It comes from different sources in different ways. Political pressure to expressly provide protection to certain groups while avoiding the creation of constitutional hierarchy is where I think the pressure should come. The reality of section 16 is that it appeared to be drafted as a concession to a couple of first ministers.

The danger is that from this political concession the courts will have to seek to impose a legal rationalization. The court cannot look at the policy that went into the legislation. The court will look at the legislation itself. It will look at the language actually used and it will say:

"If you wanted to protect all the rights, why did you not say so? If you wanted to protect equality rights, why did you not say so? If you wanted to have all of the charter's freedoms and protections that are referred to therein apply across the board, you could have done so, but you did not. Now let us take a look at what you have actually done. You have passed a law as part of the fundamental fabric of a country, and it governs all law, so that where there is a distribution of a benefit to one person and another person does not get the benefit, that is a *prima facie* breach of equality rights, but if it is done under a new accord provision or under a new part of the Constitution where there is a recognition that section 15 is not recognized as being of fundamental importance, people will have no recourse."

Let me give you some real examples of some of the other problems that flow from Meech Lake and which affect the charter. A subject we do not often talk about in this country, or have not certainly until now, is the federal spending power. We all know that in 1867 the federal authority was given power to raise money by any means, by direct or indirect taxation. That was a powerful piece of legislative power, as it were, because as the years went by and social services grew, those services were delivered at the local level, particularly in the field of health, the field of education, and today in the field of environment and so on. Those are pressing social issues. There are social needs and they are very expensive, but the provinces are confined in their power to raise money. They can only do it through direct taxation, not through indirect taxation. The provinces have never had as much money as the federal government but they have had more of a burden to deliver social services.

**1610**

Those of us who have practised in this field—and I speak as one who has practised both representing the government of Ontario in court cases as well as opposing them—recognize that for years that was an unfair balance. There had to be some way to readjust the balance so the provinces could have the money in order to carry out essential social services.

So what the federal government devised over the years, as some of you know, is a scheme legislatively enacted, not constitutionally entrenched, to distribute money either by transfer payments *holus-bolus* and say, "Spend it as you will;" or transfer payments conditioned on the provinces doing certain things.

The best example in recent years was the Canada Health Act. The federal government said, "Extra billing is a terrible thing in this country; we will give the provinces money for health care but they have to make sure there is no extra billing." Then we all know what happened in various provinces and in Ontario with Bill 94 and so on. I am not here to argue that one way or another, but it is an example of how the federal authority keeps control over the practice of medicine in a province when it has no legislative base. In other words, it has no right to control the way in which medicine is practised in the province, but it does it in an indirect way by funding. That is the constitutional scheme that has been devised to date to deal with these problems.

What the Meech Lake accord does, however, is allow the province to dig into the pocket of the federal government and get money whether it agrees to the particulars of the grant or not. It forces the federal government, under section 106A, to give compensation to a province which chooses not to participate in a shared cost program if the province carries on a program that is compatible with the national objectives.

That power to spend money in that way was, again, reviewed by the joint committee. I am hesitant to even refer to it because I do not like it, I think it is shallow, I do not think it works. What they have done, in effect, in the joint committee, is they have said we recognize this is a grave problem, we recognize there may be constitutional impediments here, but let us leave that for the court. I mean, after all, this is a compromise. That shows the basic flaw in that committee. Because it should not be, at first instance, for the courts to look into this matter, to clarify what is obviously recognized as a problem or to solve a problem. It should be for the legislative body. We see that in many, many areas, and certainly since 1982 many Canadians have questioned why the Supreme Court of Canada has the power to do what it does under the Charter of Rights and Freedoms; to strike down legislation. They are appointed, they are not elected, they do not have the constituency, they are not a voice for us. Nowhere is this seen more vividly than, of course, in the abortion debate. Surely it behooves a government, where it has an opportunity to amend the Constitution, to sit down and do it carefully, to not throw the ball back to the courts where it recognizes there may be a problem.

Unequal distribution of Canada health funds with respect to medical care delivery across the country is a prime example of how a province can



misuse or abuse the Meech Lake Accord, or how individual citizens can be denied benefits in one part of the country that are being given to citizens in another part of the country.

If you take the lack of protection in section 15, which is "equal benefit of the law," and wipe it away, the individual who is being treated differently because of province of location. Because they happen to be working in one province or living in one province and not another, they are being denied a constitutional protection, section 15, where this happens with the agreement—or even maybe disagreement—between the province and the federal authority.

The joint committee said: "We recognize there is a problem in this area, but we are sure that when the provinces and the federal authorities sit down and discuss the matter they will be able to work things out. They will be able to tell us, perhaps, what is compatible with the national objective." Well, what is the national objective of the Canada Health Act? It depends on the circumstances. It is a very broad objective to give equal access to good medical care across the country. It is interesting that equal access, getting rid of regional disparity, also appears in a not often talked about part of the Constitution of 1982.

Along with the Charter of Rights and along with the procedure for amending the Constitution of Canada, we have section 36 of the new Constitution, which is Part III, headed Equalization and Regional Disparities. It provides that:

"36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the wellbeing of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians."

There is no remedy for a breach of that loftily phrased section, but it is part of our Constitution. It is my personal opinion that Meech Lake breaches section 36 of the 1982 Constitution because what it does is further disparities and it gives a rationale for there being disparate treatment among Canadians. So, if Meech Lake stands in its present form and becomes part of the Constitution of Canada, some day the court is going to have to look at the provisions of Meech

Lake, the benefits that have been distributed, the disparity between one part of the country and the other and have to ask itself whether or not you have got two parts of the Constitution in disharmony. The accord becomes discord because it forces a reading of the Constitution which is out of harmony. Surely, any constitution must be completely harmonious within itself.

We have an opportunity very few people do. We, as Canadians, today have an opportunity to amend our Constitution. Through the democratic process, you have been selected to study whether or not there are real problems with respect to this constitutional accord and whether it should become the law of Canada. I would ask you to try to rationalize section 36, which provides for equalization and tries to cure regional disparities, with what Meech Lake is all about. Yet section 36 is not mentioned in the Meech Lake accord. No one has said to ignore it, no one has said it should be taken out.

It is also interesting that in the accord, there is the underlying value that we see that no one is trying to change, in certain areas, the legislative authority of the federal government or the provincial government. Yet, ask yourselves this: Has there not been a change because the raising of revenue, which is there in the Constitution in sections 91 and 92, is changed because the provinces can, in effect, reach into the tax dollars that were raised indirectly for their own provincial purposes. You may find that is a good thing. Certainly from a provincial perspective, it is a great thing. But how does it sit with equality, with equalization, with regional disparity concepts, with equal benefit of the law? I do not think it sits very well.

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There are a number of problems. There is a clash with section 36 of the 1982 act. There is a clash with sections 91.3 and 92.2 which is the taxing power. There is an overriding, whether it be for culturally distinct linguistic society protections or not, of equal benefit under section 15. The result is that the rights and freedoms that were granted in 1982 are, at best, questionable when applied to certain provisions where Meech Lake might affect people.

So I would ask that before you give your stamp of approval to this accord, look very hard at the concept of the Charter of Rights and examine why that document came into being. A lot of people say, "Well, the courts have arrogated to themselves this tremendous power." But that is not so; we gave the courts that power. Our

elected representatives came together and gave it. And it may well be, as we have read in various books and media and watched on TV, that this came about as a result of a political compromise, the so-called "kitchen cabinet," and Quebec was left out.

Since 1982, lawyers have been struggling to interpret the charter and see where it applies. The courts have been struggling with it and the public has been questioning why we have the charter and where we are going with it. A lot of the problems that have been created in the past have been created because the charter came into its form, not as a concept but in its form, in a very short period of time. It was rushed through.

Let us not make that mistake again. Let us examine the rationale for some of these sections. Let us work the document over a number of times. It should not be looked on as being carved in granite or stone at this present stage, because to do so will create endless litigation, and we need more litigation in this country like we need a hole in our heads. I am not speaking as a lawyer when I say that, of course.

The greatest thing that ever happened for lawyers was the passing of the Charter of Rights, and the second greatest thing will be the Meech Lake accord. There will just be more food for thought, more grist for the mill, more cases for the courts. Let us try to avoid that.

Those are my comments, Mr. Chairman. Thank you very much.

**Mr. Chairman:** Thank you very much. There is absolutely no way that we would be able to cover all the territory that you have covered this afternoon. I know that you have raised many thoughts, many ideas and many questions in my head, and I am sure you have in those of my colleagues as well. We will get to the questions and begin with Mr. Cordiano.

**Mr. Cordiano:** I will not attempt to take up too much time. First, let me say that you have covered quite a lot of territory. We thank you for adding to the body of legal expertise that has presented its case before this committee. Certainly we are going to be poring over those submissions made by many of your colleagues.

I just want to clarify something with respect to section 29 and when you referred to the separate school case and dealing with Madam Justice Wilson's submission in her writings with regard to that case. Section 29, I believe, is part of the charter. Is that not correct? It is the first part of the Constitution Act, so it is still within what we would plan to be the Charter of Rights.

**Mr. Manning:** That is correct.

**Mr. Cordiano:** OK, so she referred to that section, did she not, in her—

**Mr. Manning:** Yes.

**Mr. Cordiano:** I was not quite clear as to what you were saying. It seems to me that that runs smack against equality rights, and yet it is in the charter. So we already have a sort of dilemma within the charter itself if you are talking in absolute terms. It says clearly in section 29, "Nothing in this charter abrogates or derogates from any rights of privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

**Mr. Manning:** Right.

**Mr. Cordiano:** That clearly says you can discriminate on the basis of what was granted at the time of Confederation.

**Mr. Manning:** That is right. I agree with you. The reason I raised Madam Justice Wilson's observations was that it is a way in which the courts will interpret the other provisions. It is not so much that I am dealing with the separate school funding case per se and whether it was right or wrong, but it is the approach of the courts.

Some of my colleagues have said that the courts will not approach the fact that there is section 16 and section 16 refers to only two parts of the charter in such a way as to derogate from or abrogate other rights in the charter. To them I say that is the first hint we had that unless we have specifically done what, say, section 29 has done, we are going to get into a morass of legal interpretation, and I think it is going to come out in favour of protecting those parts of the Constitution that grant the power to the province or the federal government and not those parts that protect individual rights unless it specifically says so.

When I jumped from that case to the Acadian language case, I did so because in the subsequent case the Supreme Court again showed that that is how they were going to interpret the Constitution, the two parts: the charter on the one hand, the grant of powers on the other. If you have got powers that, when exercised, seem to override the charter's rights, if there is nothing in the Constitution that deals with that, they are going to say that the grant of powers applies, because there is no protection for that individual right in the charter, because you have already spelled out what and which individual rights you wanted to protect.



**Mr. Cordiano:** This becomes very complicated in terms of the separate school question, and I am going to venture on to some territory that I am not at all familiar with, so if you would bear with me.

**Mr. Manning:** I may not be familiar with it, either.

**Mr. Cordiano:** It has been said that the section of the Constitution Act which deals with the granting of powers with respect to the whole question of separate schools—I mean, there is a section in the Constitution, in the section that deals with granting powers, that talks about separate schools. It talks about schools of denominational character. I do not have it in front of me. I have the Constitution Act and I do not have the British North America Act, so I cannot refer back and forth. It seems to me that this was clearly put in the charter because that is the way in which Confederation was envisaged right from the beginning, that this was clear and unequivocal, and so it is right in the charter.

**Mr. Manning:** Right.

**Mr. Cordiano:** Referring back to section 16, it has also been stated by some people that it is their opinion that the reason for having section 16 in the Meech Lake accord is that the sections referred to back in the charter by section 16 deal with, in the one case, an interpretive clause and, in the other, rights that were bestowed as collective rights. All of this becomes a little bit fuzzy with respect to aboriginal peoples, but in both instances we are dealing with cultural matters. So that being the case, it was felt that section 16 had to be put into the accord.

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**Mr. Manning:** I follow you.

**Mr. Cordiano:** OK. The point here is that, given that you are dealing with cultural matters or that there should be a protection of cultural groupings, if you will, because the "distinct society" clause deals with the cultural difference, not necessarily precluding the fact that you have a Charter of Rights that deals exclusively with rights of individuals, it was not necessary to put those rights into section 16. The charter stands on its own. Essentially that is the argument that has been put forward. I do not know if I have captured it.

**Mr. Manning:** You have, and I fear for that kind of argument, because our courts have said that if you look at a section like section 16 and you really put it in *ex abundanti cautela*—out of an abundance of caution—if that is why it is there and if the whole of the charter applies and protects us,

then it is redundant. Our courts have said that no part of our Constitution is redundant. In the Acadian case they said specifically, "We are not going to allow any part of the Constitution to be declared to be redundant."

Is it the interpretation of choice, as it were, that section 16 is merely redundant? Is it there as a phrase just to recognize certain cultural protections again? We recognize them in the charter; we are going to recognize them again. That argument has not been accepted in the Supreme Court of Canada, and I say to you that if you go away from section 16 and go into section 106A, where the province is carrying on a program or initiative that is compatible with the national objectives and, as part of that program, is taking away individual rights, is denying equal benefit between men and women or the handicapped and the nonhandicapped, and someone comes to court and says, "Excuse me, you are breaching my section 15 rights; please stop, Mr. Government," the government of the day can turn around and argue in the court: "Just a minute. It is true that maybe I am taking away your section 15 rights, but I am entitled to do that because I am following a different part of the Constitution. I am following section 106A. That is part of the new Confederation and that was part of the fundamental compromise which brought Quebec into Confederation. Therefore, it should be given effect over the taking away of your individual rights under section 15."

I think there is a very strong case to be made to say that the Supreme Court of Canada would agree with that view, that methodology of interpretation, because, after all, section 106A, as an amendment, is part of the new compromise. The court would say it was put in there in full recognition that section 15 was in place, but no reference was made to section 15 either in section 106A or anywhere else, nor did the people who put in the new accord choose to say, as they did with immigration, that the Charter of Rights applies in whole. They have taken the immigration field and said, "The Charter of Rights applies in whole." They have taken the cultural problem area, which you have, I think, properly identified in section 16 and said, "Certain parts of the charter we are reaffirming," but they do not do it in section 106A. Does that not mean they recognize that 15 could be overridden? That is my fear, and I think it is important to make it clear that it is either acceptable or it is not.

You are the legislators. You can say that day is night and night is day and black is white and white is black. The courts have held for hundreds

of years that that is so. The only time there is a limit on that is because of a fundamental-rights document like the Charter of Rights, where the courts get first kick at the can but, ultimately, you can override under section 33 if you cannot say it is justifiable. And ultimately, you can always amend the Constitution. So you are always in the driver's seat, you are always in control, and that is as it should be. The first check is the court. It is not the last check. It is not the end of the line.

So in this case the court, I think in the first instance, will take a look at this and say: "There is nothing in there about section 15. Why can we not interpret it in that way? It sounds reasonable. This is part of a new compromise. It is designed to enable the province to do what it likes with its money. It puts into effect a new social program, and if it happens to override individual rights, so be it. It has overridden them, and that is with the blessing of the new Constitution." If you do not like that interpretation but if you think that interpretation is possible, then I think you have a responsibility to rewrite the provision so that you do not get that interpretation, so it is abundantly clear.

You know, people of this country for years and years talked about arcane, archaic legal language in laws and in pieces of legislation, and it is true: We do that to a great degree. In the past we have always done it. We have started to come away from it. Let us redraft it in clear, unmistakable language which shows to the world, to every Canadian who is able to read and understand, that we want to protect individual rights at the same time as we bring Quebec in. We want to be able to give the province its fair share of the economic resources so that it can carry out its social policies, and let us do it in a forthright fashion. Let us not do it in the way Meech Lake has done it and then say, as the other committee has said, and I think improperly and irresponsibly: "Let us leave it to the court. It is too big a problem. We recognize the problem. Let us leave it to the court."

I do not think that is right. What you have to do is go back to the drawing board. It is not difficult to draft provisions that do not bang into each other and it is not difficult to say things as you have said. We want to recognize that because of the history of this country, because of the aboriginal rights problems, certain provisions we want to reaffirm. They never use the word in section 16. They could have easily said, "Nothing shall affect sections 25 and 27; we reaffirm the position that is in other parts," but not derogate from other rights and freedoms

contained in the charter—phraseology that is easy to grasp, easy to understand. That is what should be put in to avoid all these legal problems. There is no need for these problems.

**Mr. Eves:** Mr. Manning, I apologize for missing the first part of your presentation. I had other duties I had to attend to, but I found the remarks I have listened to most enlightening. I think this committee is indeed privileged to have an individual of your stature give his opinion freely as an individual citizen.

First of all, with respect to section 16, the points you make are exactly the points that many witnesses who have appeared before this committee have made and that some members of the committee have made, quite frankly. I have looked at the language of the proposed amendment of the official opposition in Ottawa and thought it was very good language. We have had other people before us who have suggested that if the committee does nothing else and if it does not have the political intestinal fortitude to recommend any amendments with respect to section 16, the very least we could do is to then refer that one particular item or issue to the Court of Appeal of Ontario.

How does that sit with you, and what would your bottom line be, if I can put it that way?

**Mr. Manning:** I have publicly stated and have written that I do not think the courts should be advisers to governments. I am troubled by that concept. The independence of the judiciary, I think, to some degree is compromised. On the other hand, there is a powerful argument to be made for avoiding future litigation and future mistakes by putting important constitutional issues to the highest court in the province or the highest court in the country.

I waffle between the two concepts. I think it is very important to avoid litigation. I know that may sound funny coming from a litigation lawyer, but litigation is always the end of the line, as it were. It is after settlement cannot be reached; it is after compromises cannot be reached, and it is very expensive and it is very time-consuming.

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If there must be litigation, then I feel that a reference is a valuable tool, to us as a democratic people, to have independent judges learned in the law hear full-scale arguments and deal with problems and give us solutions. They may say, "Manning's theories are wrong." They have done it before. Occasionally they say they are right, causing great consternation.



But I think it is important to appreciate that our courts are quite burdened. They have a heavy workload. Certainly the Ontario Court of Appeal has one of the heaviest workloads in the country. The judges put in very full hours, very full days, very full weeks, very full years. If there is a way to avoid that, if there is a way to simplify the language to avoid the problems, then I think it should be done in the legislative field.

I do not see any reason why putting in a provision which protects individual rights and freedoms jeopardizes Quebec's place in Confederation. I have a lot of difficulty with that. I have no difficulty with recognition of cultural and linguistic differentiation and historical fact and people wanting to preserve what is valuable to them. I have no problem with that, but I do have a lot of difficulty in seeing that where there is a potential clash, you cannot try to work out in a legislative fashion some way to avoid it.

Short of that, if that is the end of it, then by all means put the matter before the Court of Appeal, and then it can go to the Supreme Court of Canada. I know certainly the Supreme Court of Canada would prefer to have the highest tribunal in a province look at a question first. It sort of shakes out some of the excess baggage, as it were. It certainly forces the lawyers to hone their arguments. I know you do not believe that happens.

That is always a solution. There is no question that this is an important enough subject to warrant being put before the highest court in the province.

**Mr. Eves:** Going back to section 16 again, we have heard from the Prime Minister, almost all the first ministers, perhaps with the exception of the Premier of Quebec. I am still searching for a quote of his on this matter, but every one of them seemed to say: "That is of course what we mean by section 16. Of course the Charter of Rights takes precedence to this."

**Mr. Manning:** I know.

**Mr. Eves:** Well, if that is what everybody means—

**Mr. Manning:** Then why do they not say so?

**Mr. Eves:** —then why do they not say it? Then they give you the argument, "We agreed that we would not change one comma, one word or one clause in this agreement, and if we do so, it will unravel the whole accord." What is your response to that argument?

**Mr. Manning:** I have two responses. First, if that is what they mean, they should have said so, and the fact that they say that is what they mean

does not mean that that is what the court will ultimately interpret it to be. Hoping does not make it so.

Second, the agreement not to change one comma, I think, was improper. In clear constitutional terms, why can a group of first ministers think for a minute that they can bind people in the future? Legislative bodies change. It may change in Manitoba. They may change anywhere, and no one knows better than the people sitting in the House in Ontario today how dramatic change can come about, much to people's surprise.

**Mr. Eves:** We two probably know it better than anybody else.

**Mr. Manning:** Yes, indeed. So attempting to bind future legislative bodies has traditionally been looked upon as a no-no in English constitutional terms. Dicey's Introduction to the Study of the Law of the Constitution, in England; Bagehot—they have all looked upon each parliament as being a separate and distinct parliament. You can be the same government over the four years, but there are some views that hold that each sitting of the House is a separate parliament, is a separate legislature, so that you are not bound from one legislature to another, not even as the same governing party of the day. So I do not see how it could be constitutionally valid.

Certainly, I would hope that if there was a holdout of one or two, or if there was a change in the government of Manitoba, for example, if there was a new government, the individuals who form it would say: "Now, wait a minute. Maybe we had better rethink this, because there are problems." Even if it is the same government, it is a new legislature and it does not have to be bound.

It is not like a treaty, for example, where Canada and the United States sign a treaty and they want to say, "We certainly hope our countries will be bound by this, even if the government changes," because by public international law standards they are bound. Certainly, as part of a comity of nations, you have to know that just because the government of the day is going to change, it is not necessarily going to break the treaty, although with some countries, who knows?

My answer to them—and that is a long, roundabout way, I know, of answering the second part of your question—is that perhaps what you did was illegal, unconstitutional. Perhaps you had better re-examine the validity of that agreement and if you find that it may have been made in haste and in the spirit of Confederation and the desire to bring Quebec

back into the Constitution—I never thought they had really left—the real problem will then be solved: namely, the recognition that there is a problem and the inability to deal with it.

**Mr. Eves:** When you talk about the reality of changing government, of course, we already had that situation in the province of New Brunswick.

**Mr. Manning:** That is correct.

**Mr. Eves:** Mr. McKenna is opposed to Mr. Hatfield and they take totally divergent viewpoints.

**Mr. Manning:** I hope he certainly sticks to his guns, not because of political reasons but because I think it gives us an opportunity to take a good, hard, second look. We do not have senates in the provinces. A sober second look.

**Mr. Eves:** The last comment or issue I wanted to raise with you was to deal with the process. Maybe you already did that in your earlier remarks, I do not know; if so, I apologize. I can look at Hansard. What recommendation would you have for the committee as to process? I gather that you do not agree with the process that has taken place to date.

**Mr. Manning:** I do not. Well, I agree with this part of the process; I should not be so fast. I think it is very important to establish a committee of the House to examine the problem and to report on it in as dispassionate, as critical and as honest a way as possible. If you are bound by party lines not to disagree with the end result, then certainly you should be able at least to voice your views as to whether or not there are any potential problems. If that then lands in the lap of the Premier, I think he has got to make a very important decision as to whether or not to take the accord as it stands and put a reference to the Court of Appeal because of the recognition by so many people that there are potential legal conundrums here and it is a real briar patch. That would help solve some of his problems with his first-minister colleagues. That is one route.

The other route is to bite the bullet and say: "Excuse me, I promised this. I did not realize when we agreed to this that we were in fact creating a document which might be read as denying people's individual rights, and I never intended to do that." In the field of contract law, that is done. It is far more important that you re-examine it in the field of creating a Constitution.

I think, process-wise, either route can get you to a solution. I think it is very important that this committee was set up and I think it is very important that the committee examine these

problems. If you recognize that there is a consistency and you agree, maybe not with the actual interpretation but with the fact that there is a problem, then I think that is grounds enough to stop this document from coming into effect; because once it is in, we have got one of the world's greatest quagmires of constitutional amending processes that I have ever seen.

It is very difficult to amend the Canadian Constitution. That is why it is very important that when you are going to put through an amendment, you do it right.

**1650**

**Mr. Allen:** I have certainly appreciated this session very much to date. There is a certain sense in which the more light you get on the document, the more dark corners there seem to be.

**Mr. Manning:** That is well put.

**Mr. Allen:** You raise more questions by answering more questions.

I guess I am still somewhat puzzled about the question of the relationship of the charter to the accord, the question of individual right over against collective right. We have in the Constitution what some people have defined as the little bill of rights that relates to the French-language and the English-language presence in the old Constitution. There are the native people's sections. We have section 96 and Bill 30 and so on.

It is clear that when we came to the charter and went after individual rights and we got into section 15, we had to divide it into two parts, because there had to be a second part which said that if somehow we legislated specially for some groups or individuals who were especially disadvantaged, we might be doing things differently for them or might appear to be somewhat unequal on the surface of it, but none the less it was legitimate to do that. Now we come to this accord with the central concept of the "distinct society" and the recognition of Quebec.

On the one hand, I do not have any problem in saying, "Let's say the charter overrides," but I am not sure that then solves the problem because there is a sense in which the "distinct society" is in that category of the second part of section 15. I seem to be going around and around in a circle in that respect. I never do get to the point where I have actually defended individual rights over against something that is a collective cultural right; whereby, for example, people who speak English in Ontario will have quite different signage rights, just as a natural phenomenon without anybody ever saying anything about it,



as against the English in Quebec who will probably at the best have a subsidiary small-print type on their signs as the best thing that will come out of this court decision on Bill 101.

Can you make some remarks in that connection? How far are we going to be able to go? Even if we put the charter right on top of the accord, are we going to get out of this? And if we do not get out of it, why should we bother doing it? Why not just let them sit there side by side and let them interact?

**Mr. Manning:** I think one has to keep in mind the distinction between differentiation and discrimination, between treating people differently and treating people in a discriminatory fashion, denying people equal access to benefits across the country and treating them just differently. That is the main difficulty that lies in section 15. That is why section 15 is such a difficult section; because it talks about not only equal protection of the law, it talks about equal benefit of the law.

You cannot avoid differentiation in treatment because things are different depending on which part of the country you are from. Obviously, some parts of the country need things that other parts of the country do not and some people in some parts need things that other parts do not. You will never get away from that concept. I think if you separate out the concept of grants of power on the one hand, the ability of the Legislature or the Parliament of Canada to do something on the one hand, from the individual's rights against both those parties, then you start to be able to make sense of what the charter is all about as opposed to what the distribution of powers is all about.

We do recognize differences. I think you put it well when you talked about the mini bill of rights for aboriginal peoples, for the equality rights and so on; but those are all part of protecting an individual within a defined group against the majority. That is what the charter does. It protects the individual's linguistic rights, cultural rights, legal rights, mobility rights or voting rights. It protects the individual as part of a distinct group against the government. It should be kept separate, I think, from the grant of power to those governments. What can the government get in the way of moneys? How can the government raise money? Who has power over which subject matters?

I think it is easy to do. I think it is easy to keep those concepts separate. They do not have to clash except in those areas, for example, where in the past you have created a situation which you did not ask to have created but which has become

embedded in our society: the rights of the minorities, be it English-speaking or French-speaking, be it in Quebec or Manitoba or any other province. There has to be a recognition of those rights. I do not think there has to be a recognition that you can take away the individual's right. I think two rights can live together. I do not think they necessarily have to clash.

We have to start thinking in terms of equality, for example, by talking about extra-burdening people. Treating a handicapped person differently is not justified if he is not being given equality rights. In other words, just because they are handicapped does not mean we have to treat them in a certain way. If you say to an individual who is handicapped and cannot gain access to the Legislative Building in Ontario, "It is too bad you cannot come in the door," that is recognition he is handicapped but it is denial of his rights. They are not really equal in society. They have to become equal in spite of their handicapped position.

If you can build on that and you can add to that kind of concept in order to create a truly equal society, then I do not see any reason why we cannot figure out a way to recognize differentiation in Quebec without imposing an additional burden, not in this case on the people of Quebec but on the people of the rest of Canada. It is discriminatory treatment in a different way. I do not think the Constitution should do that. I think you can avoid that.

I am not sure that answers your question.

**Mr. Allen:** You are saying there are some things it would be legitimate for Quebec to have the power to do for its peculiar cultural configuration; simply because it happens to be a language area, if I can put it that way, which is in a minority situation in the country as a whole and that would make it quite different. It would justify some rather different treatment of its language minority than might, in fact, happen in Ontario for its language minority—

**Mr. Manning:** Absolutely.

**Mr. Allen:** —but without discriminating in the fundamental sense of the word.

**Mr. Manning:** That is right. We crossed that threshold way back in 1981 and in 1982 when the charter came into force with our affirmative action programs provision. Not only in section 15 is there an affirmative action program, but it is in the mobility rights provision of section 6. It is not just in one place. It is in another place.

There is a way to recognize differences, to build on those differences and to give access to the wealth of this country—I am not just talking

about monetary wealth—without extra-burdening anyone. You do not say to the handicapped person, “You cannot go in the door, we will not build the ramp;” because that treats him in a discriminatory way. As a truly just and fair society—I think Canadians by and large view themselves, and I think rightly so, as fair people—we can say to those individuals, “We are going to create extra things for you so that you can become equal”—that is affirmative action—“and we are not going to treat you the same because that would in effect extra-burden you.”

**1700**

Similar treatment sometimes results in inequality rather than equality. Nor can you say that all handicapped people are treated the same and therefore they are all being treated equally. That is a separate but equal doctrine, which unfortunately is creeping into some of our case law dealing with certain subject matters, and it is a dangerous concept. It was rejected by the American Supreme Court in *Brown* and *Board of Education* because that is how the blacks in the United States were kept down; separate but equal, based on a Supreme Court decision many years before.

We have come away from that and we have affirmative action programs in section 15 and in section 6. Why can we not have an affirmative action program with respect to linguistic and cultural rights built into the Constitution? There is nothing wrong with that. There is nothing unique about it. We have it in other parts. That way we do not run the risk of taking away anyone else's rights.

**Mr. Allen:** Thank you very much. This is turning into an excellent seminar. I really appreciate those remarks very much.

**Mr. Offer:** Thank you very much for your presentation. I would like to pick up on a line of questioning that was earlier brought forth, I think by Mr. Eves, with respect to this whole question of the court or judicial reference.

We have heard comment as to why there ought to be one. On the other hand, it has also been said that it is in many ways something that is almost an improper use of the courts with respect to obtaining certainty in dealing with the question we wish to have dealt with, that the courts will not give us the certainty the groups want with respect to this type of judicial interpretation. My question to you is, with respect to this particular subject: first, how does one do such a thing; and second, what type of real certainty can be obtained, as it is the reason people are promoting such an exercise?

**Mr. Manning:** That raises questions which have been raised in the past in dealing with prospective legislation. It is not new and it is not different. Having advised the governments of the day for a period of years, I have participated in that process. I was counsel of the Ministry of the Attorney General for Ontario for nine years.

The way in which you do it is this. You take a look at the subject matter and you decide on one of the problem areas. You then brainstorm, in effect, the kinds of legal problems you think you are going to run into if you pass a piece of legislation. We did it in this province with respect to rent review, with residential tenancies. The question was whether or not the particular rent review officer was an independent person capable of performing a judicial-like function and whether that judicial-like function was akin to a function performed in 1867 by a high court judge; and if so then the province did not have power to appoint such an official. That appointment would have had to come from the federal authorities through the Governor General.

When there are tough problems in this country, we have put references to the courts. You list the facts, the factual basis, the historical basis, and you can put in a plethora of facts today as a result of the anti-inflation reference. Then you ask the questions of the court. Under the Courts of Justice Act and under the Supreme Court Act, section 55, the court must give you an answer.

The courts do not ordinarily like to do that because they are dealing with hypothetical situations. I think this Meech Lake accord comes in a different category because here you have premiers and the Prime Minister saying, “It is going to be the law and this is the form it is going to take.” If you can give the court what the court has called the factual underpinnings—Chief Justice Laskin, in the egg marketing reference, decried the lack of a factual underpinning for the question. As he said, he did not know how the marketing board worked. He did not know who utilized the marketing board and its function and so on. If you put enough of the facts before the court and you put the legal questions in the way you want them answered, you will definitely get an answer.

We did it with respect to the original Constitution in 1981. In 1984, with the Constitution that Quebec would not sign, we put a reference to the Supreme Court of Canada. It was a tough reference, whether the federal authority could do it on its own or whether it needed the consent of the provinces, and whether it was a



matter of law or a matter of convention. The Supreme Court did not like some of the ways in which the reference was framed. Courts never do, but it answered the question and we got on with the business of getting the new Constitution in place.

It may well be that is what you will have to do; it may not. If that is the route you go, then I do not see that people would be able to criticize, saying, "You will or you will not get the definitive answer." Nothing is certain. All you can hope to do is get enough assistance so that you try to foresee the possibilities, the various interpretations and you try to put them into a form that is manageable. You put the background of the accord and so on and you have lots of studies—your views, the various views, the factual circumstances you want answered and then the legal questions—and you argue it before the court. You pick two parties, whatever, and they go before the court and they argue.

Very seldom will you get the definitive answer for ever and ever. Obviously, that is because law is by its very nature imprecise. Lawyers can scrounge around, look around, dig around and try to find something to help a client.

**Mr. Offer:** My concern is even with the examples you have used: the egg marketing board case, the Anti-Inflation Board case, the rent review case. It was all structured with respect to a particular piece of legislation. There was a focus with respect to the questions that were posed before the court. What we are hearing is people saying, "We would like a court reference to find out whether the Meech Lake accord, Langevin agreement"—we are using the same words—"overrides the Charter of Rights."

My concern is with respect to exactly the examples you have brought forward, that without a piece of legislation, the certainty people are asking for in the use of a court reference is not there. I would like to get your thoughts on that.

**Mr. Manning:** I think if you phrase a general question—does the Meech Lake accord as a whole infringe on the Charter of Rights as a whole?—the court is going to throw up its hands and say, "In what circumstances?" So would all of us, and I am sure you have too.

I think you can avoid some of that by particularizing the question, by specifying the issue. For example, is section 16 capable of being interpreted in such a way as to mean certain things? Does the fact that section 28 is not referred to in section 16 mean that a piece of

legislation passed pursuant to section 2 of the Constitution Act, 1867, can override section 15 of the charter? That is a pretty specific question, because then the court looks at section 16 and looks at the charter and looks at the principles of constitutional interpretation and gives you an answer. You may not like the answer.

**Mr. Offer:** I understand that to a degree, save that in fact there is also section 1 in the charter which provides a huge discretion with respect to the courts in dealing with a particular facts situation. It always takes me back to the initial concern, if the court reference is there to provide a certainty and that is why it is being promoted by other groups, then in this one particular situation, it is not going to achieve the result for which it was launched.

**Mr. Manning:** I understand. I think the answer is that you cannot get the degree of certainty those people want with a reference. What you can do is try to narrow the ground so that you can allay the fears of those who say, "It is going to take away our rights." If the Supreme Court of Canada, for example, said, "Yes, it would infringe section 15 of the charter," which infringement may be justified under section 1 by the government of the day pleading evidence of an appropriate kind, then at least you would know there was a clash between the accord and the charter. You would know that your rights were in danger and then you could take steps to avert that by inserting a clause saying, "Section 15 is still in place."

**Mr. Chairman:** Mr. Manning, you have been very good with your time this afternoon and I hope we have not kept you too long, but certainly it has been extremely useful for us and we are indebted to your presentation and also the answers to a number of the questions, because I think you zeroed in today on a topic which really is—it has been underlined before—of real concern to the committee. I think you have left a lot of things that we want to reflect upon as we make our way down this road that gets more and more curving and tortuous.

**Mr. Manning:** Thank you for hearing me and if I can be of any further assistance, call me.

**Mr. Chairman:** Thank you very much. We now will adjourn to reconvene in Ottawa at two o'clock on Monday, March 21.

The committee adjourned at 5:12 p.m.

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**Substitution:**

Keyes, Kenneth A. (Kingston and The Islands L) for Mr. Morin

**Clerk:** Deller, Deborah

**Staff:**

Bedford, David, Research Officer, Legislative Research Service

**Witnesses:**

**From the Ontario Coalition for Better Child Care:**

Davis, Janet, Vice-President

**From Outreach Abuse Prevention:**

Daigle, Maureen, Founder and Program Developer

Harris, Donna, Executive Director

**From the Association of Liberals for the Amendment and Reform of Meech:**

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**Individual Presentation:**

Manning, Morris, Legal Counsel











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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Monday, March 21, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Monday, March 21, 1988**

The committee met at 2:03 p.m. in Algonquin Salon A, Delta Ottawa Hotel.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good afternoon, ladies and gentlemen. Bonjour. Alors nous commençons nos séances cet après-midi ici à Ottawa, et peut-être avant de continuer, je vais demander à notre collègue M. Morin de dire quelques mots.

**Mr. Morin:** I am very pleased to welcome you all to the most beautiful city in Canada.

**Mr. Breagh:** When do we go there?

**Mr. Morin:** There is plenty to do, and I am sure if I can be of any help, you will not hesitate to get in touch with me.

Alors, je vais vous souhaiter la bienvenue officiellement dans notre belle capitale, votre capitale, et au nom de M. McGuinty et aussi de mon voisin à l'est, M. Villeneuve, soyez les bienvenus. J'espère que si nous pouvons vous aider - pas dans tous les domaines - mais si nous pouvons vous aider, cela nous fera plaisir de la faire.

**M. le Président:** Bon, merci beaucoup. C'est notre première présentation de l'après-midi.

Before beginning with our first witness, the clerk of the committee has a few notes to make.

**Clerk of the Committee:** Only one. On your agenda you will notice that at 11 o'clock tomorrow morning the Canada Council on Social Development is scheduled. They have moved to 11:30 a.m. on Thursday, March 24.

**Mr. Allen:** I wonder if there is an additional copy of the agenda. Having bypassed my office last week very deliberately, I—thank you very much.

**Mr. Harris:** When are they appearing?

**Mr. Chairman:** Thursday at 11:30.

**Clerk of the Committee:** There will be revised agendas coming in tomorrow.

**Mr. Chairman:** If I could just note, tomorrow evening members will be free, in which case Mr. Morin can assist, I am sure.

**Mr. Morin:** Mr. Breagh has a big smile. I do not know why.

**Mr. Chairman:** I invite Professor Michael Behiels from the department of history, the

University of Ottawa, to please come forward. First of all, welcome. It is a pleasure to have you with us this afternoon. Our procedures are fairly simple. If you would like to make your presentation, we will follow that up with a period of questions. We all have, I believe, a copy of your paper.

**DR. MICHAEL BEHIELS**

**Dr. Behiels:** I wish to begin by thanking the members of this Ontario select committee on constitutional reform for the opportunity to express my views on some aspects of this very important and far-reaching document. I am happy to start off these proceedings in Ottawa and I welcome you all to our fair city.

I have been following the debates or, perhaps more appropriately, this "dialogue des sourds," since April 1987. The Meech Lake accord will soon reach its first anniversary. Unfortunately, from my point of view, Canadians have very little to celebrate.

Is the Meech Lake accord legitimate? Since the summer of 1987, I have witnessed several dozen individuals, groups and organizations and I have read submissions from literally hundreds of other individuals and organizations representing a very broad spectrum of Canadians from coast to coast and reaching to the Arctic Circle. These groups have expressed profound reservations about both the process and the substance of the 1987 constitutional accord.

This accord, even if it is eventually ratified with the 11 first ministers and the 11 legislatures, will not be legitimate in the eyes, I think, of a large percentage of Canadians. It will most certainly never be looked upon as legitimate by the peoples of the Northwest Territories and the Yukon, whose representatives were excluded completely from the talks at every stage. The francophone and anglophone linguistic minorities will be left in the unenviable situation of having to plead for privileges from their respective governments.

Moreover, all this discussion and debate, which is taking place after the deed is done and duly carved in stone, will not legitimize what the politicians have done or hope to do. Instead, this protracted debate has focused and will continue to focus critical attention on the undemocratic

nature of the existing constitutional process and on the egregious flaws of the accord itself. Many highly respected scholars, including Professors Alan Cairns, Albert Breton, Ramsay Cook, Bryan Schwartz and John Whyte, and organizations too numerous to mention have fleshed out the serious contradictions, ambiguities and pitfalls of virtually every clause of the accord.

The Constitution Act, 1982, was considered flawed by the Mulroney government because it was not legitimate in the eyes of Quebec's nationalists and separatists. The Prime Minister and the premiers, in attempting to appease the nationalist-minded government of Robert Bourassa by accepting its five demands and offering even more, are proposing a constitutional coup de force which will, if accepted, undermine the significant social and democratic achievements of the Constitution Act, 1982.

The patriation of the British North America Act, 1867, with an amendment formula and, most important, the entrenchment of a Charter of Rights and Freedoms represented a profound social and political shift in Canada's constitutional development. Our Constitution was no longer going to be exclusively a matter of a power relationship between federal and provincial governments. The charter, because its function is to determine the relationship among individuals, groups and the state, brought new groups and social classes into the constitutional process.

In sum, our Constitution was both Canadianized and democratized in such a way as to reflect the fundamental socioeconomic and cultural changes that had occurred in Canadian society since the war. As a result of this concordance, the Constitution Act, 1982, despite its minor shortcomings, was easily legitimized in the eyes of the vast majority of Canadians.

#### 1410

By its undemocratic process and its content, the Meech Lake accord represents a constitutional counter-revolution. The first ministers, through the entrenchment of their annual constitutional conferences, the extension of the unanimity rule to important sections of the Constitution, the de facto transfer of Senate and Supreme Court appointments to the premiers and the undermining of the charter with the ambiguous "distinct society" clause, have effectively blunted further development of the people's Constitution. It is this larger political reality that I think constitutes the egregious flaw of the accord.

Quebec challenges the 1982 accord: What the Quebec government of René Lévesque failed to

achieve after its re-election in 1981, the Liberal government of Robert Bourassa was determined to accomplish through political blackmail. That government simply refused to co-operate in any serious constitutional discussions until Quebec's minimum demands had been granted. In some measure, that contributed to the dead end or the deadlock of talks with the aboriginal peoples. Those four meetings really achieved nothing.

The one major development that precipitated the unravelling of the 1982 equilibrium was the dramatic and wholesale shift in the voting patterns of Quebec's citizens. Of course, this had all started in the election of 1984. Once the election was over, the Quebec electorate had some second thoughts about its decision to support the Mulroney Conservative Party and then began to move all over the electoral map, so to speak, and the polls started to go up and down. That jeopardized the potential of the Mulroney government's getting a second mandate.

That really opened the door for Robert Bourassa and the Minister Responsible for Canadian Intergovernmental Affairs, Gil Rémillard, and they decided to put on the push for what were determined to be Quebec's five minimum demands. Bourassa and his nationalist colleagues jumped at signing the Meech Lake accord because it was such a marvellous deal for the nationalist, political and bureaucratic élites of Quebec.

Thanks to Mr. Mulroney, Quebec received more than it asked for. The accord will allow Quebec's governing bureaucrats and politicians to legislate in favour of the preservation and promotion of Quebec's majority francophone society without fear that such legislation will be overruled by the courts. Bourassa agreed to the Meech Lake accord only because the "distinct society" clause took precedence over the Charter of Rights and Freedoms. René Lévesque, had he received such an offer from his arch-enemy, Pierre Trudeau, would have jettisoned the separatist nationalists in a flash and signed immediately.

René Lévesque's closest constitutional adviser, Claude Morin, and his Minister of Finance, Jacques Parizeau, have given their blessing to the accord. An aggressive and shrewd Quebec government could use the accord, according to Morin and Parizeau, to disrupt the federal system and move Quebec step by step towards independence.

It is clear from the testimony before the special joint committee of the Senate and the House of Commons; it is clear from the testimony of



Senator Lowell Murray, Minister of State (Federal-Provincial Relations) and his deputy minister, Norman Spector, that Premier Bourassa fully intended that the "distinct society" clause should allow the government of Quebec to legislate in favour of the preservation and promotion of the francophone majority of Quebec without fear that the Supreme Court could use the charter to strike down those legislative measures that violated the charter, except for aboriginal and multicultural rights.

The charter under attack: The Meech Lake accord, which everyone now agrees constitutionalizes enhanced powers for the premiers, runs against the increased liberalization and democratization of the Canadian society which has been under way since the Second World War and, more specifically, since the 1960s. As Bryan Schwartz has so aptly written, in his *Fathoming Meech Lake*, the Meech Lake accord is "first and foremost a 'charter of rights for the provincial governments.'" Professor Schwartz goes on to state:

"The 1982 accord strengthened the rights of individual Canadians; the 1987 accord does not contain a single provision that enhances the court-enforceable rights of anyone. The 'non-derogation' section of the 'Quebec clause' ensures that absolutely nothing in the section can enhance the legal position of an individual in litigation against a government. On the other hand, a major purpose of the 'Quebec clause' is to bolster the position of the Quebec government in court challenges brought by its linguistic minorities."

Since the 1960s, Canadians have experienced and grown to appreciate a far more democratic, participatory and pluralistic society, one which places a premium on the rights and freedoms of the individual and of minorities. Thanks to a quiet but effective evolution in our educational, social welfare and health services, our society has become progressively less elitist. Certainly there remains plenty of room for improvement, but the 1982 Charter of Rights and Freedoms symbolized the guarantee of these tremendously significant changes in our social structure and our values and norms of behaviour which underlay that social structure. The Trudeau government did not impose the Charter of Rights and Freedoms upon Canadians. Indeed, the immense popularity of the charter among all groups and social classes is a striking reflection of the fact that the charter's time had come.

The premiers feared this new Canadianism symbolized by the Charter of Rights and

Freedoms because it enhanced marginally the role of the national government. More important, the charter enhanced and constitutionalized the democratic rights and freedoms of individual Canadians and minority groups. The Meech Lake accord gave the premiers their first opportunity to reassert provincial prerogatives and entrench in the Constitution both the provincial compact and the two-nations theories of Confederation.

In their eagerness to obtain the veto, and control over the Senate and the Supreme Court, and to have fisheries on the agenda in perpetuity, the premiers were all too eager to grant Quebec not merely provincial equality but rather special status via the "distinct society" clause. This Quebec clause, which is the *raison d'être* of the Meech Lake accord, has generated the greatest amount of anxiety and discussion, because of its potential to unravel the gains represented by the Charter of Rights and Freedoms.

What is at stake here, really, in this constitutional debate is competing visions of Canada. Since the end of the Second World War, and in particular since the 1960s, we have been working towards a bilingual and multicultural vision of the country. That was painful at times. We moved by fits and starts and trial and error, but I believe we were making significant progress, particularly in central Canada and New Brunswick, but less so in western Canada. I think in time other parts of the country would have followed the direction in which Ontario and New Brunswick were moving. The charter does, in fact, turn us around 180 degrees.

At the heart of this debate that we have been going through since last summer over the Meech Lake accord resides a very profound divergence about the very nature of our country. Rather than leading to a national reconciliation as predicted by the Mulroney government, a national reconciliation which to some extent is necessary, it is becoming increasingly clear that the stage is once again being set for a very bitter, prolonged and divisive battle over linguistic and multicultural policy.

It is this author's considered view that many of the positive achievements in these two areas over the past two decades are going to be jeopardized by the government's attempt to constitutionalize in this Meech Lake accord a conception of the country which is diametrically opposed to the bilingual and multicultural vision accepted and cherished by the vast majority of Canadians.

Will Canada indeed become a country in which its citizens will have the same civil,

gender, linguistic, ethnic and socioeconomic rights from coast to coast, or will Canada develop into a patchwork quilt of provinces providing divergent sets of rights to Canadian citizens? The Parliament of Canada is presently dealing with two very crucial and, I argue, long-overdue legislative measures, the Canadian Multiculturalism Act, Bill C-93, and the new Official Languages Act, Bill C-72. Both of these important legislative measures provide the necessary statutory power for the advancement of this bilingual and multicultural vision of nation-building.

Running counter to this vision, to this bilingual and multicultural vision, is the opposite conception of the country, which is advanced in the Meech Lake accord. Many learned critics, including the award-winning historian Ramsay Cook and John D. Whyte, dean of law at Queen's University, have demonstrated in their very lucid submissions to the special joint committee of the Senate and the House of Commons that the accord provides the constitutional and legal provisions for the emergence of two increasingly unilingual Canadas, one French-speaking in Quebec and the other English-speaking in the rest of the country.

#### 1420

That Quebec clause, especially clause 2(1)(b) of the accord, recognizes Quebec as a distinct society. This is not just a symbolic preamble, as was originally proposed, in fact, by all three parties and the Quebec government. Something happened there at Meech Lake and Langevin. It was changed into a provision of substance. Rather, this article is a powerful constitutional interpretative clause that instructs the judges of the Supreme Court to interpret the entire charter, except sections 25 or 27, in the light of this sociological reality. Second, subsection 2(3) stipulates that "the Legislature and the government of Quebec" have the responsibility "to preserve and promote the distinct identity of Quebec...." Finally, the power of the Legislature and government of Quebec pertaining to the rights or privileges relating to language is reaffirmed by the "nonderogatory" clause, subsection 2(4).

If past history is any indication, and I think it most certainly is, Quebec's majority francophone society will certainly insist that the "distinct society" clause refers primarily to their culture and their language rather than to the bilingual and multicultural nature of Quebec society. If this accord is ratified by all parties, Québécois nationalists and the Quebec govern-

ment will have at their disposal a constitutional mechanism, for the first time since Confederation, to enhance step by step the powers of the province of Quebec. They will achieve through the courts what the people and the politicians have refused to grant them since the early 1960s; that is, special status. They will be able to make the Quebec state coterminous with the francophone nationality of that province.

No Quebec government will be able to resist such political pressures. This virtually guarantees a collision with the Parliament of Canada, which under subsection 2(2) has merely the constitutional responsibility to preserve the bilingual nature of Canada, including Quebec. Given the political realities of our federal system and the limited and highly ambiguous wording of the Quebec clause, the responsibilities of the Legislature and government of Quebec will of necessity take precedence over those of the Parliament of Canada.

The same dynamic will occur in all the other provinces, which henceforth will only have to comply with the very limited constitutional obligation to preserve the linguistic rights of French-speaking Canadians. Some provinces, like Ontario and New Brunswick, have already adopted fairly enlightened legislative approaches towards their linguistic minorities. On the other hand, the remaining provinces have not. They quickly jumped at the opportunity, I feel, to limit their constitutional obligations by supporting the "preservation" clause of the Meech Lake accord.

Canada's linguistic minorities, represented by the provincial francophone associations—that is, the Fédération des francophones hors Québec—and by the Alliance Québec, have objected and continue to object vigorously to the severe constitutional limitation placed upon the Parliament of Canada and the provincial legislatures. The Mulroney government quietly acknowledges the political clout of these respective linguistic groups and their organizations. Rather than address their very real and pressing concerns with the accord by reopening discussions and entertaining substantive amendments, the Mulroney government has responded by speeding up the process of rewriting the 1969 Official Languages Act. Bill C-72 is now before the House and has passed second reading and is going into committee stage. Despite the support of the two opposition parties, I think a full-scale and potentially divisive debate on the language issue is virtually guaranteed.

Rather than campaign aggressively for immediate improvements in the Meech Lake accord, it



appeared, until just recently, that the FFHQ was willing to accept the government's peace offering of a new and improved Official Languages Act. Indeed, since last summer, there has been a profound, bitter, divisive debate within the francophone associations of this country from coast to coast. They have met on numerous occasions to try to come to grips with the Meech Lake accord. The accord really has torn that organization, I think, inside out.

When the deal—that is, Bill C-72—appeared to be threatened by opposition in Tory caucus, FFHQ's president, Yvon Fontaine, stated publicly that if Bill C-72 was amended in any fundamental way, the association would advise Premier McKenna of New Brunswick not to ratify the accord. In a very real sense, the FFHQ had undermined its bargaining position by agreeing at the outset with the Bourassa government's desire to pursue, thanks to the central provision in the accord, an increasingly unilingual Quebec society. It would have been far better for the FFHQ to have insisted from the outset, as it is now doing, that Premier Bourassa obtain from a majority of the premiers a commitment to preserving and promoting their respective linguistic minorities before giving its consent to the Meech Lake accord.

It now appears from the statement the Association canadienne-française de l'Ontario president, Jacques Marchand, made before this very committee that Premier Bourassa and Gil Rémillard had indeed promised to protect the rights of francophones outside Quebec. Unfortunately, in the heat of the prolonged, all-night discussions, perhaps when they were running out of doughnuts and coffee, the rights of Canada's linguistic minorities were deemed secondary to those of the majorities.

The FFHQ and its provincial associations, after realizing that their initial political strategy was not going to achieve the desired results for their constituents, have now decided to withdraw their support for the Meech Lake accord until the appropriate amendments are made. They want three basic amendments to the Quebec clause.

First, they want the recognition of the collective as well as the individual linguistic rights of francophones. They feel that the Quebec-Ottawa dualism expressed in the Quebec clause runs against the more traditional perception of the French-speaking Canadians versus English-speaking Canadians, the two cultural communities.

Second, the federal and provincial governments and the legislatures, they argue, must have

the responsibility to promote as well as preserve the duality of Canada.

Finally, they contend that subsection 2(4) should be eliminated entirely. Clearly, the francophone associations have come to understand that an effective and politically viable policy of bilingualism cannot be advocated for their constituents while at the same time supporting the policies and the strategy of the Quebec government for a unilingual Quebec society.

Similarly, the Mulroney government and the Liberal and New Democratic Party opposition parties, to be logical and fair to all Canadians, cannot push an accord that will allow a policy of unilingualism in Quebec while pursuing a policy of bilingualism in the rest of the country.

How can the premiers square their achievement of the equality of the provinces with a Quebec clause that constitutionalizes special status for one province, Quebec, in our federal system? Moreover, one must ask whether it is in the interest of all Canadians that our legislatures define and entrench the preservation and promotion of majority rights in our Constitution while leaving the promotion of minority rights up to statutory legislation that can be readily altered with the election of new governments in the various provincial assemblies and in the Parliament of Canada.

Majorities can defend their rights at the legislative level. It is the minorities who require a constitutional defence against the tyranny of the majority. Their representatives are now unanimous on the need for amendments. It is only just and proper that the first ministers take their recommendations seriously and improve what has come to be seen and understood as a flawed constitutional document in its very essence—that is, the *raison d'être*, the Quebec clause.

No one really, I think, up until this point has made that point. I think now the linguistic minorities, the Alliance Québec and the FFHQ are making that point loud and clear.

I reiterate that, rather than leading to a national reconciliation, as predicted by the Mulroney government, it is becoming increasingly clear that the stage is being set for a very bitter, prolonged and divisive battle over the linguistic and cultural multicultural policy. All of this is rather tragic and need not occur.

#### 1430

Since last summer, there have been many excellent and practical recommendations advanced by a wide variety of groups and individuals before various national and provincial committees scrutinizing the accord. It is only proper and

democratic that the 10 first ministers who signed the accord take the opportunity offered to them by the 11th first minister, Premier Frank McKenna, who did not sign the accord, to reopen negotiations. The opportunity is there. Justice must not only be done but also be seen to be done.

Canada's linguistic and ethnic minorities, its northern citizens, its native groups and its women must be assured that their rights receive the same constitutional protection as those of the majorities. Statutory protection of such rights is laudable but clearly insufficient. There must not be conflict between the national vision of Canada incorporated in our Constitution and the vision advanced in our statutory legislation.

In two very important ways, the Meech Lake accord is a constitutional counter-revolution that threatens to unravel the significant gains made in the Constitution Act of 1982. By constitutionalizing the Quebec Liberal government's ambitions to create a nationalist state—that is, a state committed to the defence and the promotion of the majority nationality—the accord threatens the very fabric of Canada's constitutional evolution since Confederation. In both its process and its content, the Meech Lake accord undermines the people's Constitution, represented in part by the Charter of Rights and Freedoms, by reinforcing the primary role of provincial governments in the process of constitutional reform at all stages.

Since 1982, the dynamic of constitutional reform has changed. The first ministers refuse to accept this reality. Consequently, the Meech Lake accord is not and will not become legitimate, I feel, in the eyes of a great many Canadians. Constitution-making is a difficult and delicate process. It must not be hurried. It must not be dictated by mere political expediency. It must be the result of statesmanship. It must involve Canadians at all stages.

Before irreparable damage is done, the first ministers have the opportunity, as I have mentioned, to exercise statesmanship and nation-building of the highest order. They have the heavy responsibility of remedying the fundamental flaws in the Meech Lake accord. This committee can help accomplish this worthwhile goal by recommending, with great determination and dignity, an appropriate set of amendments to the accord for the consideration of the Legislature of Ontario.

If our federal system is to survive as Canadians have come to know and understand it, any and all constitutional reforms must contribute to maintaining an equilibrium between the national and provincial governments. The powerful centripe-

tal forces at work within all provinces must be carefully counterbalanced by the centrifugal forces required in all modern nation-states. Only in this manner will Canada be able to serve its citizens' domestic needs as well as play a meaningful role in an increasingly troubled world.

The Meech Lake accord is a genuine test of the democratic nature of our society. Canadians must not fail that test. Committee members, all of you can help to ensure that we all pass the test with flying colours.

I wish to thank you for hearing me out.

**Mr. Chairman:** Thank you very much. I should note for the record that in your presentation, at times you were doing a summary. We certainly will have this with us as well to see and to go back to some of the points you have raised. Clearly, there is a lot of food for thought there, and we thank you for taking the time in preparing it.

**Mr. Harris:** I do not want to get into the specifics. I want to ask you a little bit about the process, because a number of people, as you mention in your brief, have commented on the process and I think I share some of those concerns.

I get the feeling from your presentation that the process that led to the Constitution Act, 1982, was somehow much better than this process. I do not recall it being significantly different. In fact, I do not remember too many hearings in 1982. I am not sure all the legislatures got a chance for hearings and a chance to vote on it. Other than the content, which you do not seem to like as well as that of the 1982 one, I wonder why you make the comment that this process is so flawed.

**Dr. Behiels:** If you go back to 1982, you will understand that we were trying in effect to get the process started. We had been unable, over a period of more than 50 years, since 1927, to get an agreement on an amendment formula. There had been some discussion since 1968 of entrenching a Charter of Rights and Freedoms, so that was a major turning point in our modern Constitution-building and nation-building.

I agree there were a lot of shortcomings in 1982 over the process, and people did make that point. Many groups in fact called for a constituent assembly in the steps leading up to the first ministers' conferences, but there was a lot more debate. Those discussions were open; they were in public. There was some sense of where we were going, of the issues being debated. When there were some shortcomings with regard to women's rights and native rights, there was a



process whereby people met and organized and put pressure on the first ministers and on the three parties at the national level, and amendments were made at a number of steps in the process. It was not kind of written in stone, finished for good. The whole thing was referred to the courts. It was a very long-drawn-out, protracted procedure, which resulted in a better document in the end, I might add; not a perfect document, but a better document.

I think the same thing can happen this time. They should not simply leave out the input that can be provided to them via this kind of process. After all, that is why you people are there: to hear your constituents and to make the point that perhaps they did not get it all right the first time, that they could really use the opportunity to go back and hammer out a document that will be there for a period of time, which constitutions really should be. We must not come back to this process on a regular basis, otherwise we will tear the country apart. Constitutions should be something that are debated long and hard. Then, once they go into effect, they are there for a period of a generation or two or three. You may tinker with them, you may make minor amendments; but on something like the Quebec laws, if we do not get it right the first time, we stand to reap no end of grievance and debate.

I agree that the 1982 process was not completely satisfactory, but I think it was merely the beginning of putting into place a very different kind of Constitution, as I have tried to explain, a Constitution that has really a people's dimension. I think they really overlooked, even at that time, the kind of amendment formula that is required to deal with that very different kind of Constitution.

**Mr. Harris:** You have suggested that the process be more open and that more time, I suppose, in between—

**Dr. Behiels:** Yes, leading up to the first ministers' meeting and even after. I think, first, there has to be a stage up to the meeting of the first ministers, and then between the time they come up with something which is in principle and the final draft, there should be other meetings at the legislative level, at the Senate and the House of Commons level, and then the first ministers come back again.

**Mr. Harris:** One of the things that is different is the charter. It is in now. It was not in; it was brought in during 1982 and gives rights to individuals. You still seem to be advocating that it is the first ministers who should be making the final decisions. Whether they are done over a

period of time, behind closed doors or out in the public, it is still the first ministers who should be making these decisions. Have you given any thought to what part the individuals, whose rights are now protected in the Constitution, should be playing in this whole process? You say it has changed because individuals are there, but you are not recommending any changes that particularly give individuals any more say in constitutional change. You are still suggesting that these changes be done by 11 people.

**Dr. Behiels:** No, that is not true. What I am suggesting is that we set in motion, when we want to change the Constitution, a process of very general and protracted hearings, where legislatures invite groups and individuals over an extended period of time to discuss what it is the first ministers have in mind. After hearing people at some length in all 10 provinces and at the federal level, then, of course, the first ministers and the bureaucrats will draft something which they perhaps find acceptable. It will then go back again to committees of the legislatures, the House and the Senate for a second round, where again people can have an input. After all, that is our parliamentary system.

#### 1440

Then, of course, if at that stage all the parties in the houses and the legislatures agree that we really do have a final draft which is next to near-perfect—nothing is ever going to be perfect—then the first ministers can get together and ratify what has been done over a period of maybe two or three years, not what has happened this time where the cart comes before the horse and the door is closed and whatever. All of this ends up being very fine, but it is not going to lead, as I understand it from the statement of the Premier (Mr. Peterson), to any change whatsoever to the accord on the part of the Ontario government, any requests to meet again.

**Mr. Harris:** He has changed his mind before.

**Dr. Behiels:** I hope so. That is why I did not give up, why I am not going to give up and why other people I talk to are not going to give up. We are going to keep hammering away until common sense prevails. We do not want to have a document that is not perceived as legitimate. That helps no one and in fact gets us involved in a second level of the problem: How do you unravel that mistake and proceed to redo it? If you compound the mistakes, one on top of the other, the process of unravelling them becomes extraordinarily complicated and becomes in itself a problem, politically and constitutionally.

**Mr. Breagh:** I would like to touch on a couple of things around this process question. Most of us, I think, have observed that this is an intolerable process as it is now constituted, but in hindsight it is not as bad as I originally thought.

In the previous rounds, for example, there were no hearings of this kind at all that I can remember anywhere in the country. I guess what it is coming down to is, how many legislatures will accept the big bluff that is being undertaken here? When you get right down to it, if the legislatures do not ratify this agreement, there is no deal. That means that probably 1,000 or so members of parliament of different kinds across the country are going to have to agree that this package is workable, or it is no deal.

I have some hope that democracy could break out at any moment here and freedom could rear its ugly head. My concern is that I am given a package and I am told, by and large, that I have to work within that package. To many of us who have sat through a long set of hearings now, it is becoming apparent that there are some loose ends that have to be done up.

My personal concern is that if we are unable to address, for example, whether or not the charter is dramatically affected by this accord, if we cannot find the answer to that in a more definitive way than we have seen so far, which in essence is a stream of very learned opinions from different folks—the score is about even on whether it does or not; that has to be nailed down—if we cannot deal with the Yukon's and the Northwest Territories' questions as to where they are at, and if we cannot deal with the matter of how we proceed from this point on, in other words, if we do not find a better process, I think we are up the creek as well. But all is not lost.

Can you conceive of a package of steps that might make this accord more palatable to you?

**Dr. Behiels:** Yes, if under the urging of Premier Frank McKenna the first ministers do take the opportunity to meet again. This time I would say it should be more than 24 hours or 48 hours. It should probably be a good week, after, of course, some preparation from the deputy ministers as to where the problems lie, with a very intensive seeking out of very important legal advice on those issues from a wide variety of sources after they have prepared everything very well. They should meet and they should not leave the table. They should remain at the table until they have worked out the Quebec clause and some of the other issues in terms, for example, of Senate and Supreme Court appointments, and even the question of immigration because people

in the west, like Izzy Asper, are very, very concerned about how that is going to lock in the country's development in demographic terms.

I have spoken to the Quebec-clause issue because that is the one I feel is at the heart of the document. That is really what brought the premiers together. All the other issues were brought to the table as extraneous matters by the other premiers in return for their support of the Quebec package. Maybe some of those things have to be set aside momentarily and simply put off until another agenda rather than be constitutionalized in an accord.

Like you, I am not pessimistic. I think things can be put right, by and large. I think the whole question of the north and the question of a provision for the aboriginal groups can be looked after. I do not think the whole thing will unravel. I think that is a lot of scare tactics on the part of Prime Minister Brian Mulroney.

People have not had sufficient time to understand what is happening and what we are trying to achieve. There is a very real feeling out there in the country that, yes, some accommodation can and should be made to ensure that the French-Canadian majority in Quebec can survive and develop and contribute, not only to a distinct Quebec, but in fact to a very distinct Canada vis-à-vis, for example, our cultural relationship with the United States.

I think the will is out there. Let us simply get these gentlemen together one more time and I think we can have a much better document through that process.

**Mr. Breagh:** May I just touch on one other thing that Mike Harris mentioned. I am more concerned about the process question, frankly, than about almost anything else that is involved here. It may be true that in the first round of drafting the Constitution there was a great public debate, but I have to tell you it did not happen in Oshawa. At Mike's smoke shop they did not discuss the Constitution at all. It was not mentioned at the Queen's Hotel or in any rink I was in at all. I think what is true is that people who had a particular interest and were organized had that kind of accommodation of factors. They had the opportunity to participate, in kind of an ad hoc way, in what went into the first draft of the Canadian Constitution.

I am torn—I guess that is the best way to put it—by saying that is a right and natural way to move those who have a particular interest and are organized. Probably in any free democracy they will be at the bargaining table and at the public



hearings. They will be presenting their briefs and doing that.

My concern really is, what about everybody else? Where the hell do they fit in this? Where do they get their say? One could argue, I suppose, that at the next provincial election they will decide whether or not I am a good guy or a bad guy, but the truth is that this will not have anything to do with the Constitution, anything I said about the Constitution or any amendments that I moved. It will probably have to do with whether or not I got them a compensation pension or not.

There is a flaw in the process here that I am trying to get at. How do we rectify where we have been, which I think most of us would say is the wrong way to go about this. The whole process is backwards. How do we get it turned around so that there is a duly recognized process that all Canadians have a fair shot at, so that they have a role to play and it is clear what it is? Can you offer some advice in that regard?

**Dr. Behiels:** As I tried to point out, there is no doubt that there are really two constitutions within the Constitution. There is that traditional part of the Constitution which deals with powers between governments and there is now a constitutional dimension of the Charter of Rights and Freedoms that really deals with the relationship between individuals in the state, provincial and federal.

The amendment formula we now have requires seven provinces and 50 per cent of the population, or, in many items—far too many from my point of view because a unanimity rule can really hang us again for a long, long time—unanimity of all the provinces. Perhaps we need a third amendment procedure pertaining to the people's dimension of the Constitution, so that any time you introduce changes which will affect individual Canadians, perhaps that kind of amendment requires referendums.

That is just one thought off the top of my head, that we may have to become perhaps a bit more complicated here, God forbid; I am not sure how much more complicated. Perhaps, for that series of amendments pertaining to anything that might impinge in any way, shape or form on the people's dimension of the Constitution, we should really open it to all Canadians on an individual basis and have a national referendum for that kind of category of changes.

I am not sure. We really do have two different creatures here within the same Constitution. As you say, are we simply going to leave it up to the first ministers to resolve, in the end, amendments

to the two different categories, or are we going to be more sophisticated and introduce a third amendment procedure?

**1450**

**Mr. Breagh:** I have one final question. It has been dignified by the term "executive federalism," which I did not know existed in this nation until these hearings began. To put it bluntly, 11 guys went off to the lake for the weekend and drafted a new Constitution. I do not remember the source of their authority to do so. Some experts have appeared in parliaments and said we have always done it this way, that a small, select group of very wise people draft things like Constitutions and the rest of us just put up with it.

It concerns me somewhat. I am not at all sure this is legal. I admit they are all properly elected as the premiers and the Prime Minister of the country, but I do not know where they draw their source of power from for putting in place constitutional changes of this scope.

If the big bluff works and this routine floats through all the legislative assemblies in the country with nary a ripple, no one will be able to complain, but it seems to me they admit they did not have the authority to do that. Otherwise, why are we here and why will there be a vote in each of the assemblies across the country? Have you noted, in your opinion, how legit this process is?

**Dr. Behiels:** Executive federalism is not something which is new. After the Second World War, particularly by the 1960s, the first ministers met on a recurring basis, discussing a wide range of items from the economy to other aspects of Canadian society such as social welfare programs and pensions. The list became longer and longer as society became more complicated. As governments did more and more, there were conflicting jurisdictions. They had to sort out those programs.

When you enter into the process of constitution-making, it is a very different ball game. It is a different subject matter entirely. I think you are right in a sense, that perhaps not legally but in conventional terms Canadians should stand back and say, "Executive federalism is fine for some things, certain categories of problems that have to be resolved between provinces and Ottawa."

But when it comes to making the first law of the land, the rule book, so to speak, that will guide our lives and the lives of our children for generations, perhaps we should say, "It is not something where you simply allow 11 men to go off for a weekend and say: 'Here it is, boys and girls. This is yours and you really cannot change

an i or cross a t or whatever on it. That is it. It is a fait accompli. You can talk about it all you want. You can grumble about it and groan about it, but that is it. You have got it and unless you can kick us all out and replace us and do the same thing we did, you really do not have any alternative.”

When it comes to constitution-making, I think you are right. We are in a jam here. We have to go back and consider very seriously how we go about this. I do not think we can afford to do it every year because, if we do, people like myself are going to be awfully tired and people like yourselves are going to waste a lot of time and energy when that time and energy should be better spent doing other things.

**Miss Roberts:** I will be very brief. Thank you for your presentation, doctor. I, too, am interested in the process. From what you are saying, I would suggest you do not think the Meech Lake accord can be made legitimate.

**Dr. Behiels:** No, I did not say that at all. I said, “Get back to the table after having an enormous amount of input.” I have followed the whole procedure from day one. I have read most of the briefs to the joint committee. I have read most of the briefs to the Senate. I am trying to keep up with what is happening in front of this committee. I have tried to follow what is going on in other parts of the country. I think there has been enough debate, and by the time more hearings are held in New Brunswick and perhaps in Manitoba, I think the first ministers will have ample evidence as to what they should be doing and the kinds of changes that this document at this point in time should undergo.

As to what we do in the future, I think they should also put, as a first item of any future constitutional conferences, how we prevent this kind of disaster from happening again.

**Miss Roberts:** But the changes you are suggesting are so fundamental and are dealing with so many other things that have been dealt with in the Meech Lake accord, that when you were finished that process, it certainly would not be a Meech Lake accord. You are not just going to rearrange some of the words. You are suggesting a very fundamental change, more things being introduced and a much more extensive or a much less extensive change in the Constitution or in the 1982 act

**Dr. Behiels:** The heart of the Meech Lake accord is the Quebec clause. That is why they got together. I think it is now understood by a lot of people that in order to make that clause acceptable and in order to make it work for all parts of the country, for the linguistic minorities

as well as for, of course, the French Canadian majority in Quebec, there has to be some rewriting of that clause. If you begin with that and you get that right, then the other matters can be sorted out. Western Canada will want to have some sort of redrafting of the clause on the Supreme Court, rather than having this kind of interim measure. They will say: “Let us start right now. Let us not put it off indefinitely and perhaps never get any kind of genuine reform of the Senate.”

There is no doubt that what I am talking about are some fundamental changes to the accord, but I feel the accord is so flawed that to allow it to go through is going to create, for a long time, a protracted constitutional debate which no country can endure indefinitely. Before we really do that I think we want to say, “Let us get back to the table.” If they cannot resolve it in one meeting, fine, have another meeting, but get it right or as right as you can get it under the circumstances. This is not ordinary statutory legislation. This is putting into place the Constitution of the country and because of that you have to take a far greater amount of time, energy and caution.

**Miss Roberts:** No further questions.

**Mr. Allen:** It is a pleasure to have Professor Behiels with us to give his analysis of the Meech Lake accord. Like him, I certainly have some questions about process and I have some questions about aspects of the accord. He has fielded many of those issues as a kind of trailer to the main concerns, which are the “distinct society” sections, the dualism section, the first part that addresses the issue of Quebec. It is principally around the problem of whether this does not field a totally different vision of Canada than one he is sympathetic with and that many others have fought hard to accomplish.

What I want to ask him, though, is whether it really is as apocalyptic as it all sounds and whether it is not possible to read that language in other ways. One says, “Mr. Bourassa will do this,” and, “The Quebec government may do that,” without at the same time putting alongside that the fact that there will be the Supreme Court; there will be references to the court and court challenges all the way up and down the line.

There is the possibility of issuing challenges on the basis of what it means to preserve the linguistic duality of Ontario, for example. Does that in fact mean, as l’Association canadienne-française de l’Ontario said to us, that there will therefore simply be the preservation of museum pieces in Ontario, or does “preserve” really mean that preserving is a positive form of action. When



the courts come to decide what is meant by the promotion of the "distinct society" in Quebec, it will not necessarily, finally, be Mr. Bourassa's view on that, or even Mr. Parizeau's view, that will determine the court decisions.

If the courts decide that the promotion includes also the promotion of the dualism of Quebec society, if it presumes that the promotion also is the promotion of a province that already has the strongest human rights legislation in the country, if it presumes the promotion of multilingualism such as it exists in the context of a predominantly French society or French language culture, then is one not moving in quite a different direction than you are suggesting, namely, in the direction of the two-nations theory, the two unilingual blocs? Is one not really still talking in terms of a bilingual concept of the nation, both bicultural in a big sense and multicultural at another level? Is it not possible to read this thing in a rather different fashion than you are presenting in, I think, perhaps, too strict a fashion?

**1500**

**Dr. Behiels:** Yes, Mr. Allen, I think it can be read in other ways. There is no doubt that those people in Quebec in the situation of being either linguistic minorities or ethnic minorities are going to make a very strong attempt to try to read and have the court read that clause in such a way that it does not jeopardize unduly their situation. But the courts, you have to understand, operate in a political context, in the context of a political culture, in the context of a political debate.

There is no doubt in my mind that the present Quebec government of Robert Bourassa and Gil Rémillard and others will push very hard to have the courts interpret this document in such a way as to give the Quebec government enhanced powers to preserve and promote the development of the French-speaking majority of that province. That is very clear. If you read what they had to say before the Quebec commission on the Meech Lake accord, if you hear what they had to say to the national assembly, if you read what they have been saying and what has been written about their statements in the press, that is really, as they see it, their mandate. They will set their lawyers, and a great many of them, to the task of ensuring that the Supreme Court interprets this document in just that way.

There is no doubt that there are going to be a great many other groups in Quebec and in other parts of Canada who will also go before the Supreme Court and this will drag on indefinitely, case after case. Of course, he is waiting now for the shoe to drop on the question of bilingual signs

and Bill 101. If the courts rule against the Quebec government on that question, the scenario, as I see it, is either to invoke the "notwithstanding" clause or, in fact, when the Meech Lake accord is ratified, to introduce amendments to Bill 101 and then push them right through the court system or wait until they are challenged by others and see them right on through to the Supreme Court, where they can make the argument this time around on the basis of the Meech Lake accord, hoping then, of course, that their Bill 101, as they design it, will stand.

This will lead, I think, to long and protracted constitutional debates within the judicial system. I am not sure, again, if a country can endure that kind of constitutional guerrilla-style warfare between the provinces and Ottawa. I do not think that is healthy.

**Mr. Allen:** Can I simply ask you, then, if one puts it in that political context, is that debate not going to go on anyway? You just said if Bill 101 is in certain portions struck down by the Supreme Court, if the "distinct society" language is not there, if the Meech Lake accord is not at hand to refer to, none the less, the minimum ground in the most moderate party in Quebec at this time is such that, without contemplating even a move towards a future Parti québécois government, the debate is there, the political pressures are there, the demands are going to be there.

That brings me back to my question. Is there anything then really that is essentially apocalyptic or that fundamentally changes that situation in the Meech Lake accord?

**Dr. Behiels:** The point I am trying to make is that we have had this debate now; I have taught it for almost 16 years, and I have studied it for 20 years. I think it is about time we bring the debate to an end rather than simply feed it. I think the only way to bring the debate to an end is to have very specific, nonambiguous, clear and precise clauses in the Constitution that will help Quebec do what it wants to do; that is, preserve and promote the development of the French-Canadian society in that province and in other parts of the country equally well.

In effect, we want to avoid prolonged debate by making sure that everyone is not going to challenge it indefinitely in the courts. We do not want that. We want a Constitution that is clear, that people understand and that addresses and resolves specific problems, not one that can be used by any incoming Quebec government—and it could be a Parti québécois government once again—to exercise through the Constitution this time, not through the ballot box or through the

democratic process but through the courts, a kind of leverage on the rest of society which will create political and social instability. We need something more precise so that it is not challenged at every turn of the way by some group in society.

**Mr. Chairman:** Thank you very much, Professor Behiels. Our next witness is going to have to catch a plane a little before four o'clock, so I have asked Mr. Offer if he would stand down at this point. We thank you very much for preparing your paper and for coming here this afternoon and sharing your thoughts with us. We thank you once again.

**Dr. Behiels:** Thank you very much.

**Mr. Chairman:** I now call upon Professor Bradford Morse of the faculty of law at the University of Ottawa. Please come forward. I appreciate that you have some airplane problems, so without further ado, welcome and please go ahead and make your presentation; we will follow up with questions.

#### BRADFORD MORSE

**Mr. Morse:** Fortunately, my flight is not at four, but I will have to leave before then in order to get it. It is one of the joys of Air Ontario being out on strike; there are very few flights into Sarnia these days.

Let me begin by thanking the chairman and the other members of the committee for the opportunity to appear before you today and express my personal views on the so-called Meech Lake accord. I think you have in front of you a copy of my presentation; so I will just kind of dive right through it. Please excuse a few typos, but my typing skills are perhaps not what I would like them to be.

I have been a participant in what I think could be called the constitution-building experience in this country over the years since before the Constitution Act, 1982, in a particular capacity, namely, as a legal adviser to different Indian and Metis groups and particularly with the Native Council of Canada in the last few years.

I mention that for a couple of reasons: first, to give you some idea that my background has involved a fair degree of exposure to these issues both from the outside looking in and on the inside, in the conference halls, in the back rooms and so forth, seeing the good aspects of constitution-building and some of the perhaps less savoury ones; second, to indicate perhaps that my views therefore come from a particular perspective; and finally, because I do want to make it very clear that I am appearing before you

today in my personal capacity, presenting those views and not those of any aboriginal group with which I have been associated.

I particularly stress that last point because the Native Council of Canada is going to be appearing before you tomorrow. I have had the honour of appearing with them before the joint committee of the Senate and House of Commons and, more recently, the Senate committee of the whole last December. They will be presenting the official position of the Native Council of Canada in reference to their constituents, literally tens of thousands of Indian and Metis people off reserves, which includes the constituents in Ontario of off-reserve aboriginal peoples.

Let me also indicate that I have referred to "the so-called Meech Lake accord" deliberately. The reason for that is not merely a legalistic one but rather to try to emphasize what I think is a rather important distinction; that is, the distinction between the accord that was reached last April at Meech Lake—which was not quite Bob and Doug and the boys going off with a couple of cases of Molson's, the image of which was raised by one of the earlier questions.

#### 1510

Nevertheless, at the meeting of the first ministers that did take place at Meech Lake on April 30, an accord was reached, an accord which I think was applauded by many Canadians at that time, and I understand with good reasons. In the amendment proposals that were reached in the early morning hours in the Langevin building in Ottawa in June, we have now replaced what perhaps was once called the cannelloni accord in late 1981 with the early-morning Langevin accord. Prepared in haste by a tired group of men and, I should add, one woman, it has somehow become rather sacred and untouchable.

I would like to focus in on the language of the actual draft.

**Mr. Chairman:** I have one question. You have introduced a completely new concept. You say there was one woman?

**Mr. Morse:** Yes. There were 11 first ministers, but there were two other people in the room.

**Mr. Chairman:** I see.

**Mr. Morse:** The official authorship, perhaps, might be dubiously directed to the male side of the species, but there were two senior officials, one federal and one Albertan, who were present in the room as well, and therefore, women were—if one could use it in those terms—present if not represented around that table. That might be the most apt way of putting it.



This accord, or the actual amendment language as well, has been described by many first ministers as essential because it is stated to be needed to satisfy the Quebec government's demands in order for it to accept the 1982 Constitution. However, it does contain constitutional amendments that were not sought by Quebec.

It has been called untouchable because of some fear that it is almost as if it is a magical beast that will unravel or evaporate if even one minor change is made. I confess, perhaps somewhat following along the lines of the previous speaker, I have a great deal of concern as well in envisioning that those amendments to our Constitution—which is, after all, the supreme law of the land, has always been seen as such and clearly declared to be such in the Constitution Act of 1982—could rest on such a shaky foundation as to be subject to unravelling with even the most minor of amendments. In fact, I think our own experience in developing the Charter of Rights and Freedoms in late 1980 through 1981 demonstrates that compromises and negotiations are possible when a positive spirit is present.

My fear really is that the first ministers have labelled it as untouchable because they cannot themselves justify certain parts of it. They do not wish to explain each important component of the amendment package, as some aspects of this politically inspired deal, I think, cannot be satisfactorily substantiated. I just do not think they can be justified to the Canadian public.

It is far easier, therefore, to present it as a package, as an entire whole, and then describe it as something which Quebec demanded, thereby suggesting that it cannot be touched, it is unnecessary to pull it apart and look at it piece by piece, because if we pull one string, the entire fabric will become unwoven.

The specific issues I would like to address are as follows: the "distinct society" clause; what might be characterized as some of the northern provisions or those provisions that affect people in the north; and the question of future reform, particularly one clause that I fear may not have received quite as much attention before the committee, and that is the nonderogation clause.

Let me begin by addressing the aspects of the Langevin draft which I think disclose an obvious southern bias and prejudice, the clauses that would not have been negotiated if the territorial governments were present and clearly were not the kinds of proposals that were coming forth

during the first ministers' conference process that culminated under part IV on March 27, 1987.

These are the provisions that I think violate standards of fairness that Canadians have had for a long time. Our history, of course, is one that has always demonstrated a southern and eastern bias; in fact, a bias in favour of white European settlers. Colonial boundaries since before 1867 were pushed northward in this province, in Quebec and in British Columbia so as to absorb lands in which the majority population was Indian and Metis. Since Confederation, we have continued this process, which, from an aboriginal standpoint, is seen very much as a land grab; grabbing territory in the sense of trying to get the natural resources attached to it and also in the sense of trying to impose provincial control over those regions.

In no case of which I am aware were the local residents ever consulted, were there ever legislative committees of this nature that travelled into their territories, let alone were they ever given a decision-making voice. Instead, these were decisions taken by southern, urban-driven governments, whether in the colonial context or in the post-Confederation context of governments based in Quebec City, Toronto, Winnipeg and Victoria.

Likewise, even when we created the provinces of Alberta and Saskatchewan, we never went to the population north of Edmonton and Prince Albert and asked them if they would like to be included in these provinces, if they wished to have those provincial boundaries drawn up to the 60th parallel. The final example, of course, would be the residents of Labrador, again, predominantly aboriginal.

If we had actually drawn our boundary map somewhat differently, we would see a string of 10 much smaller provinces to the south, which would still consist of the vast majority of Canadians. We might then see a number of other provinces such as northern Ontario as a province of its own, which still would be below the 60th parallel, but in which the population makeup would be quite distinctly different from the population makeup of the province of Ontario as it stands today.

The proposed amendments will entrench what has already been a somewhat undemocratic experience of northerners since 1982 and will entrench that even more so in the future.

There are two elements to this issue. I know you have already received complaints from governments and northerners about the institution of further obstacles. I suggest this is not just

an issue of concern to northerners. We might say this is an Ontario select committee; that is a problem for people in the north or perhaps a problem for the federal government, such as the Senate task force report that has now come out specifically on the north. But I think this in fact speaks to a concern of Canadians generally, that is, a perception of fairness about changes to the Constitution, changes that will affect us all.

I confess I have some difficulty in seeing what could possibly be the basis for demanding unanimous support from all 10 provinces for any proposal that is ever endorsed by the government of Canada in the future. It would create one, two or perhaps three or more provinces out of the territories that are currently territories, currently subject to exclusive federal jurisdiction.

Why should we, in 1988, while making amendments to our Constitution, especially when we are championing the rights and freedoms of all Canadians through a charter enacted a mere six years ago, be declaring residents in the north second-class citizens, particularly when we have no history in Canada of doing this? We did not do it with Manitobans in 1870, we did not do it with people in Saskatchewan and Alberta in 1905, yet all those are examples of provinces that were carved out of what we still call the Northwest Territories.

How do we explain this today? How can we justify that, not only to northerners but to other Canadians? I fear it suggests, perhaps, that the premiers wish to keep the first ministers' club closed only to the current members. This is a new club in constitutional terms. It did not exist prior to 1982 in any official terms. It was created in fact by virtue of part IV of the Constitution, namely, the aboriginal constitutional development clause. That is the first reference in our constitutional history to first ministers as such—in fact, to the Prime Minister or premiers.

Now that it has official existence—that existence expired on April 17, 1987, and it seems, within a mere two weeks, the first ministers wanted to preserve their existence as such and we now have proposals that will entrench their existence for evermore.

The draft amendments also allow the existing provinces to resume this earlier approach of expanding their boundaries, even at the expense of the wishes of the residents of the territories. Why do we add such a clause today? Is there a province today that is anxiously coveting part of the Northwest Territories or the Yukon that really wants such an amendment as this to be included?

Is there some desire of such? Clearly, no first minister has come forward to say so.

## 1520

Nevertheless, these two provisions are present among the amendments. Even if no first minister has publicly justified them, nor has any first minister really publicly claimed authorship of them, they are present. They are not present at the request of the province of Quebec, but they are present. If no one will stand up to support these two provisions, then they should clearly be removed.

The territories, of course, suffer in other ways. There is at least one I can relate to very directly as a lawyer. However, let me suggest this is not exclusively a lawyer's concern. Under the constitutional language as it is drafted at present, lawyers from the Northwest Territories and the Yukon bars are eligible for appointment to the Supreme Court of Canada. There has been some misunderstanding by some witnesses or some reporters to suggest that lawyers from the north are ineligible for appointment to the Supreme Court. They are eligible.

The difficulty, however, is that the nominees come from lists of the premiers. I find some difficulty imagining that Premier Peterson would choose to say: "There is no lawyer competent in the province of Ontario. I am instead going to nominate a lawyer from the Northwest Territories or the Yukon for consideration." Practical politics and provincial pride being what they are, it seems a little bit difficult to imagine that. As such, therefore, lawyers, although eligible, would never appear on the lists of nominees for appointment to the Supreme Court.

Again, this has been suggested by many to be an oversight. In part, it has been rationalized by some, such as Professor Hogg, by saying, "Look, we have never had a member on the Supreme Court from the territories in the past." If it is an oversight, then let us correct it, as has been proposed by the special joint committee and most recently by the Senate task force.

If we choose to rely on past practice and that is our criterion, then in 1981 we would have said that future appointees to the Supreme Court of Canada should only be men because there have never been any women on the Supreme Court. If that had been the case, we would no longer be able to benefit from the presence of Madam Justice Wilson, a judge from the Supreme Court of Ontario and Court of Appeal before being elevated to the Supreme Court of Canada in 1982.



Territorial governments are also precluded from creating lists of Senate candidates to fill vacancies in their respective seats. In other words, what we have done is to modify the status quo regarding Senate appointments modestly to say, "There are 104 senators and 102 of them will be drawn from lists generated by the provinces, therefore ensuring perhaps some level of provincial representation outside the exclusive control of the federal government"—or as some cynics would suggest, just simply sharing the power and patronage that had been the fiefdom of the Prime Minister with 10 other first ministers—"but we will not do that for the other two seats."

This again is not an earth-shaking provision. It is not likely to cause people to demonstrate in the streets or riot in front of the Senate—or wake up the Senate, as some might suggest, by such protests—but I think it does have a symbolic effect. The message it gives to northerners simply is that they do not count. Where we wish to stress Arctic sovereignty, then we will point to northerners. When we are concerned about resource development in the north, we of course then pay attention to it. But otherwise, it sends an image that northerners just are not welcome to participate on the same terms as other Canadian citizens.

The governments are duly elected by northerners. Granted they are not provinces, but they still will not be able to participate in the same way. We are not talking about provincial power here really. We are talking about inviting premiers to be involved in the selection process of appointments to the Senate.

I confess that last summer, when I saw these clauses, I was feeling perhaps in a charitable mood or just regarded these as functions of sloppy drafting, of tiredness, of people being locked in a room and denied bread and water until they agreed to sign, but I confess I am less charitable today. If this was a function of poor drafting, and I think in many ways it probably was, we might expect the first ministers to appreciate the outpouring of complaints and say: "We never intended that. We are prepared to rectify it."

That has not been the case. The first ministers have met. It is not as if they have not spoken to each other by phone. For that matter, they have met since Meech Lake, since Langevin. We have had a first ministers' conference on the economy. The suggestions have been discussed in the hallways but, nevertheless, the official position from the Prime Minister and a number of premiers is that they refuse to reopen it. That,

from a northern standpoint, suggests either that these flaws were premeditated and are not flaws but were intentionally instituted, or it again reflects a rather complete disregard for the people of the north.

Of course, the people who were slighted most by this process are the first peoples, the original or aboriginal peoples with whom I have had the good pleasure of working over the years. Needless to say, they are the ones who have really set Canada apart. They are the people on whom we rely for our foreign demonstrations of our uniqueness. We acknowledge their presence whenever visiting dignitaries are given gifts of Canada; they are so frequently given gifts that are, in fact, really gifts of aboriginal art.

They are the people who have devoted years of energy in this constitutional process. They are the ones who in fact had extensive negotiations before the joint committee in 1981, who participated in a fairly broadly based, careful, long-term drafting of the new Constitution. They are the ones who also had the experience of having a victory snatched from their hands by, again, 11 first ministers meeting in this city. That is why many aboriginal people are starting to become angrier and angrier whenever they think of Ottawa.

It has not been a happy place in constitutional terms for them, because these 11 men, sitting around a table in this city, deleted the first provisions that would reflect aboriginal peoples and their rights. In fact, we must remember that is why Quebec felt left out of the Constitution Act, 1982. It was a deal struck late at night that brought six of Quebec's then allies across to the other side, and the price of admission for that was to drop the provisions regarding aboriginal peoples and equality rights. We know those provisions made it back in, but they did not make it back in on the same terms as they were originally present.

However, aboriginal people continued to believe in the Constitution-building process. A first ministers' conference process was established—as I have alluded to, this is the first such constitutionally mandated first ministers' conference process in our history—and created the process in constitutional terms. It had existed in the past by political agreement but never by constitutional requirement. That process began, as you know, in 1983, led to some minimal success at that time, led to the first amendments which went through the provincial legislatures, all with the exception of Quebec, interestingly

enough without hearings of this scale, because they were seen as so uncontroversial.

They continued that process for three more attempts, unfortunately without significant success. Despite dozens of officials' meetings, ministerial meetings and then four first ministers' conferences, in the final analysis the first ministers were unwilling to agree with the proposals of the four national aboriginal associations.

What has infuriated aboriginal people somewhat further is that, of course, within a mere 33 days of the last first ministers' conference they were at, the Meech Lake accord had been struck. In fact, they discovered that while they thought they were the only agenda item in first ministers' conferencing, the Quebec demands were very much on the agenda, and separate, secret meetings were taking place at the officials' level without aboriginal involvement.

The effect of this is to leave aboriginal people feeling somewhat betrayed. They were told many times at their conference table that their demands could not be acceded to because they were not understood. I find it hard to believe that the first ministers, when they walked out of the Langevin building early that morning, could have stood before a committee such as this and articulated in detail what the meanings were of the different clauses in the so-called Meech Lake accord. Nevertheless, they were prepared, of course, to sign that deal without years of work, without careful, close scrutiny. Not so for aboriginal proposals.

Obviously, that suggests some differences, differences that emanate from the different status of Quebec, but also emanate as well from the fact that what we have here to a degree is a bit of a power grab, the results of a power grab. As I mentioned earlier, there are provisions here that were not sought by Quebec. Thus this proposal is not solely an attempt to meet Quebec's concerns. It is, again, meeting the price of some other premiers for their endorsement; the kind of thing that was done back in November 1981.

**1530**

I think what you have already heard from some aboriginal groups and will continue to hear from others are their concerns both at a legal level and a symbolic level. The "distinct society" clause does raise concerns. It raises concerns specifically, I think, for aboriginal people because of its implicit message rather than its explicit one.

The "distinct society" clause does not explicitly say that Quebec is the only distinct society, but by virtue of being the only one that is defined as

such, it implicitly suggests that no other group or society in Canada is distinct. Some of that lovely little legal advice you have received suggests that the Latin phrase "*expressio unius est exclusio alterius*" means that as soon as you express one thing, you, in effect, exclude others. That, then, perpetuates what from an aboriginal perspective is a two-founding-peoples fallacy and not exclusively from the aboriginal peoples' perspective, either.

The concern then is not so much that section 2 may have great legal effect; after all, it is a rule of interpretation. But then again I must hasten to add, as a lawyer, one can never predict how any statutory provision will be interpreted, let alone a constitutional provision. We will only know once the Supreme Court of Canada tells us, and even then it will be telling us its view of that constitutional provision at that time. It is subject to alternative interpretation by the Supreme Court yet again at a later date or a later generation.

My suggestion is that the effect here is very clearly—at least on an immediate level, immediate terms—on a symbolic level. It is giving a message across to aboriginal people that they are not a distinct society. It is suggesting as well to other cultural groups in this country that somehow they are not founding, they are not distinct. The presence of the clause defining Quebec as a distinct society does not really provide concrete expression to Quebec's concerns about preserving its integrity and uniqueness. Those become more immediately realizable through other provisions in the accord, through constitutionalizing what has been a convention of having three appointees on the Supreme Court of Canada, but now giving the province of Quebec control over those appointees; the change in the immigration provisions, the change in the financial compensation provisions and the shared-cost provisions. But for all other Canadians, seeing Quebec as a distinct society, seeing English and French speakers as "a fundamental characteristic of Canada" gives a bit of a slap in the face to them.

The accord also suggests in section 16 that there is a protection here, nothing to worry about. The protection to the "distinct society" clause will not be interpreted in a way that would run afoul of multicultural heritage or that would run afoul of the rights of aboriginal peoples. This is, unfortunately, not a clause that was carefully or well drafted. It is inadequate at eliminating what I think is a sense of outrage for many who feel explicitly omitted by the "distinct society"



clause, but I think it also fails to accomplish in law what it set out to do.

By specifically attempting to exclude the "aboriginal peoples" clauses and the "multicultural heritage" clauses, it raises the possible interpretation that all other provisions within the Charter of Rights and Freedoms are subject to the scope of section 2. So, again, by specifically excepting something, you raise the inference that everything else is covered or is subject to section 2.

Furthermore, by exempting the multicultural and aboriginal peoples clauses only from section 2 within this package, you raise an inference that those clauses have expressly somehow been changed by all of the other provisions in the Meech Lake accord, such as, for example, the national cost-shared program.

I think at this stage it is rather distressing for aboriginal people and for many other Canadians, such as myself, to see where we are ending up. Some would suggest that section 50 preserves the possibility for what is now really a third round, rather than a second round, of constitutional change, but here too I think we have a mistake.

Section 50 guarantees that we will have constitutional conferences each and every year, even if it may be ludicrous to think of having such conferences in each and every year for evermore, on into the 25th century. Presumably, if the first ministers ultimately become overwhelmed by this experience, they may seek to amend and delete it. But until that time they will meet each and every year. In fact, by accord, they have agreed to meet by the end of this year. Whether the Meech Lake amendments are in place or not, we have a political agreement to have a constitutional conference by December 31, 1988.

In the future they will be meeting again each and every year. The Senate reform and control over fisheries are on the agenda, year after year after year, and what is suggested is "such other matters as are agreed upon." This is one of these lovely phrases that leaves open to great legal debate, one legal opinion versus another, what it really means.

One scenario that I fear may well be correct is that a court will conclude that "agreed upon" means agreed upon by the first ministers. Namely, the 11 first ministers decide what will be other agenda items. If that is correct, as I fear it is, then the promises of first ministers to aboriginal peoples and to others that their agenda items will come back before the first ministers for future discussion is a false one. The only way that

can occur then would be through unanimous consent of all first ministers. Several have indicated very clearly that they have no desire to see that occur, now or in the future.

If that is the case, then what Ontario will be saying, in effect, when it passes this amendment, if it does, is that it is intentionally closing the door on future reform of the Constitution as far as aboriginal peoples are concerned.

There are clearly other provisions in the accord that have caused a concern for many Canadians, particularly those concerned about erosion of federal authority, but I think perhaps I have gone on long enough at this stage.

Let me just suggest to you that you have two options at this stage. You clearly can seek amendments in the proposal as at present. There is an alternative option, which is far too little understood, and that is that you can ratify the package as it stands now but introduce simultaneously a separate resolution which seeks to make the amendments.

If first ministers say, "We can't touch the agreement that was signed because of fear that any amendment will cause it to disintegrate," surely that explanation would not stand up to close scrutiny so as to prevent the Legislature of Ontario from initiating subsequent constitutional change through a companion or separate resolution.

Thank you for your attention.

**Mr. Chairman:** Thank you very much, Professor Morse. You have touched on a number of aspects. I wonder if I could just ask you, first, to expand a bit upon your last point. I think you are the third or fourth person who has raised the question of a separate resolution, and this has also come up, I believe, shortly after his election, when Premier McKenna, in an interview in *Le Devoir*, talked about that aspect. It was the association of Metis, I believe, that raised it specifically before us several weeks ago. I know it has come up another time.

Could you just set out in your mind how that would work and perhaps put some flesh on the bones there, because it is one that is interesting?

1540

**Mr. Morse:** Surely. This is actually an idea you will hear more about tomorrow from the Native Council of Canada. It is one that the Native Council of Canada dreamed up last summer in trying to assess what are the appropriate responses to the Meech Lake accord, given its dissatisfaction with it.

It really simply suggests that, by virtue of the constitutional amendments that were made in

1982, we do now have something of a new ball game. Prior to that time, constitutional change occurred through a variety of different means, but it always occurred by the informal arrangements of first ministers. There were no clear, concrete rules. The Supreme Court of Canada, as you know, in the reference case in 1981, suggested that perhaps there was a convention that had coalesced. It was not entirely clear on what it might be.

The amendments in 1982 give us a precise amendment formula or, in fact, several such formulae. What they suggest is that amendments can occur. The precise procedure is for the Great Seal to be given once a resolution has passed the Senate, the House of Commons and the appropriate number of legislatures.

They do not say how one gets to that point. They simply say that once one is there, the Governor General can issue the Great Seal. The interpretation that I have put upon this clause—and I have discussed this with many other constitutional experts and they agree—is that this process can be initiated in one of several ways. We have seen one such way to date: the first ministers' conference process with the first ministers agreeing, drafting a text, signing it and then promising, in a companion accord, that they will take this forth and go where with it—to their legislatures and to the Parliament of Canada where they will introduce it as a resolution?

The second way in which this can proceed is for any one of those legislative bodies, such as the Legislature of Ontario, to initiate a resolution at any time. If that resolution passes the province of Ontario and then passes the requisite number of other provincial legislatures, the Senate and the House of Commons, then a Great Seal would be issued, i.e., an amendment would occur without a first ministers' conference ever being held.

In fact, when it comes to amendments that would affect aboriginal peoples, there is a special little wrinkle, and that is by virtue of one of the amendments that was agreed to in 1983 and implemented in 1984. That is section 35.1. What it suggests is that whenever there is a constitutional amendment that is being discussed that would affect the clauses in the Constitution regarding aboriginal peoples, then there must be a first ministers' conference to which they are invited. That, too, suggests that there is a mechanism other than the first ministers' conference process. My understanding is that the official legal view of the government of Canada

is that this is available, or their view is that this opinion is the correct one.

What I am suggesting is that the Legislature of Ontario could tomorrow, if it wished, introduce a resolution on any constitutional provision. It then becomes really the political question of, "Will there be enough support among the requisite number of other legislatures in the country for that amendment actually to come into existence?" But that is clearly a possibility.

**Mr. Chairman:** Thank you very much. I have Mr. Villeneuve.

**Mr. Villeneuve:** I have a quick supplementary on that companion.

**Mr. Chairman:** OK, a quick supplementary, then Mr. Villeneuve, Mr. Breaugh and the chair.

**Mr. Villeneuve:** On the companion resolution, is there any breach between the matter at hand and the companion resolution? In other words, the matter at hand does not proceed, pending disposition of the companion resolution?

**Mr. Morse:** Yes, if you were to initiate a resolution, let us say, of companion amendments, obviously you would have to draft them in such a way as to be independent of the Meech Lake accord or to be supplementary. They could not be drafted, for example, to repeal subsection X of the Meech Lake accord, to pass today when you have yet to pass your resolution on the accord itself.

However, you can initiate resolutions that address the specific concerns perhaps without referring to the language of the other accord. So you have the effect of accomplishing that objective. If you wish to amend specific wording in the Meech Lake accord, I think you have to do that as a resolution which is passed subsequent to the Meech Lake accord. But it can be immediately, five minutes afterwards or five months afterwards; it is really a drafting question.

**Mr. Villeneuve:** Professor Morse, you make a very interesting presentation. Under the "distinct society" clause—and I am not learned in the law—I would like you to let your mind ramble a bit and present us, knowing how legal people operate and maybe how some of your peers in politics operate, with what might be a case scenario. With a "distinct society" in Quebec, where does this end, in your opinion? Does it go on from simply linguistic and cultural; just how broad is that?

**Mr. Morse:** One of the challenges when one is dealing with new constitutional language is that no one is learned in the law, so one has lots of



company. What that refers to simply is that the language used here is undefined; it is vague. I clearly would not attempt to tell you that this is the only meaning the "distinct society" clause could have. What the first ministers had in mind when they met at Meech Lake or what they had in mind when they met in the Langevin building is ultimately rather irrelevant. First, we do not know; second, it will be for the courts to decide. They are the true arbiters of constitutional language.

Section 2 speaks to it being a rule of interpretation. It grounds it in the 1867 Constitution. This, in and of itself, may perhaps surprise people a little bit just in practical terms when you say: "What do you mean you are putting it in the 1867 Constitution? Do you mean you are retroactively making Quebec a 'distinct society' or something of that nature?"

It is just an attempt to suggest that when one interprets the 1867 act as opposed to the 1982 one, one would look at all the other provisions in the light of this principle that Quebec is a "distinct society, that English speakers and French speakers are a fundamental characteristic of Canada. In other words, one then turns to section 92 and analyses the provincial powers and asks: "There is an administration of justice power that has been there all along. Has that changed in some way? Has the province of Quebec now got an expanded jurisdiction?"

Frankly, I think not. I think what the courts will do with section 2 is simply say that in trying to interpret the validity of any statute promulgated by the government of Quebec, they will apply the constitutional law as it has been until now, a federal-provincial conflict, interpreting the language that is present in the 1867 act as amended and just keeping this principle in mind, that Quebec is a "distinct society."

In other words, I am suggesting that I personally do not believe the presence of this clause is now going to allow Quebec to enact laws it could not enact before. If we were trying to determine whether Quebec had any ability to pass a language law at all under section 92—could they do that?—we would say to ourselves: "Gee, when we look in those clauses in section 92, there is nothing there that says specifically they can pass language laws. It comes in under education and in other contexts but not under the normal section 92 powers." But you would look at section 2 and say: "There is a principle here—Quebec is a 'distinct society'—the principle of English and French language its importance in the country, therefore we will interpret the

general language in section 92 so as to conclude that Quebec could do so."

But it still really is that you are using it to try to interpret section 92. Did the province have power over culture before? Yes, it did. Did it have power over education before? Yes, it did. Language? Yes. The courts have said those things to date, so I think that if one were today asking the question, for example: "Who has control over television? Should this be a federal power or a provincial power?" Sections 91 and 92 do not tell us. There was no TV in 1867.

We might be asking that question with section 2 in mind and we might conclude that television was a provincial jurisdiction. I think the impact of section 2 is likely to be in terms of future questions where we have not yet allocated responsibility to one level of government or the other; but in terms of affecting our status quo, I frankly do not believe it will have a significant effect.

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**Mr. Villeneuve:** But it does recognize and enshrine in black and white that they are a "distinct," unique, special province or society, which was not there before.

**Mr. Morse:** Frankly, I think the effect of section 2 is to try to elaborate in the Constitution what had been there before. If one had looked at the Constitution last year and asked, "Is Quebec distinct or different or treated in some way different from other provinces?" the answer would have been yes. There have been provisions all along, since 1867, which have distinguished between Quebec and other provinces. In fact, we go back to the creation of the colony of Upper Canada in 1791. We chose that Ontario, or Upper Canada as it then was, would be different from Lower Canada. Lower Canada was treated differently in 1774 with the Quebec Act being passed, so we have a long history of seeing it as different from other provinces, a civil law province instead of a common law province etc. I think we would have said, "Yes, it is distinct."

If section 2 was not an interpretative clause and if it said, "The province of Quebec now has constitutional power to enact laws to make Quebec more distinct or to preserve and protect Quebec as a 'distinct society,'" in other words made this an enabling provision, a power-granting provision, then I think we would be making a significant change. The courts would have to read into it that things were different. Where it is an interpretative clause, I do not believe the courts will ignore it by any means, but they will use it where there is some debate about

how far provincial power extends. That is going to be in new debates rather than rearguing the old ones.

**Mr. Villeneuve:** This is the beginning of many debates. Thank you.

**Mr. Morse:** That there will be.

**Mr. Chairman:** Professor Morse, just before turning the mike over to Mr. Breagh, I assume you will leap from your chair when you feel you have to escape to your plane.

**Mr. Morse:** Fine.

**Mr. Breagh:** One of the concerns you have noted in here, frankly, I am rejecting. I was a little worried that maybe these guys got a little tired and hungry until I saw their catering bill for the evening was seven grand, so I think they did all right.

**Mr. Morse:** They may have been tired but not hungry.

**Mr. Breagh:** They were not hungry, that is for sure.

I do not think there were any mistakes made in here. I do not think there was any word chosen that was not carefully thought out. This is not exactly a document that is chock-full of radical new ideas. These are all old ideas that have been introduced and discussed for some time. They had a chance to rethink the wording before it was finalized and I believe there is evidence to indicate they did just exactly that. I do not buy any of the arguments that say: "Oh, we forgot. This was just an oversight. We did not think the Northwest Territories existed any more," or whatever. I believe the document has to be taken as is; and I really do not have a whole lot of worries about that provided a number of other events can take place, like the companion resolutions if they can be worked out, and we have several interesting suggestions about what they might look like.

We have had suggestions about referrals to the court to establish whether the charter is ruined entirely or not. It seems to me, as one who is halfway through a hearing process on this, that this deal was, and you cannot get away from it, done in secret by 11 men. In fact, the way governments work it was not quite that casual. It was not done on the back of a cigarette pack. It was done in a more formal way and there were hordes of bureaucrats outside the doors drafting little words on how one might do all this.

I am not as fearful as some might be about what I would consider to be how this will be finally interpreted. That is a kind of silly game for us to play. We do not sit on the Supreme

Court yet—an appointment is due any moment but we are not there—so we cannot concern ourselves with that. As law-makers, what we are trying to determine, I think all the time, is that it is our job to put it in as clear and straightforward a way as we know how so that we know what we are trying to do here. That is as good as we get.

How does that sit with you? I am not suggesting for a moment that we put a Band-Aid on over here and patch it up over there, but it does strike me that we have a number of really good suggestions now before the committee on how to deal with people's legitimate concerns about this agreement and that we ought to start work on that.

Does this accord make sense to you if those things carry through?

**Mr. Morse:** Let me say that I have degrees of concern about certain clauses. I think you can improve what is here relatively easily by making a number of changes which are noncontroversial ones in the sense that so many of the changes do not address Quebec's so-called five demands. When it comes time to start looking at some of those demands, it becomes much trickier.

To pick up on what you suggest, it would be worth while to try to have clearer language. Clearer language does not always mean longer language. Somehow there seems to be a suggestion from legislative drafters that whenever you wish to be more precise you must be more wordy. That is not always the case; particularly when it comes to constitutional language, one wishes to shy away from more wordy provisions. To take on, for example, the national shared-cost program clause, it looks almost like something straight out of the Income Tax Act for its lack of clarity. Attempting to address that one, I think, really requires an entire rewrite.

I guess what I am suggesting in a roundabout way is that, yes, I think you can improve it significantly through companion amendments that do not have to go to the heart of it. To try to address some of the other matters, such as the immigration clauses or the cost-shared clause, the financial compensation for opt-out clause, really requires a rewrite.

Personally, I think as a country we will probably survive with those clauses intact as they are now. Although I am personally not enamoured with them, I do not believe they do violence to our more commonly accepted standards of fairness and equity and our sense of justice. As a country, I think we would accept them. Some would say: "Well, I'm not happy with that clause. I think it should be changed," but that, to



a degree, is the nature of the process with which we live. We are always encountering legislation or political decisions we are not entirely enamoured with.

**Mr. Breauh:** I would argue, and I think it is not an unreasonable thing to do, that there is no way in hell we can please every group that comes before us, and that should not be our job. When we are all finished, there should be groups which are very unhappy with this accord because they did not get what they want, but we are looking more for a reasoned response here. There actually have been people who came before the committee and said the nation will disintegrate the moment the accord is signed. We have withstood Brian and his folks for a while and we will withstand this one, so that is not my concern.

My concern is that there is reasoned ground, things we all think we can live with, which will not rip the country apart and will not cause a whole lot of problems. I think I see that, provided some other things are done. My concern is that this package, once it is done, changes dramatically the rules on how we do a Constitution and how this country really interacts with itself. So if you do four or five things and resolve those problems, such as deal with aboriginal rights, it seems to me you have something here we can live with.

I was impressed by people who have been arguing with the federal government for a hell of a lot longer than I have, who came before us and said: "We can go to court. We have been dealing with these folks for a couple of centuries now. They are not too easy to deal with, but we are in this for the long haul and we are not dead once this accord is signed. There are other avenues and we will explore them."

For example, it does seem to me that when representatives from the Yukon and the Northwest Territories knocked on the door, if the people inside that meeting had had the brains to invite them in and let them do what they have always done, watch, listen and speak occasionally without voting, it would have resolved a whole lot of problems. For the life of me, I do not understand why they did not do just that.

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**Mr. Morse:** Let me suggest there is another element to this, too, and that is because this accord is being sold on the basis that it is what Quebec demands, then it means anyone who is opposed to the accord is put in the position of being an enemy of Quebec. The effect of that, of course, is to make people even angrier, because that is not the intent of many of the opponents.

What is the effect of that in the long term? If we do not change anything, people will walk away still angry. The reason they are angry is because no change is to be made. The reason no change is to be made is because Quebec demanded it. Are we not then fueling the kinds of anxieties or hatreds that can exist within the country? It is in no one's interest to be fueling that kind of concern. It makes Quebec the so-called fall guy for all of the flaws in the agreement, therefore anyone who opposes the agreement must, in the long haul, turn his anger towards Quebec. I see no attraction in that scheme.

**Mr. Harris:** I will be very brief. I am intrigued with your comments on the unravelling aspect. If you look at one part of this it falls apart. Others, of course, have said that, but it is kind of hitting home to me that this is a very undesirable thing in a Constitution. If each and every section and thought cannot stand on its own, then you have to ask yourself, "Does it belong in the Constitution?"

We have heard much of the hijackings that went on by premiers, and I suppose those who prefer that view, I suspect many of us, myself included, believe much of that went on. The criticism of the Prime Minister is that he allowed it, I guess.

Would you agree that everything there should be able to stand on its own and be debated on its own merits? Does that make sense?

**Mr. Morse:** What we have is a collection of disparate clauses. It is one thing to say, "Don't pull apart the Supreme Court of Canada provision because the subsections fit together," or the immigration one; but when you look at this as a package we have a number of completely unrelated provisions. On what basis then can pulling out one of them or altering one of them somehow cause the house of cards to come tumbling down? It is not a house of cards.

**Mr. Harris:** But the process that is there now for constitutional reform is a house of cards; it is a negotiating game. I think the last presenter criticized the process. What disappointed me most in his presentation is when he said, "Make them sit there for five days." I think that is worse. There are going to be a hell of a lot more compromises if the rule—

**Mr. Breauh:** We cannot afford that either.

**Mr. Harris:** That is right. I mean it is seven grand, is it not?

**Miss Roberts:** Seven hundred dollars a night—God.

**Mr. Harris:** That philosophy of sit there until you get a deal does not sit well with me and leads me to believe that the process will be even more flawed if everything gets interrelated.

**Mr. Morse:** I can only concur with you. It is hardly attractive if what we have ended up with is a trading session behind a closed door, and what comes out is not only the first trade but a commitment that henceforth all other deals will be on a trade basis as well. There will be each province, and the federal government will walk in with a ticket price you have to pay if you want to get its vote; and that is not, it seems to me, the way to go.

**Mr. Harris:** That part concerns me and I think it concerns Mr. Breaugh as well. What process have we set up here for the future in these types of things? The silliest thing to me—you have mentioned it, and I disagree with your interpretation of what will happen—is that in our Constitution we now have an agenda for the next meeting and, as you say, unless they take it out for every meeting that takes place then we have constitutionalized the process, which many of us have concerns about.

Why the agenda is in a constitutional document I will never know. I guess that had to be the ultimate compromise on those who were pushing the two items that are going to be on there. But you have said—and this is where I disagree with you—that because of that the aboriginal people are finished. I would argue that if you have constitutionalize this process, one province holds the whole country hostage. If one province wants aboriginal rights on the agenda, they are on the agenda, if it feels strongly enough about them, because it will not agree to anything else.

**Mr. Morse:** They may be able to work a deal, for example, if Ontario goes forward and says, "Look, we don't much care about Senate reform, we don't care about fisheries, but Premier Peterson says we'll never give an inch on either of those unless the rest of you agree that we put aboriginal rights on the agenda." If the other 10 first ministers all really want Ontario's vote on Senate and fisheries and that is the price to pay, then perhaps they may agree.

I suggest that, at least as it is worded now, one way or another you have to get all 11 to agree to put anything on the agenda. If that is correct, then each and every province has a veto. The effect of that is they may trade their vetoes, as you have kind of proposed, to get something on the agenda.

Conversely, one province will sit there and say, "Look, we are going to veto that issue. We

just will not agree. Senate and fisheries are not important enough to us. We do not care in Manitoba. We are going to veto because we do not want aboriginal rights on the agenda," or northern development or what have you.

**Mr. Harris:** It is an aspect that we have not talked about too much. I think a few have mentioned the actual agenda-setting process, but if your interpretation is correct, then—

**Mr. Morse:** "Agreed upon" suggests to me that somebody has got to agree. Since we are talking about 11 first ministers, a logical interpretation of that is that the 11 agree. Does "agree" mean unanimous or does it suggest a kind of majority rule? Given our experience of constitutional reform and referring to first ministers, I think we are looking for unanimous consent for any matter to be added to the agenda.

**Mr. Harris:** For those of us who are not sure that is the way to proceed, it might be the end of federal-provincial conferences to decide the Constitution too.

**Mr. Morse:** But only if they take this clause out of the Constitution.

**Mr. Harris:** If they leave it in, I do not think it will work to put us very much further—

**Mr. Morse:** They will at least have to meet every year on Senate reform and fisheries. It will probably keep the Chateau Laurier busy anyway.

**Mr. Allen:** A lot of the provisions in the Constitution have gone ignored for ages, in any case. For example, it came as a great surprise to everybody, when we got into this immigration stuff, to learn that in fact it was a shared field. Most people really had thought it was a federal action and that nobody else got in on it. Even though there were special agreements between Quebec and the federal government, still most people in the country did not cotton on to the fact that this had been there since 1867. The provinces could have acted quite legitimately in that field but just chose not to. One can ignore things in constitutions and get along quite nicely, thank you.

I want to ask you two quick questions. First, with respect to the relationship of aboriginal self-government, the prospects of aboriginal self-government and the unanimity principle, is it your legal opinion that aboriginal self-government would fall under federal institutions properly and therefore be covered by the unanimity principle, or would it not?

**Mr. Morse:** My answer on that is I believe that is still under the seven-and-50 rule. There is an argument to the contrary, but I think the



majority view of all of the government lawyers and the lawyers representing aboriginal groups around those first ministers' conference tables, with the exception of a lawyer from Saskatchewan, was that the seven-and-50 rule would apply.

**Mr. Allen:** I want to clarify this "exclusio" business a little bit. It seems to be growing. It is like one of those expansive ideas. We first encountered it with respect to section 16, where section 28 was not referred to and therefore women were not included, therefore they were excluded, therefore they did not have the protections that aboriginal and multicultural people have secured under section 16. Now I am hearing it, and I hear it from you, with respect to the "distinct society" and section 2.

I am hearing it also with respect to the exclusion of aboriginal peoples—no, I am sorry, just in that respect alone. Is it not the case that in section 2 the "distinct society" language is in the context of talking about federal governments and provincial governments, and only one of those entities—namely, Quebec—houses a different society that is configured around language in a much different way, dramatically different way, so that the province as a whole, in its daily life, functions more completely in one language than in the normal language of the rest of the country. Therefore, one is talking about a province.

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When one then says that multicultural groups or aboriginal peoples are somehow or other left out because they are not mentioned in that clause, does one not have to conclude they should not be there anyway because they are not a province and do not come under the provincial-federal jurisdictions that are in the Constitution and which that particular clause refers to?

**Mr. Morse:** I would feel more comfortable with that argument if what the clause suggested was that Quebec is a distinct province. Instead, it has spoken to Quebec as being a "distinct society," and it seems to me the language it is using here gives Quebec almost two elements. We refer to it as a province, but we also now refer to it as something other than a province; namely, a society. Then other groups in the country that regard themselves as groups or societies, even though not provinces, feel somehow left out, that we have singled out Quebec, which I think has been distinct as a province for many years.

What, then, is the effect of calling it a society instead of saying "Quebec is a distinct province" or "Quebec is a unique province"? That, I think, would be no cause for concern because you are

then speaking to it as a province alone, but using the language of "society" raises concern that we are singling it out in reference to other societies within the country of Canada and thereby suggesting that those others are not distinct.

**Mr. Allen:** But one can certainly see a line of argument developing in the context of Supreme Court challenges and so on, I would think, in the other direction, which would be that this is a province that houses a "distinct society," which separates it from other provinces in the country, and therefore there is no point in referring to any of the other provinces in that section because they are part of that different mosaic. No one of them is distinct from the other 10 provinces in that respect.

**Mr. Morse:** I would suggest that Quebec is distinct not alone because of its majority French-speaking population. If that were the basis and Acadians became the majority in New Brunswick, would we thereby say that New Brunswick is a "distinct society" on the same terms as Quebec is? I think not.

**Mr. Allen:** Of course, there is the civil code and there are a number of other factors that are very important there, which you alluded to when you talked about the division in the Constitution Act and so on between the two—the creation of Ontario.

**Mr. Chairman:** Do you have time for one last question?

**Mr. Morse:** A short one, certainly.

**Mr. Cordiano:** I will make it brief. I just want to know your opinion with respect to the whole question that has been put forward by some that we should have a reference to the Supreme Court with respect to the charter vis-à-vis section 2 of the accord. The question would be: is the charter still paramount in light of Meech Lake?

Would it not be impossible, practically speaking, to frame such a question to cover all possible scenarios and practical situations that could arise? The question would be quite abstract and theoretical and the court would find it difficult to answer it. What is your opinion on that?

**Mr. Morse:** Courts have lots of experience in dealing with—at least in the view of nonlawyers—lots of abstract, arcane questions. I think the question can be phrased. I am not sure the Supreme Court of Canada would really be happy to receive it, but I think the question can be phrased, "Is section 2 subject to the charter or not?"

**Mr. Cordiano:** What would be the answer?

**Mr. Breaugh:** You gave the answer. It is already in the question.

**Mr. Morse:** I think the answer from the court is that section 2 is not subject to the charter, but for a different reason. I do not think section 92 is subject to the charter either. It is a different provision in the Constitution. The courts made it clear that you do not use one part of the Constitution, i.e., the charter, to somehow override another part of the Constitution.

I think the greater concern, however, that gives rise to that question, is does the presence of section 2 somehow jeopardize rights and freedoms that are guaranteed by other parts of the charter; such as, does it mean that there will not be freedom of speech in Quebec, or sexual equality or something of that nature? I think those really are different questions to the court that could also be framed. Personally, I think the answer the court would give is that the charter still applies in Quebec and it has not been eroded.

**Mr. Cordiano:** You do not see any difficulty in the framing; because each of the questions that have been put before the court since the inception of the charter have been very specific, practical cases involving real-life situations, sometimes theoretical situations based on legislation that has been drafted and ready to be proceeded with by a government. In this particular case, it would be highly abstract, it would be highly hypothetical.

**Mr. Morse:** No, I think it is fairly concrete. You have a draft constitutional amendment here. There is specific language that the court can interpret. They dealt with something far more abstract in 1981 when they were asked if there was a constitutional convention about provincial consent. They had a look at a long history of federal-provincial relations that did not give a clear message, and deal with that with the possible constitutional proposal over here but not really look at it. They were able to deal with that, and I would envision that they would have no difficulty in answering a precise question here that is phrased in precise constitutional language.

Whether it is believed to be necessary or not, whether you believe that you need such a decision before being able to ratify the accord as it stands, those are political questions, but I think it is a legal matter. That question could be framed to the court, it could be argued before the court relatively expeditiously, and there would be a decision from the court.

**Mr. Chairman:** Thank you very much. I think we have determined one thing this afternoon. Mr. Breaugh spoke earlier about openings in the Supreme Court. I think we had the first

judgement from Judge Breaugh here in response to Mr. Cordiano. I do not know how we will judge his opinion.

**Mr. Morse:** In both cases, it is up to Premier Peterson under the Meech Lake accord.

**Mr. Chairman:** Right. It shows that we are open. Thank you very much for joining with us. We wish you luck in catching your plane.

Maintenant, j'aimerais convoquer les représentants de l'Association des juristes d'expression française de l'Ontario: M<sup>e</sup> John Richard, président; M<sup>e</sup> Paul Rouleau, ancien président; et M<sup>e</sup> Robert Doyle, directeur général.

I would say for those in the audience who would like to make use of the interpretation facilities, there are some available at the back here. If somebody does have need, please feel free to use it.

Messieurs, nous aimerions d'abord vous souhaiter la bienvenue devant le comité. Comme vous le savez, vous pouvez maintenant présenter vos remarques, et puis après, nous allons vous poser des questions. Alors, encore une fois bienvenue. C'est M<sup>e</sup> Richard qui va commencer?

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#### ASSOCIATION DES JURISTES D'EXPRESSION FRANÇAISE DE L'ONTARIO

**Me Richard:** Oui. Merci, Monsieur le Président et membres distingués du comité. Nous vous remercions de l'invitation à comparaître devant vous. Nous avons déposé avec vous aujourd'hui un mémoire qui n'est pas tellement long, six ou sept pages. Alors, je me permets de le lire, surtout que ça va permettre la traduction du document en même temps.

L'AJEFO, l'Association des juristes d'expression française de l'Ontario, regroupe quelque 500 avocats, juges, professeurs, étudiants en droit, sténographes, interprètes, traducteurs et autres membres du personnel judiciaire. Nous avons donné de plus amples renseignements sur cette association comme annexe au document.

Les 2 et 3 juin 1987, les premiers ministres ont convenu des dispositions de l'accord constitutionnel de 1987, entérinant et fixant le détail d'une entente de principe survenue le 30 avril de la même année à leur rencontre au lac Meech.

Les premiers ministres ont tous indiqué qu'ils souhaitaient voir la Législature de leur province souscrire à l'accord. C'est déjà chose faite au Québec, en Saskatchewan et en Alberta. Le premier ministre de l'Ontario (M. Peterson) a, lui aussi, manifesté l'espoir de voir sa province, et notre province, y souscrire.



L'Association des juristes d'expression française de l'Ontario reconnaît de bons éléments à l'accord dans son ensemble. Le texte de la modification à la Loi constitutionnelle de 1867 comporte néanmoins des lacunes. Il est susceptible d'amélioration.

Le français a réalisé des progrès remarquables en Ontario depuis les dernières décennies, et surtout depuis 1980. Mentionnons surtout les domaines de l'éducation et de la justice, où le français jouit du statut de langue officielle. La Loi de 1986 sur les services en français, qui entre en vigueur au début de 1989, y ajoutera une gamme complète de services en français dans tous les ministères et plusieurs organismes gouvernementaux dans les régions où habitent la majorité des francophones de la province. Alors, nous nous réjouissons de ces progrès réalisés depuis les deux dernières décennies en Ontario.

Exception faite du domaine de l'éducation, où la Charte canadienne des droits et libertés offre certaines garanties aux Franco-Ontariens, tout l'échafaudage des services en français peut s'écrouler petit à petit, ou d'un seul trait, par l'adoption d'une loi l'abrogeant. Ces services, confinés dans les lois ordinaires qui les créent, ne bénéficient donc pas de l'enchâssement constitutionnel. La position de l'AJEFO, par conséquent, est claire: Le bilinguisme devrait être enchâssé en Ontario; enchâssé, bien évidemment, dans la constitution.

Maintenant, nous citons textuellement dans notre mémoire, et je me dispense de le lire, l'article 1 de la Modification constitutionnelle de 1987. Nous avons souligné les parties que nous trouvions les plus importantes pour fins de notre mémoire.

Il ressort d'une analyse de ces dispositions que toute interprétation de la constitution du Canada doit concorder avec la reconnaissance de la caractéristique fondamentale du Canada énoncée aux alinéas 2(1)a) et b). Cette règle d'interprétation s'étend non seulement à la Charte canadienne des droits et libertés mais aussi au reste de la Loi constitutionnelle de 1982, ainsi qu'aux lois constitutionnelles de 1867 à 1982 et aux modifications de ces textes législatifs.

Ce qui doit être reconnu, selon l'alinéa 2(1)a), est notamment «l'existence de Canadiens d'expression française, concentrés au Québec mais présents aussi dans le reste du pays». L'alinéa 2(1)b), de son côté, réclame la reconnaissance d'une société distincte au Québec. Les Canadiens d'expression française concentrés au Québec seraient-ils différents de ceux présents dans le reste du pays?

Le Parlement et les législatures ont le rôle de protéger la caractéristique fondamentale du Canada, alors qu'au Québec, et la Législature et le gouvernement du Québec sont chargés de la promotion autant que de la protection de la société distincte.

Bien que l'expression «société distincte» ne soit pas définie ailleurs dans le texte de la modification, en se référant à l'alinéa 2(1)a), il semble clair que l'élément majeur de cette société soit que l'on y retrouve surtout des Canadiens d'expression française qui y sont concentrés, mais que l'on y dénote également la présence de Canadiens d'expression anglaise. Aussi les Canadiens d'expression anglaise du Québec bénéficient-ils, en même temps et au même titre que les Canadiens d'expression française du Québec, de l'exercice du rôle de protection et de promotion qu'impose la Modification constitutionnelle de 1987 à la Législature et au gouvernement du Québec?

Par contre, en ce qui concerne les Canadiens d'expression française «présents aussi dans le reste du pays», le rôle du Parlement et de la Législature de leur province se borne à protéger et non à promouvoir la caractéristique fondamentale du Canada. Qui plus est, ce rôle n'est assigné qu'au pouvoir législatif. La protection des droits des francophones hors Québec n'est pas équivalente à celle des francophones du Québec ou, pour reprendre la terminologie de la Modification constitutionnelle de 1987, la protection des droits des Canadiens d'expression française n'est pas la même partout, selon qu'ils font partie ou non de la société distincte. La protection des droits des francophones hors Québec n'est même pas équivalente à celle des Canadiens d'expression anglaise vivant à l'intérieur de la société distincte qui, eux, obtiennent de l'accord la promotion de leurs intérêts.

Le texte de la modification de la Loi constitutionnelle de 1867 introduit de nouvelles expressions, notamment au paragraphe 2(1), où sont utilisés les mots «Canadiens d'expression française» et «Canadiens d'expression anglaise».

Que le Québec soit parvenu à faire inscrire dans la constitution la reconnaissance de son caractère distinct servira, nous en sommes persuadés, à faciliter la survie de la minorité francophone en Amérique du Nord en lui fournissant un centre de rayonnement. Mais que le gouvernement fédéral et ceux des autres provinces n'aient qu'à protéger les minorités francophones se trouvant à l'extérieur du Québec, voilà qui n'assure certes pas la survie de ces dernières.

Le statut particulier accordé aux francophones du Québec et le statut différent accordé aux francophones hors Québec introduisent une distinction entre les deux groupes. Cette distinction, qu'elle soit souhaitable ou non, mène à une règle d'interprétation de la Charte qui, elle, doit être appliquée par les tribunaux. Dans l'interprétation des droits garantis par la Charte et dans l'application de l'article 1, on devra tenir compte de cette distinction.

La constatation d'un fait historique, à savoir que les francophones se retrouvent surtout au Québec et que les anglophones se retrouvent surtout à l'extérieur du Québec, ne devrait pas en soi aboutir à cette distinction dans l'application de la Charte, laquelle garantit des droits individuels et non des droits collectifs. La protection d'une minorité exige plus qu'une simple protection, surtout s'il ne s'agit que de protéger un acquis parcellaire et encore insuffisant. Je cite deux extraits d'une revue qui est citée au bas de la page:

«La protection d'une minorité, qu'elle soit internationale ou nationale, exige l'application de deux principes:

«— l'égalité de traitement en faveur des membres du groupe minoritaire;

«— l'adoption de mesures spéciales destinées à assurer le maintien des caractéristiques propres à ce groupe.»

Le paragraphe 2(2) de la Loi constitutionnelle de 1867, tel qu'il est suggéré par l'article 1 de la Modification constitutionnelle, n'accomplit pas l'application des deux principes précités. Il y a lieu de croire qu'il n'obligerait pas les gouvernements visés à poser des gestes en ce sens. Les minorités francophones hors Québec, en vertu de l'accord constitutionnel du 3 juin, ne sont pas présentes de la même façon à l'extérieur du Québec que le seraient les Canadiens d'expression anglaise au Québec.

Aussi estimons-nous que l'alinéa 2(1)a) proposé devrait se lire comme suit:

«La reconnaissance de ce que l'existence de Canadiens francophones, concentrés au Québec mais présents en tant que minorité dans le reste du pays, et de Canadiens anglophones, concentrés dans le reste du pays mais aussi présents en tant que minorité au Québec, constitue une caractéristique fondamentale du Canada.»

1630

Le libellé que suggère l'AJEFO reprend une terminologie que l'on retrouve déjà dans la Loi constitutionnelle de 1982 et qui a déjà fait l'objet d'une interprétation par les tribunaux. Pourquoi introduire de nouvelles expressions qui risquent

de saper un édifice jurisprudentiel qui, jusqu'ici, tendait à bien protéger les minorités? Le concept de «minorité», de même que ceux d'«anglophones» et de «francophones», sont connus des tribunaux canadiens. Le renvoi à la Cour d'appel de l'Ontario intitulé «Re: Minority Language Educational Rights» a bien élucidé les besoins des minorités linguistiques dans le domaine de l'éducation. L'interprétation qu'on y trouve de l'article 23 de la Charte est limpide. Elle permet aux Franco-Ontariens d'envisager leur avenir avec plus d'espoir. Là se situe, croyons-nous, la façon d'aborder le problème des minorités. Mais la teneur de ce jugement tient sans doute au libellé même de l'article 23, qui parle, lui, de minorités.

Je me permets de citer un extrait de cet arrêt, que l'on retrouve à la page 43 de l'arrêt, et vous n'avez pas le texte devant vous. On y parle de l'article 23 de la Charte, et je cite:

«We note that, subject to the charter and s. 93 of the Constitution Act, 1867, education in the province is a provincial matter. The Legislature has exclusive power to make laws in relation to education and to establish a system for the management thereof that it deems suitable to conditions in the province. Section 23 of the charter limits this power in respect to minority language education. The rights conferred by this section with respect to minority language facilities impose a duty», and I underline the word "duty", «on the Legislature to provide for educational facilities, which, viewed objectively, can be said to be of or appertain to the linguistic minority in that they can be regarded as part and parcel of the minority's social and cultural fabric. The quality of education to be provided to the minority is to be on a basis of equality with the majority.»

Puisque la terminologie de l'accord et de la Modification constitutionnelle qui en résulte est différente, la charge sémantique de chacune doit donc, elle également, être différente. Qu'est-ce qu'un Canadien d'expression française par rapport à un francophone, ou un Canadien d'expression anglaise par rapport à un anglophone?

Il existe une règle d'interprétation voulant qu'on doive présumer dans une loi que le même terme a partout le même sens. Une variation dans l'expression signifie un changement dans les concepts signifiés: terme différent égale sens différent. Certes, la règle de base de l'interprétation législative veut que le contexte donne leur sens aux mots d'une disposition donnée. Mais le réflexe premier de celui appelé à interpréter la modification à la Loi constitutionnelle sera de



donner à la nouvelle expression un sens différent de celui des mots de la Loi constitutionnelle de 1982. La protection des Canadiens d'expression française n'équivaut pas nécessairement à la protection des minorités francophones. «Canadiens d'expression française» ne comporte qu'un élément de langue, tandis que «minorités francophones» comporte un élément de culture.

**1640**

Le paragraphe 2(2) de la modification proposée donne au Parlement du Canada et aux législatures des provinces le rôle de protéger la caractéristique fondamentale du Canada, à savoir que les Canadiens d'expression française se retrouvent surtout au Québec et que les Canadiens d'expression anglaise se retrouvent surtout dans les autres provinces. La société distincte du Québec, elle, impose, et à la Législature et au gouvernement du Québec, le rôle de la protéger et de la promouvoir. L'AJEFO s'explique mal pourquoi le gouvernement de l'Ontario n'aurait pas, lui aussi, le rôle de protéger sa minorité et de la promouvoir, comme nous le disions plus tôt. En principe, la Législature pourrait légiférer pour protéger, sans que le gouvernement donne effet à cette législation: L'exécutif pourrait fonctionner sans tenir compte du législatif.

Alors, voilà les remarques que nous voulions vous adresser, Monsieur le Président et membres du comité.

**M. le Président:** Merci beaucoup. Vous avez certainement soulevé plusieurs points que, jusqu'ici, nous n'avons pas étudiés de la même façon: surtout, je pense, l'aspect de «francophones», «anglophones», «d'expression française», «d'expression anglaise» et les autres aspects de cette question. Vous avez même présenté un amendement pour notre considération. Alors, je donne maintenant la parole à M. Morin.

**M. Morin:** Je voudrais premièrement vous féliciter de l'excellente présentation et aussi du fait que vous êtes un de mes résidents, un de mes commettants dans ma circonscription. Vous en êtes le deuxième cet après-midi et je m'en réjouis énormément.

**M. le Président:** Conflit d'intérêts.

**M. Morin:** Peut-être.

**Me Richard:** Vous êtes un excellent député, je vous en félicite.

**M. Morin:** J'aurais deux questions à vous poser. La première: Est-ce que vous êtes d'accord que l'entente, telle quelle a été créée, même s'il existe des erreurs, est déjà une amélioration pour les Canadiens français, en ce

sens qu'on y a déjà inclus une protection qui n'existait pas auparavant?

**Me Richard:** La protection, oui, c'est déjà quelque chose, mais nous cherchons évidemment plus. D'après nous, pour vraiment protéger, on doit pouvoir promouvoir, on doit promouvoir, avoir l'obligation de promouvoir aussi bien. Nous craignons que, quand on utilise dans le même article les mots «protéger» et «promouvoir» et que dans le cas des francophones hors Québec on utilise seulement le mot «protéger», nous soyons les perdants. Nous voudrions avoir la protection additionnelle d'une obligation de promouvoir la minorité francophone hors Québec.

**M. Morin:** Il semblerait aussi que les mots «preserve» et «protéger» ne donnent pas tout à fait la même définition, la même consonance.

**Me Richard:** Je suis d'accord avec ça, que la version anglaise est moins—

**M. Morin:** Elle est moins spécifique.

**Me Richard:** Oui, moins spécifique. Et aussi «preserve», on pense peut-être—

**M. Morin:** Conserver.

**Me Richard:** —à conserver quelque chose qui est statique—

**M. Morin:** Mettre en boîte.

**Me Richard:** —qui ne change pas. C'est ça qui nous inquiète.

**M. Morin:** Ma deuxième question: On dit présentement que si l'entente n'est pas ratifiée, n'est pas signée, le Québec se détacherait et ça créerait des problèmes énormes. Est-ce qu'il n'y aurait peut-être pas la possibilité que ce serait une bonne idée, que ce serait une bonne façon, de dire tout simplement: «Mais voici, signons l'entente et faisons les corrections par après»?

**Me Richard:** Monsieur Morin, si les gouvernements ont la volonté de faire cela, ce serait bien. Mais ce qu'on craint, c'est que, une fois qu'un texte comme celui-ci est adopté, est enchâssé dans la constitution, est-ce qu'il y aura vraiment la volonté de la part des onze niveaux de gouvernement, ou des onze chefs de gouvernement, ou des législatures des dix provinces et du fédéral, de faire les modifications qui, à notre avis, sont nécessaires? C'est ce qui nous inquiète.

**M. Morin:** Certaines déclarations ont été faites tout récemment, en fin de semaine dernière, à savoir que si l'entente n'était pas ratifiée, ça créerait des problèmes énormes. Puis on nous a laissé une espèce d'inquiétude peut-être encore plus prononcée qu'on semble y

croire, qu'on semble y connaître. Est-ce que je peux avoir votre réponse à ça?

**Me Richard:** Monsieur Morin, vous avez vu par notre présentation que nous ne cherchons pas à détruire l'accord ou même à mettre l'accord en question; nous avons dit qu'il est susceptible d'amélioration. C'est une question politique de savoir si on doit adopter l'accord tel quel et revenir plus tard avec des modifications.

Le moins qu'on puisse espérer, je pense, c'est que la Législature de la province de l'Ontario reconnaîtra la lacune et se dira prête à promouvoir des modifications à l'avenir. Mais nous ne vous demandons pas ici, notre présentation n'est pas que l'accord devrait être remis en doute. Nous répondons à votre invitation et nous disons: Nous voici. A notre avis, il y a des lacunes très importantes qui nous inquiètent beaucoup non seulement comme juristes mais comme francophones et francophiles.

Je ne sais pas si mon collègue M. Rouleau veut ajouter quelque chose à cette question-là, mais nous ne sommes pas ici pour demander d'annuler ou de résilier ou de ne pas accepter l'accord.

**M. Morin:** Le message était très clair, d'accord.

**Me Rouleau:** Je pense qu'il y a juste deux aspects importants à soulever. Je suis tout à fait d'accord avec M. Richard, mais premièrement, le nouvel article 2 sème un doute; ça introduit, comme on l'a mentionné, le concept «d'expression française». Aujourd'hui, le Franco-Ontarien a une seule protection constitutionnelle, une seule: C'est l'article 23 de la Charte. Cet article a été interprété par les tribunaux de l'Ontario comme un article protégeant la culture et la société franco-ontariennes, c'est-à-dire l'habitat de l'espèce qui est en danger.

Là, ce qui nous fait peur un peu, c'est que le changement qu'on voit dans l'article 2 ne parle plus de l'habitat, de la culture, de la racine du peuple, mais plutôt de l'expression de la langue. Alors, pour répondre à votre question, une peur qu'on a exprimée dans notre mémoire, c'est qu'on puisse prendre un pas à reculons comme communauté franco-ontarienne. Il faut se souvenir – et ça a été soulevé plus tôt aujourd'hui – que l'article 2 maintenant va être un filtre pour tous les autres articles de la Charte. Ce qui veut dire que notre décision de la Cour d'appel de l'Ontario, qui dit que la culture et la société sont protégées par l'article 23, doit maintenant être reprise à la lumière de l'article 2, qui dit qu'on lit cette Charte comme une protection pas nécessairement des cultures mais de l'expression. Et si les tribunaux, à la lumière du nouvel article 2,

disaient: «Ah! Ce n'est plus la culture qui était l'intention des parlements, c'est la langue. Alors, cours d'immersion, d'abord que la langue est protégée.»

Je vous ferais noter que le nombre de parlants français a augmenté dans cette province l'année dernière; la minorité francophone a déperî, a été réduite. Est-ce que l'Ontario rencontre le test de l'article 2? Nous, on trouve que c'est une question fondamentale.

#### 1650

Alors ça, c'est un aspect important qui, je pense, a été négligé. Ce n'est pas pour mettre l'accord en doute, c'est une question de mots. Quelle était l'intention de ceux qui étaient à la table: de protéger la minorité, l'habitat de l'espèce qui est en danger, ou la langue? Nous croyons que la raison d'être est vraiment la culture, qui est, de fait, la raison de la Charte de ce pays.

Maintenant, il y a aussi l'aspect périphérique de ça. En Ontario aujourd'hui, la province fait beaucoup pour améliorer le sort des Franco-Ontariens dans le domaine de l'éducation. Ils font de grands pas. Ils ont annoncé la semaine dernière cinq millions de dollars pour une école pour les francophones à Penetanguishene.

**M. Villeneuve:** Il y a une petite chicane, par exemple, là-bas.

**Me Rouleau:** Il y a des chicanes, mais ce qui est important, c'est que l'avancement, c'est plus que juste protéger, ou ça pourrait être interprété comme beaucoup plus que protéger. Lorsqu'on met dans la balance que maintenant ils ont seulement à protéger et non pas à promouvoir, comme le dit la Cour d'appel de l'Ontario sous l'article 23, de nouveau on se préoccupe de la possibilité que les mots soient peut-être mal choisis.

Le point évident, c'est que, comme M<sup>e</sup> Richard l'a dit, l'Ontario refuse de se lancer dans la protection et l'enchâssement du bilinguisme, pour plusieurs raisons. Aujourd'hui, on dit avec l'accord Meech: On va couper le cordon ombilical avec le Québec. Il y a maintenant une société distincte de l'autre côté. Il serait probablement temps que l'Ontario fasse quelque chose, que ce soit dans le lac Meech ou, comme quelqu'un l'a suggéré dans un mémoire précédent, par une proposition qui accompagnerait la résolution du lac Meech et viserait à l'enchâssement du bilinguisme.

Je pense que c'est vraiment ça, notre position. Mais on n'est pas contre l'accord, puisqu'on trouve que c'est un avancement, c'est un pas en



avant. Mais, tout d'un coup, il ne faut pas oublier le pauvre cousin franco-ontarien.

**M. Allen:** J'apprécie beaucoup le mémoire de l'Association des juristes d'expression française de l'Ontario, et en particulier la discussion sémantique des termes «d'expression française» et «d'expression anglaise» par rapport à «francophone» et «anglophone».

Est-ce normal dans des discussions juridiques de faire une telle distinction entre ces mots ou expressions? «Phone» signifie la langue, «expression» signifie la langue. Le peuple dans l'expression d'une langue a toujours une culture. La phonétique implique la culture. Est-ce vraiment possible de faire une distinction très claire et nette pour des fins juridiques? Est-ce la pratique normale des tribunaux de faire cette distinction maintenant?

**Me Richard:** Ce n'est pas nous qui avons introduit la distinction, Monsieur Allen, c'est la loi elle-même. On parle jusqu'à présent dans la Charte, en particulier à l'article 23, de francophones; et maintenant, avec les modifications, on introduit une autre expression, des gens «d'expression anglaise» ou «d'expression française». Alors, ce qui nous inquiète, c'est qu'on donne, dans une interprétation, un sens ou un contenu différent à ces deux expressions.

Évidemment, nous ne sommes pas là pour refaire le document, dans le sens que nous n'étions pas présents au moment où le document a été rédigé et nous ne savons pas si les gens qui ont signé l'accord voulaient donner un contenu différent à «francophones» et à gens «d'expression française» ou à personnes «d'expression anglaise». Mais nous croyons que «francophones», c'est plus fort, ça inclut plus que la langue, ça inclut une culture.

Nous savons que l'article 23, qui contient l'expression «francophones», a reçu une interprétation — est-ce que j'ose utiliser le mot «libérale»? — très libérale de la part de la Cour suprême de l'Ontario. Nous croyons que nous avons, en Ontario, une population francophone de 500 000 environ. C'est quand même une population assez fragile, dans le sens que même si c'est le plus grand nombre de francophones hors Québec, c'est quand même 500 000 sur une population en Ontario de quoi, de sept millions?

**M. Villeneuve:** Neuf millions.

**Me Richard:** Neuf millions, excusez-moi. Alors, il est important pour nous de soulever ces questions-là. Ce ne sont pas seulement des questions, à notre avis, d'ordre juridique, mais ce sont des inquiétudes que nous avons parce que nous tenons beaucoup à la culture franco-

ontarienne et à la survie des francophones en Ontario. Je crois que c'est partagé par tout le monde, surtout autour de cette table, de toute façon.

**M. Allen:** J'ai une autre question à l'égard de la pratique des cours et d'autres professions. Est-ce que la pratique dans l'interprétation des projets de loi, des articles constitutionnels, est d'interpréter le texte anglais à la lumière du texte français et l'inverse? Ou est-ce qu'on donne la priorité à une langue sur l'autre? Quelle est la pratique? Je pose cette question—

**Me Richard:** C'est une très bonne question.

**M. Allen:** —puisqu'on emploie, comme M. Morin l'a indiqué, les mots «préservation» en anglais et le verbe «protéger» en français, et pour moi comme anglophone, le verbe «protéger» est plus fort que le mot «préserver».

**Me Richard:** Oui, je suis d'accord avec vous quant aux mots. La Charte prévoit que les deux versions, en français et en anglais, sont authentiques; alors, de même valeur. La Loi sur les langues officielles du Canada portait la même disposition, et dans les textes de la Constitution de 1867 jusqu'à 1982, les deux versions sont aussi authentiques. Alors, depuis longtemps les tribunaux, quand ils ont affaire à des textes législatifs du Parlement du Canada ou à des textes constitutionnels, doivent tenir compte des deux versions et essayer de réconcilier les deux expressions pour leur donner un sens qui leur soit commun.

Il y a certaines règles d'interprétation qui se trouvent, si je me souviens bien, dans l'article 8 de la Loi sur les langues officielles. On ne peut pas dire que la Loi sur les langues officielles prime la constitution, mais ce sont les règles d'interprétation qu'on utilise dans les tribunaux pour réconcilier les versions française et anglaise des deux textes. On aura à faire face, en 1990, au même problème en Ontario. On doit y faire face maintenant, même avec les textes législatifs qui sont adoptés dans les deux langues par la Législature de l'Ontario, pour essayer de réconcilier les deux, pour leur donner un sens qui soit commun.

Il n'y a pas un texte qui soit plus authentique que l'autre.

1700

**M. Allen:** Merci, ça m'aide beaucoup.

Je constate, comme vous, et je pense que mon parti aussi constate que la vraie protection de la langue française et des Franco-Ontariens serait l'enchâssement de la langue comme langue officielle. Je pense que le premier ministre se

sentirait mal à l'aise avec une telle démarche en ce moment.

Mais quelles limites, selon votre opinion, sont imposées aux Franco-Ontariens dans la promotion de la langue et de la culture françaises par les mots «préservation» ou «protection»? L'épanouissement de la culture d'un peuple, évidemment, exige qu'on ait des pouvoirs significatifs, mais quelle est la limite imposée par ces mots?

**Me Richard:** Quelle est la frontière entre «protéger» et «promouvoir»?

**M. Allen:** Oui.

**Me Richard:** Je ne peux pas vous répondre, ça prendrait des cas concrets peut-être. Mais je pourrais dire, en n'utilisant pas encore l'expression libérale, qu'il est évident, à mon avis, que l'expression «promouvoir» est plus large, a un sens plus large, un contenu plus important que le mot «protéger».

**M. Allen:** Est-ce que «préservation» signifie inégalité, par exemple dans le domaine de l'éducation? C'est ce dont vous avez discuté. Ou est-ce qu'il permet l'avancement vers un système totalement francophone à l'égard des conseils de l'éducation partout en Ontario? Quelle est la limite que signifie le mot «préservation»? Si on préserve la dualité de l'Ontario, cela implique peut-être, je pense, la promotion des deux facteurs, des anglophones et des francophones.

**Me Richard:** Je le sais bien, et en l'absence du texte de l'accord, on pourrait s'entendre peut-être sur cette expression. Mais quand on a dans le même article de l'accord, de la modification à l'accord constitutionnel, les mots «protéger» et «promouvoir», c'est une invitation à donner un sens différent à ces deux mots. Je ne peux pas répondre autrement que ça, Monsieur Allen.

Si on parlait de «protéger» uniquement à l'article 2, peut-être qu'on dirait: Bon, la portée de «protéger», c'est suffisant pour aussi promouvoir. Mais quand on a dans le même texte, dans le même article, dans un cas le mot «protéger» et dans l'autre cas les mots «protéger» et «promouvoir», c'est ce qui nous inquiète. Est-ce qu'on va donner un sens restreint au mot «protéger» en raison du fait que le mot «promotion» ou «promouvoir» existe ailleurs dans le même article?

**M. Allen:** Oui, je suis sympathique à ce point de vue, mais en même temps, il y a un contexte dans le pays d'une politique, et on discute toujours dans ce domaine de la balance entre les francophones et les anglophones, les provinces et le fédéral. Dans cet article il y a une forte balance

entre deux niveaux des phénomènes au Canada. Pour le Québec, le pouvoir de promouvoir la société distincte et d'augmenter le pouvoir d'un foyer principal – encore un autre mot – qui toucherait, à l'avenir, à la force des minorités francophones hors Québec: On a fait cet argument-là de temps en temps dans ces discussions. Mais pour la minorité anglophone au Québec, il n'est pas nécessaire d'avoir une telle promotion, car il existe la force de la majorité anglophone partout dans le pays pour préserver leurs droits, comme toujours dans notre histoire.

**Me Richard:** Oui.

**M. Allen:** Oui? Est-ce que les premiers ministres ont raison, dans ce contexte, d'employer deux mots différents dans cet article?

**Me Richard:** Nous avons dit dans notre texte que la reconnaissance du Québec comme société distincte va, nous l'espérons, aider au rayonnement du français au Canada, mais on ne peut pas s'en remettre uniquement au Québec. Je crois que la province de l'Ontario a la responsabilité, elle aussi, de promouvoir la francophonie en Ontario. On ne peut pas toujours dépendre, et on ne veut pas dépendre non plus, des politiques québécoises pour l'épanouissement des francophones en Ontario.

**Me Rouleau:** Vous parlez de protection, et il me semble évident que protéger, dans le contexte de l'article 2, veut dire que l'Ontario doit protéger le caractère canadien. La majorité de l'Ontario, c'est anglais, et il y a une présence francophone en Ontario. Protéger ce fait peut vouloir dire bien des choses, et comme vous l'avez dit, la protection du côté anglophone peut être très minime; du côté francophone, la même protection ne vaut rien. Dans le domaine de l'éducation, on fait beaucoup plus que protéger aujourd'hui: On promeut, on présente des lois spéciales, on présente des budgets spéciaux, on donne des droits spécifiques à la minorité, on fait avancer les choses pour les francophones parce qu'ils ont souffert. Le statu quo voue l'Ontario à la perte de sa minorité francophone.

Mais laissez-moi poser une question. Si le Québec croyait nécessaire, pour protéger le fait français au Québec, d'avoir le droit de promouvoir, comment pouvons-nous prétendre que la minorité francophone en Ontario, qui est en butte à plus d'attaques que la majorité francophone au Québec, n'ait pas le droit et le besoin d'être promue? C'est un peu la logique. Quand on lit le tout, le Québec a besoin de promotion; le Franco-Ontarien, lui, va être protégé seulement. Alors, qu'est-ce que les tribunaux vont dire? Comme M<sup>e</sup> Richard l'a dit, on ne le sait pas,



mais lorsqu'on le lit, il faut lire le contexte complet.

**M. Allen:** Vous avez raison. Merci beaucoup.

**M. Villeneuve:** Maître Richard, Maître Rouleau, Maître Doyle, merci infiniment pour votre présentation.

Si on avait demandé à vous, l'Association des juristes d'expression française de l'Ontario, vos recommandations, auriez-vous suggéré une société distincte, ou auriez-vous suggéré un autre mot que « société », avec les réactions que nous avons vues récemment?

**Me Richard:** Écoutez, il fallait choisir une expression pour donner suite à une volonté politique. « Société » implique collectivité. On a eu des débats dans le passé sur l'utilisation du mot « nation ». Je crois que le mot « société » est beaucoup plus acceptable que celui-là. Quelle autre expression aurait-on pu trouver? On ne s'attaque pas à l'expression « société ». Nous trouvons que si on doit reconnaître cette réalité, c'est un mot qui l'exprime bien.

**M. Villeneuve:** Maintenant, seriez-vous plus à l'aise si nous pouvions peut-être mettre l'accord de côté une couple d'années et puis avoir des interprétations juridiques des tribunaux, qui prendraient des décisions où on pourrait peut-être avoir certaines lignes de conduite pour que, à un moment donné, nous ayons des précédents d'établis? En ce moment, nous semblons avoir un problème de ce côté-là, dans l'interprétation.

1710

**Me Richard:** Non, nous ne proposons pas de retard pour permettre des renvois aux tribunaux. Je ne vois pas quelle utilité ça pourrait avoir, car les tribunaux auraient à étudier quel texte? un texte possible? Non, je ne vois pas l'utilité de remettre l'adoption de l'accord ou des modifications pour permettre des renvois, certainement pas en ce qui concerne la question qui nous touche ici, l'article 2. Je ne vais pas exprimer une opinion sur les questions qui pourraient être soulevées par les autochtones ou autres, mais pour ce qui est du sujet que nous examinons aujourd'hui, nous ne voyons pas l'utilité de remettre ça aux tribunaux. Nous sommes inquiets du fait, et nous croyons avec raison, qu'on utilise des expressions différentes auxquelles les tribunaux pourraient accorder, dans des cas spécifiques, un contenu différent.

**M. Villeneuve:** Pour terminer ici, je reviens à la société distincte. Est-ce que ça se limite aux choses linguistiques, aux choses culturelles, d'après vous comme juriste, ou est-ce que ça se

répand à des domaines économiques – en fin de compte, à tous les domaines gouvernementaux?

**Me Richard:** Il est difficile d'y répondre puisque ce n'est pas défini. Vous savez, lors de la conquête, ou très peu après la conquête de la colonie du Québec, la Grande-Bretagne a adopté une loi appelée l'Acte de Québec, en 1774 – c'est le gouvernement à Westminster qui a adopté cette loi-là pour la colonie du Québec – et qui reconnaissait principalement, à ce moment-là, la langue, la religion et le Code civil, la coutume de Paris.

Alors, à mon avis, même au 18<sup>e</sup> siècle on reconnaissait que le Québec était une société distincte, puisqu'il faut se rappeler que même si le Canada n'était pas colonisé bien loin à l'ouest du Québec, les colonies au sud, qui s'appellent maintenant les États-Unis d'Amérique, faisaient partie des colonies britanniques. C'étaient toutes des colonies britanniques à ce moment-là. Alors, on nous a donné un statut distinct. La Grande-Bretagne, à mon avis, d'après mon interprétation de l'histoire, a accordé un statut distinct au Québec alors qu'il était l'une des colonies britanniques dans toute l'Amérique du Nord. Le contenu à ce moment-là, c'était la langue, c'était la religion, c'était la coutume de Paris, c'est-à-dire le droit civil.

Qu'est-ce que « société distincte » veut dire aujourd'hui? Pour moi, ça a une connotation sociologique surtout plutôt qu'une connotation économique. Alors, c'est distinct en raison des facteurs sociologiques du Québec plutôt que des facteurs économiques. Sans ça, ça n'a pas grand sens, à mon avis.

**M. Villeneuve:** Je sais que la traduction n'est jamais facile, surtout quand nous sommes dans des termes juridiques, comme nous allons l'être ici. Je crois qu'en français nous avons un vocabulaire un peu plus large et que nous pouvons préciser nos mots. Alors, je crois que ça va être un choix de mots qui va probablement être la décision du côté du texte français.

Un francophone pour vous et un Ontarien d'expression française, ou deux gens qui peuvent s'exprimer en français en Ontario, d'après vous, est-ce qu'on devrait viser à « francophones » ou à « Ontariens d'expression française »?

**Me Richard:** Dans quel texte?

**M. Villeneuve:** Dans le texte de l'entente du lac Meech.

**Me Richard:** On prétend que ça devrait être « francophones » puisque, à notre avis, « francophones » inclut un élément de culture aussi bien qu'un élément de langue.

**M. Villeneuve:** J'oserais suggérer que dans ce contexte-là nous avons moins de francophones en Ontario que nous en avons d'Ontariens d'expression française.

**Me Richard:** Non. Nous cherchons évidemment à protéger et à promouvoir l'usage de la langue française et de la culture francophone parce que «francophone» inclut, à notre avis, l'expression «par la voie de langue»: en d'autres mots, d'expression française.

**M. Villeneuve:** Une culture française aussi.

**Me Richard:** Bien, une culture en plus. «Francophone» inclut, en plus de la langue, un élément de culture.

**M. Villeneuve:** C'est à ça que vous visez. C'est ce que vous voulez protéger, majoritairement.

**Me Richard:** Oui, et puis la Cour suprême de l'Ontario a reconnu l'application de... je l'ai déjà cité.

**M. Villeneuve:** Oui, l'article 23, je crois?

**Me Richard:** Sous l'article 23: «can be said to be of or appertain to the linguistic minority in that they can be regarded as part and parcel of the minority's social and cultural fabric». Alors, en utilisant le mot «francophone», il y a non seulement l'élément de langue mais un élément de culture et de société.

**M. Villeneuve:** Il y a toujours une situation où on pourrait être frustrés, nos collègues qui ont peut-être acquis la langue mais qui, par contre, ne seraient pas considérés à ce moment-là.

**Me Richard:** Non, ce n'est pas à ça qu'on vise.

**M. Villeneuve:** Non, mais ça pourrait être interprété de cette façon.

**Me Richard:** Écoutez, ce à quoi on vise, c'est à protéger la langue française et la culture francophone.

**M. Villeneuve:** Merci.

**Mr. Offer:** I would like to thank you very much for your presentation.

My question revolves around what has already been brought up, in particular the amendment you have suggested with respect to clause 2(1)(a) of the accord. It seems to me, in my opinion—and I would ask you to comment on this—that the amendment you are suggesting is not so much an amendment as a very fundamental change to the particular section.

The section as now written—and I realize it is but an interpretive section—seems to recognize as a fundamental characteristic the existence of French-speaking Canadians and English-

speaking Canadians within Canada. The amendment you have suggested seems to say that an element of that fundamental characteristic is indeed the minority aspect to the anglophone and francophone experience.

I have a concern, and I would ask you to comment, as to whether in dealing with a fundamental characteristic of a nation we should be dealing within an interpretive section with the whole question of what is that characteristic—indeed, in this case English- and French-speaking persons within the country—as opposed to taking away from the fundamental characteristic in that respect and saying it is something where there is a minority aspect attached. My concern is that your amendment might work in such a way that it will provide less for a court to use in the interpretation of matters coming before it, and I am wondering if you have looked upon this section in that light.

**Mr. Richard:** We have the use of the words “minority” and “linguistic minority” already in the charter, which is, of course, part of the Constitution.

1720

**Mr. Offer:** You are referring to section 23?

**Mr. Richard:** Yes.

**Mr. Offer:** In response to that, section 23 is in many ways very different from section 2, in that section 23, and I imagine you will agree, is a rights-giving section, whereas section 2 of the accord neither gives rights nor takes away rights. It is an interpretative type of clause, to be used by courts in matters which come before it, to be used by others in matters which come before it.

I am not comfortable with the comparison of section 23, a substantive type of section, with section 2, an interpretative section. I am just having difficulty with the amendment you have suggested.

**Mr. Richard:** I may be wrong, but I get the impression you are not happy at all with the interpretative provision, referring as it does to French-speaking Canadians or English-speaking Canadians.

**Mr. Offer:** No, I am concerned with the amendment you have suggested, whether it takes away from the whole fundamental aspect or characteristic of Canada.

**Mr. Richard:** We think that if there is going to be a rule of interpretation, rather than using the words presently in the accord I think the words we propose would be better suited. We do not think it would take away or diminish rights. We



are suggesting it because we think it would enhance them.

**Mr. Offer:** I am not saying it would take away or diminish rights. I am saying the use of the words you are suggesting as opposed to the words which are now in it would be less strong in application, in how they are applied.

**Mr. Richard:** I do not know how, by using the words "francophones" and "anglophones"—

**Mr. Offer:** I am concerned with the minority aspect of it as opposed to saying: "It matters not with respect to the numbers. The fundamental characteristic in the country is the existence of French- and English-speaking persons and the question of whether they are a minority is not to take away from the fundamental characteristic."

**Mr. Richard:** No, you have to get to the obligation.

**Mr. Chairman:** Just in trying to get the distinction, it would seem to me that what you are suggesting by the use of the word "minority" suggests a collectivity, suggests something beyond an individual. In that sense, in your mind, that is a stronger term than the way it is phrased.

**Mr. Richard:** That is right.

**Mr. Chairman:** They may have different meanings. The courts may interpret them the same way, but from the point of view of the linguistic minority, that phrase would suggest or would have within it not only a sense of individual but also of collective rights.

**Mr. Richard:** Yes, that is true.

**Mr. Chairman:** I am just not sure if Mr. Offer—

**Mr. Richard:** Then when we get to the question of whether it imposes an obligation there can be a debate about that. Although it says, "Toute interprétation de la Constitution du Canada doit concorder avec...", it then goes on to say—I have the French text in front of me—that the role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic is affirmed.

Maybe in that sense it does not impose an obligation, but it certainly gives it a role and what a role means. I think it is a little more than just interpretative. It starts off as being an interpretative provision, but then it goes on to give a role to legislative bodies in one case, and a legislative body and the government in another case, to do certain things.

**Mr. Rouleau:** To try and answer further, we are not saying we want to preserve the minority

aspect, which I think is your concern. We are saying that the minority, as was suggested, better identifies the group you are trying to protect. You are trying to protect the minority, not a language. You are not saying, "We want to preserve Latin in Ontario." We want to preserve the minority, not just the language.

To take it one step further, you say you do not like the comparison between section 23 and section 2. What I think we are answering is that the two words clash so you are going to have a problem with section 2 and section 23, and if it results in section 23 not being interpreted as it has been in the past, we have a concern. At the very least, exclude section 23 from the application of section 2, but also make sure that you identify what you want to protect. I do not think it is a fundamental characteristic of Canada that people speak French. That is a part of the fundamental characteristic, a necessary part, but that is not all. I think that is really our position.

**Mr. Offer:** Thank you.

**Mr. Chairman:** Just wanting to be very clear here, by minority we are talking of the official language minority because that is an identified group of people, in statute and in other parts of the Constitution.

**Mr. Richard:** Yes.

**Mr. Harris:** Just to follow up with the angle Mr. Offer is on, you have difficulty with Quebec on the word "promote."

**Mr. Richard:** I do not have difficulty with that at all.

**Mr. Harris:** But you have difficulty in that it is not an obligation of the rest of the provinces.

**Mr. Richard:** Yes, and in particular Ontario.

**Mr. Harris:** Except that to me, that section on Quebec promoting is not promoting a minority there. It deals with why Quebec is different as a province. In fact, they are promoting a majority language in that province. I do not know why, because that is in there, that diminishes anything that is already in existence. I understand you would like to have something else in the Constitution that clarifies what Ontario should be doing with a minority. I am not a lawyer, but the quid pro quo to me would be, Quebec will promote the French language and Ontario will promote the English language in Ontario. If you ask me to do that, I could say that has a logic to me.

**Mr. Richard:** I do not know why you say that is a quid pro quo.

**Mr. Harris:** Because what is being suggested in Quebec is that it will be able to promote the

majority, not the minority. That section does not deal with protection of a minority.

**Mr. Richard:** I disagree with you on that point, Mr. Harris.

**Mr. Harris:** In Quebec.

**Mr. Richard:** In my view, when you are talking about a "distinct society" in Quebec you are talking about a society that had to recognize that there were two language groups.

**Mr. Harris:** I agree, but it is dealing with Quebec as a province; and what is making Quebec different from the rest of Canada, to me, is that it is the only province where the French language and those who are of the French culture are in the majority.

**Mr. Richard:** I think that is a fact. I am not disputing that.

**Mr. Harris:** Is that not what makes it distinct?

**Mr. Richard:** I tried to answer. I think it is more than that. In answer to Mr. Villeneuve, I said it was a sociological concept, which to me includes more than language. I think the English-speaking population or the anglophones in Quebec are part of that "distinct society." My interpretation, and we have said it in our brief, is that they have an obligation to promote both. If I am wrong in that interpretation, that is a different matter.

**Mr. Harris:** As I said, I am not a lawyer and I am trying to understand. I understand what you are asking for and that is fair and that is fine, but I am not convinced that anything that is in Meech Lake or Langevin or whatever you want to call it, that talks about the rights of Quebec, defines it. It is a province. That clause does not talk about minority rights. It is how it is perceived as a province. How does that diminish in any way any minority rights in other provinces or minority rights of francophones in other provinces? I am having trouble being convinced that it makes any difference at all.

**Mr. Richard:** It is not a question of whether it diminishes it. It is a question of whether there is a corresponding obligation. I think you recognize that from the preamble.

**Mr. Harris:** But to me the corresponding obligation that would flow from that is to promote English in Ontario.

**Mr. Richard:** Well, fine. I have no problem with that, but I also want you to promote French.

**Mr. Harris:** I do not think anybody is asking for that or that is necessary.

**Mr. Richard:** No, but we are asking that you promote French.

**Mr. Harris:** If you said to me that Quebec then has an obligation to promote English and French in Quebec, and by the same token Ontario should have an obligation to promote English and French, I would understand that.

**Mr. Richard:** Sir, I think that is what we have said.

**Mr. Harris:** That is not what you have asked here.

**Mr. Richard:** That is exactly what we have said in our brief.

**Mr. Harris:** That is what you would like to see?

1730

**Mr. Richard:** It is not what I would like to see. What I would like to see is the corresponding obligation in Ontario.

**Mr. Harris:** But to me the corresponding obligation is to promote English, if you want to have the sections the same. If you want a separate section that talks about the minority language rights in Ontario, I understand that. I am not unsympathetic to it.

**Mr. Richard:** Minority French language rights.

**Mr. Harris:** Yes, or minority French culture rights, if you want.

**Mr. Chairman:** Again, to be clear, what you are saying is that in terms of Quebec, you read that as it has an obligation to promote English and French and you would see using those words to have that same obligation for Ontario, New Brunswick, whatever. That is what that would mean. It would not just mean to promote English.

**Mr. Richard:** Because we have, as the role of the Parliament of Canada and the provincial legislatures, to preserve the fundamental characteristic of Canada. The fundamental characteristic is the "existence of French-speaking Canadians, centred in Quebec but also present elsewhere" in English-speaking Canada, and "English-speaking Canadians concentrated outside Quebec but also present in Quebec." The obligation is on the provincial legislatures, including the Ontario Legislature, to preserve this fundamental characteristic.

You already have "preserve English and French in Ontario," and what we are saying is that we want—we are looking at it from the francophone point of view but it logically flows in exactly the way you said it—not only to preserve, but to promote. Obviously, as a francophone group, we were looking at the francophone promotion but we certainly are not



saying that you should not also promote English. If you have to protect English in Ontario and protect French, then if you promote French you would promote English as well.

**Mr. Harris:** I do not think you have to protect English in Ontario. Let's face it, Quebec is sitting in a milieu in Canada and in North America that is special. That is why Meech exists. That is why the "distinct society." That is why the extra rights, if you want, or extra obligations on Quebec.

**Mr. Richard:** But people are people and language is language. Why should francophones outside Quebec not have their language promoted as for francophones within Quebec, and as we understand it, from our interpretation, as for anglophones within Quebec?

**Mr. Harris:** I guess I am not convinced that the interpretative clause used there to define a provincial power vis-à-vis how it relates—I am not sure that they are getting something to the detriment of francophones outside. It may be, but I have not—

**Mr. Richard:** I am not saying it is to the detriment. I am being positive here. I am not trying to take anything away from Quebec.

**Mr. Chairman:** Just a short, sharp, last supplementary.

**Mr. Offer:** As a short, sharp, last supplementary, is it your feeling that the use of the word "preservation" only, as opposed to "preservation and promotion," is a stultifying process for the provinces—in other words, that in the 1980s, in the evolution of the country, the mere fact that now it is constitutionally required that all the

legislatures preserve something will, keeping in mind the whole realities of how we are evolving, require the legislatures to enhance different programs such as the French Language Services Act, things of this nature—or is it your feeling that your concern with the word "preserve," without "promote," means that the service shall now be frozen in time, that there is no evolution?

**Mr. Chairman:** Can I have a short, sharp answer to that?

**Mr. Offer:** It is about as short as I remember.

**Mr. Morin:** As you are accustomed to do.

**Mr. Richard:** My answer is that I think this is an advance because it does provide for protection. I think it is an advance. I just say that it does not go far enough. Because of the way the protection and promotion factors are used when talking about Quebec, I think we should have similar language when talking about the other provinces in relation to minority languages. I certainly think it is an advance over what we have in the Constitution.

**M. le Président:** Nous vous remercions infiniment d'être venus cet après-midi, d'avoir présenté votre mémoire et aussi d'avoir répondu à nos questions. Nous avons beaucoup de travail à faire et ça va nous aider énormément d'ici la fin de nos séances et la publication de notre rapport. Alors, encore une fois, merci beaucoup.

**Me Richard:** Merci, Monsieur le Président et membres du comité.

**Mr. Chairman:** We will reconvene tomorrow morning here at 9:30.

The committee adjourned at 5:36 p.m.

## ERRATA

No.	Page	Column	Line	Should read:
C-12	C-592	1	14	<b>Ms. Pearlston:</b> The accord changes the future
C-12	C-593	1	17	<b>Ms. Pearlston:</b> All right. What we are concerned
C-12	C-593	2	39	<b>Ms. Pearlston:</b> I think there has to be a balance of
C-12	C-593	2	47	<b>Ms. Pearlston:</b> That is not exactly what we are
C-12	C-594	1	1	<b>Ms. Pearlston:</b> If you try to think to the future of
C-12	C-596	1	35	<b>Ms. Pearlston:</b> Myself, I am afraid of a Supreme
C-12	C-596	2	46	<b>Ms. Pearlston:</b> The point is to make the change

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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Tuesday, March 22, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, March 22, 1988**

The committee met at 9:35 a.m. in Algonquin Salon A, Delta Ottawa Hotel.

### 1987 CONSTITUTIONAL ACCORD (continued)

**M. le Président:** Bonjour. Cela nous fait vraiment un grand plaisir de souhaiter la bienvenue à Me Albert Roy, quelqu'un que la plupart d'entre nous connaissons très bien. C'est un ancien député. Si je me souviens bien, Monsieur Morin, ne serait-ce pas — non, c'est la circonscription de M. Grandmaître.

**M. Morin:** C'est la circonscription voisine, excepté que M. Roy est aussi un de mes commettants.

**M. le Président:** Ah bon.

**M. Morin:** Il vit dans la circonscription.

**M. le Président:** Alors, quel bonheur ce matin!

Monsieur Roy, comme je le disais, cela nous fait plaisir de vous souhaiter la bienvenue. Si vous voulez présenter vos commentaires, nous vous poserons des questions après.

### ALBERT J. ROY

**Me Roy:** D'accord, Monsieur le Président. Je ne suis pas sans savoir que le temps pour faire des présentations ici est assez limité. Alors, pour fins de brièveté, peut-être que je pourrais répondre à des questions, en français ou en anglais selon la langue dans laquelle elles sont posées. Mais pour fins de mes commentaires, peut-être que je pourrais les faire plus brièvement en anglais, et s'il y a des questions, je peux certainement y répondre en anglais ou en français. Je ne suis pas sans savoir non plus que s'amuser avec de petites bobines comme celles-ci, des fois ça devient un peu ahalant.

**M. le Président:** En Ontario, on est de plus en plus bilingue.

**Me Roy:** Oui, je comprends, Monsieur le Président. Mais avec votre permission, je voudrais tout simplement faire certains commentaires. Je vais les faire en anglais ou, de temps à autre, peut-être en français, mais surtout en anglais et, comme de raison, je répondrai à des questions, si vous en avez, dans la langue dans laquelle elles seront posées.

**Mr. Chairman,** thank you for the kind words, the welcoming. I want to thank you and the members of the committee for the opportunity to make a few brief comments on a subject that I personally, and on behalf of people I represented in this part of the woods for a period of about 13 years, have taken very seriously. I know you have been involved in this topic yourself, Mr. Chairman. I do not know if it has been longer, but I think it has been a bit longer, because you started in the late 1960s with John Robarts's Confederation of Tomorrow Conference; so I think you are an appropriate candidate to chair this particular committee, without being too partisan, of course.

**Mr. Breaugh:** You have never been known for that.

**Mr. Roy:** I want to thank all of you and congratulate you on the initiative you are taking. I know there is some cynicism around the province, saying: "It is a fait accompli. Ontario is going to approve the accord, and let's get on with it. We don't need these public hearings." I do not subscribe to that. Even though I feel strongly that the accord should be accepted and approved, I nevertheless feel that the more public participation you have, when you hear from the citizens of Ontario, when you hear the different views and the objections and some of the concerns that people have, this is part of the democratic process, and it seems to me that that is important.

Your function may well play a very important role in suggesting major amendments or major suggestions. I do not know if I would call them amendments, but I think you can play an important role in making recommendations to the government and to the governments of other provinces that are still expressing some reluctance about this accord.

I do not intend to go into the constitutional aspect of it. I know you have had representation from such learned constitutionalists as Professor Hogg and my friend the former dean of the faculty of civil law at the University of Ottawa, Professor Beaudoin, and, I am sure, others. I notice on your list that there will be more coming, people who are far more expert than I am on the constitutional legalities.

I am aware as well of the great concern on the part of certain groups about this accord, be they

groups such as the representatives from the Northwest Territories, the Yukon, women's groups or minority groups both within Quebec and outside of Quebec. I am aware of their concerns as well.

**0940**

What I want to give is just a brief perspective as I see the process as it has evolved, just as a citizen. I apologize, Mr. Chairman, ladies and gentlemen, that I do not have any written submissions. Being involved in a busy law practice, we tend sometimes to forget about sitting down and putting things on paper. I do not want to think that my submissions would have more weight if they were on paper, but I know that it is more helpful when you do have something in writing, and I apologize for not having that. We work in private practice. We have limited staff and limited time and sometimes we just do not get matters together, so I apologize for that.

**Mr. Chairman:** Unlike government.

**Mr. Roy:** I will not make any comment.

**Mr. Villeneuve:** You were spoiled before.

**Mr. Roy:** In fact, I do not recall ever preparing written submissions. I find I am somewhat constrained by anything in writing.

**Mr. Chairman:** I was going to make that comment.

**Mr. Roy:** I just want to look at the overall perspective of what brought the agreement on and to talk as one who was around the Legislature and has watched the process which started around 1971. As I watched the rise of nationalism in Quebec, I recall the nationalistic utterings of René Lévesque in the days even when he was with the Lesage government and then the founding of le Parti québécois in the late 1960s.

I recall that at that time that was the context. The early elections of René were not very successful. I recall the Prime Minister of Canada at that time, Pierre Trudeau, had said that separatism was dead. I think it was about the early 1970s when Lévesque could not get himself elected in the Legislature. That was a context we took for granted. It was interesting that it was Bourassa then who was getting these fantastic majorities in Quebec.

People were sort of taking things for granted. I recall in Ontario we took a lot of things for granted as well. From the period when I was able to observe it at first hand, from 1971 to 1976, the advancement of francophone rights and services did not progress very much during that period. The credibility of Ontario vis-à-vis Quebec

because of the frustration on the part of the francophone minority in this province was very high indeed.

I recall the election of le Parti québécois in 1976 and the absolute panic and confusion that was in the Legislature. People were saying: "What does Quebec want now? What is happening? Is this country going to fall apart?" I recall at that time thinking that this province—Ontario—would have had much more credibility had we taken steps to have an objective or a meaningful rapprochement with Quebec. If we could have pointed to some of the initiatives that have been taken on behalf of francophones within the province by this province, which is now saying Quebec is wanted within Confederation, we would have had far more credibility, had we some tangible evidence to show we had made progress in Ontario.

But that was not the case, of course. There was panic and confusion. I recall at that time that the only time I ever heard Bill Davis say anything in French was after the 1976 election of le Parti québécois, out of a sense of frustration, sort of expressing or wanting to make Quebec feel at home; but I just felt it was so late and it was so superficial that it was certainly not effective.

Many of you recall the referendum of 1980. In fact, a legislative committee of all parties was set up at that time in 1980. I look at the colleagues here and I do not know if any of you—I do not think so—were sitting on that legislative committee. Our late colleague Renwick was on this committee, Sean Conway, myself and others. We travelled all across Canada and into Quebec and tried to get the views, to see what was happening and how Ontario could contribute to that dialogue and how we could make Quebec feel at home within Confederation.

I recall all of that very vividly. I participated actively in the referendum. I went into certain areas of Quebec with some of my colleagues who were elected provincially and participated in the referendum process. People tend to forget that the federalist forces were losing that referendum in the early part of the process. It was only the active involvement of people like Pierre Trudeau and others who made a tangible commitment to Quebec at that point that things would change, that there would be renewed federalism and that Quebec would be made a full partner within Confederation, that helped turn things around.

There were major mistakes made by the anti-indépendistes forces. The classic one was Lise Payette and her comments about the wives of those who were in favour of federalism. I think



she called them les Yvettes. That was a major blunder which ignited some of the federalist forces in Quebec. Then the referendum was won, the federalist forces prevailed and we went on to the agreement of 1982 and the frustration at that time in 1982 that Quebec was excluded.

In fairness to those who were bargaining at time, it was not easy to come to an agreement with the government, with a group of individuals whose major platform was independence. It is not easy to arrive at a consensus in that sort of context. Nevertheless, I think there was clear unanimity in Quebec by all those elected—not only the indépendistes, le Parti québécois, but also the Liberal Party and others—that they were not going to subscribe to the 1982 agreement. They felt frustrated and betrayed.

I see Meech Lake in that sense and in that context as keeping that agreement or that promise that we had made in the 1980 referendum. We have kept our faith with Quebec. Basically, Meech Lake is an attempt by the rest of the country to make Quebec a full partner in Confederation.

I heard Robért Bourassa, the Premier of Quebec, say he was proud to be a Canadian. It has been a long, long time since we had heard anything like that from a Premier in Quebec. I am not talking only about René Lévesque. Back in the days of Jean Lesage, Daniel Johnson and others who followed, you did not often hear that comment coming out of Quebec.

We have with Meech Lake an agreement which has the overwhelming support of Quebec and the overwhelming support of most of the provinces. I think this is something we should keep in mind. Meech Lake is not perfect—I realize that—but I think the major thing we must say about it is that in a sense it is evidence of our commitment, that we have kept our word. Quebec renewed its faith in Confederation in 1980, and I think the rest of Canada is doing so by the Meech Lake agreement.

I understand, I agree and I am well aware of the groups that have made representation that the agreement is not perfect. I was disappointed in 1982 when in that particular constitutional agreement there were no constitutional guarantees other than in education for francophone minorities outside Quebec. I was deeply disappointed then and I am deeply disappointed that there are still some flaws in the present agreement vis-à-vis minorities. You have had submissions on this from my good friend, Jean Richard, who is the president of the Association des juristes d'expression française de l'Ontario.

I am aware as well and I feel that the exclusion, for all intents and purposes, of groups such as the Northwest Territories and the Yukon in the process is something that has to be corrected. I am concerned that certain women's groups feel the Charter of Rights and Freedoms may be overridden by the "distinct society" clause. There is constitutional disagreement on that point. You certainly have heard those submissions. Nevertheless, in spite of this, you do not go back on this particular agreement. I think you build on it.

**0950**

If I may suggest, Mr. Chairman and members of this committee, what you do is accept the agreement for what it is. Then you make submissions on the basis of, "Here is what we have accomplished, but there are some major flaws." Surely these are some things that have to be corrected. But I do not think you reopen it. Once you have an agreement that has such overwhelming support inside and outside of Quebec as well, you move forward and build on it.

My concern is that at this time some people may say that in the context of today, of 1987-88, the forces of nationalism are dying, are weak, are dead. People kid themselves about that. I look at the caricature in the *Globe and Mail* this morning. Did you see the caricature which has got portly Parizeau sitting on a dead horse, the dead horse of independence, I guess? I think that might be the case in 1988 presently, but le Parti québécois with Parizeau heading it still has as its main plank independence. It is the only viable alternative in Quebec as a political party at the present time. Those who think that situation will continue for ever are kidding themselves. Just as when we were talking about separatism being dead in the early 1970s, it is foolish to think the forces of nationalism and the forces of independence are dying.

From the point of view of keeping the faith with Quebec and from a very practical point of view, we have an agreement now. You have heard other constitutional people talk about the price we have had to pay to get this agreement. I do not think the price, frankly, is too high. I think we should accept it. What this committee should be doing is making serious or strong recommendations to people like Premier McKenna, who is expressing some reluctance about accepting the agreement. I think this committee should make those recommendations, but strongly suggest that there are flaws and weaknesses and these weaknesses should be corrected at the first

possible opportunity. But I do not think you should go back at this particular stage on it.

Those basically are the brief comments on Meech Lake.

**Mr. Chairman:** Thank you. If I could start the questioning, one of the issues that has emerged more recently has been the statement by the Fédération des francophones hors Québec, ACFO and Alliance Québec with respect to their, I suppose, increasing lack of support for the accord. I want to put the question this way. You yourself are from, if I remember, Gravelbourg in Saskatchewan and you have lived in Ontario in terms of your professional life.

Because of the concerns the official-language minority organizations have raised with respect to what they see as not just the preservation but the promotion, if you like, of official-language minority rights, can you give your assessment of that issue? What might we be suggesting that perhaps would not mean a rejection of the accord, but would be the kinds of things you think we could be recommending to help calm the fears that the major official-language minority groups have been expressing and expressing pretty vigorously to this committee?

**Mr. Roy:** I think that is such an important issue, Mr. Chairman.

As I said earlier, I was deeply disappointed after that in 1982 when it looked for a while as though Ontario might accept some constitutional guarantees other than just education for minorities in this province. You will recall that; I can recall that. I was attending that constitutional conference, and I can recall the big, red headline in the Toronto Star, and Bill Davis's reaction at that time. Without being partisan, Bill Davis was always very nervous when we talked about language, and his reaction was to just back off completely from what appeared to be an initiative taken by Ontario. I was deeply disappointed by that.

I want to say that I agree with what they are saying. I guess the difference is, if they are saying the accord should not go forward without these amendments, that it should be reopened, I have some reluctance to go that far because, in my opinion, one of the best guarantees for French-language minorities outside Quebec is a strong Quebec government within Confederation. I mean, just imagine an independent Quebec outside, what that would do with minorities within the rest of the country. I think it is not as though it is only giving something to Quebec. I think even from self-preservation, that is maybe one of the most important factors.

Just to give you an example of how important it is to have these constitutional guarantees for minorities outside Quebec, you can see right now in Ontario some of the advancements that have taken place within education. One of the reasons for that is that minorities were able to use the courts, based on section 23 of the Charter of Rights and Freedoms, to advance education. You recall we went to the Court of Appeal. In fact, I was one of the participants arguing before the Court of Appeal about the rights under section 23. The same thing has happened to those minorities in Saskatchewan, and likely will happen in Alberta because Alberta and Saskatchewan apparently, constitutionally, are in about the same position. So, that it is extremely important for them.

Back in the days when I was a member of the Legislature, I think in the early 1980s, I proposed a private members' bill which would have given constitutional guarantees to matters other than language within the Ontario. It certainly would not be very difficult for Ontario to give those guarantees now, for instance, in law, in the courts. I mean, we have a whole process which is functioning in the courts presently. There is no reason why, if it were given a constitutional guarantee, that it would cause any difficulty in that sense. And I think you could move on.

What I would suggest is that the committee suggest that there be, as was suggested by l'Association des juristes d'expression française de l'Ontario, at least as a first step—as I recall reading the agreement, I think it talks in Quebec about preservation and promouvoir, I think, of the rights of the anglophone minority within the Quebec and for the minorities outside Quebec it talks only about preserving. I think certainly there should be a balance and I agree with les juristes that it should not only be protecting or preserving but there should be promoting—promouvoir, as well—of the rights of minorities outside Quebec.

Considering we are talking about Ontario, it would not be difficult, I think, for this committee to suggest that if there are certain areas presently in Ontario where constitutional guarantees could be given to the minorities outside, other than education—and I suggest the courts as one area; there may be other areas, for instance, health services—that would not cause great disruption in the province. I am aware that with Bill 8 we are moving forward. There are legislative guarantees to French-language services in this province. Francophones are no different from any other group. There is nothing like constitutional



guarantees to make them make feel at home and to give them the absolute protection.

**1000**

I think that it would be wise for this committee to suggest that, if I may say this respectfully, you move ahead with the agreement but that you make strong recommendation that there are weaknesses in the areas that have been suggested, like those suggested by l'Association des juristes d'expression française de l'Ontario, and that Ontario can move forward by giving constitutional guarantees in other areas.

**Mr. Allen:** It is a pleasure to have Mr. Roy before us. Having enjoyed his company in the Legislature for a number of years, it is always good to renew that acquaintance. I wonder if I could ask much the same question but from a slightly different point of view. If one recognizes in the first instance, as I think you do politically, that even to move beyond the word "preservation" in some provinces would be almost impossible to get agreement about across the board from all the premiers—

One cannot imagine Mr. Vander Zalm, having opposed French on corn-flakes boxes and so on a few years ago, being willing to move not just to preservation but also to promotion of the French language in British Columbia. Politically, that does not sound as if it is very much of a possibility; it is a nonstarter, quite frankly. When we ask about moving beyond in terms of any realistic possibilities, we are really talking about fine-tuning rather than what is really possible.

Could you perhaps, turning to the positive side of all that, give us your opinion as to what remains possible to do within the bounds of the preservation of the linguistic dualism of a province like Ontario? It is clear that we certainly have not yet exhausted the legislative options that are there for us. With political will, it would appear to me that there is much more that could be done. Are there serious limits that exist in Ontario given the language preservation, if one interprets that in a fairly positive, active sense?

**Mr. Roy:** It is not easy to answer your question because people keep talking about the backlash or what is politically possible and there has been a long tradition in this province to proceed cautiously in these areas.

**Mr. Breaugh:** That tradition continues, too.

**Mr. Roy:** One must say that there has been some major advancement. The acceptance of Bill 8 at least to give some legislative guarantees is going to be extremely important as that proceeds through, and it seems to be. Talking to my friend

Gérard Bertrand, who heads the Ontario French Language Services Commission, it is difficult to reverse some of the attitudes within government. It is all very well to say that the law is there, but to get people to accept it, and to have it in practice is something else.

I think that we are making progress in that area. We are making progress in the area of education: the creation of a French-language board. That is a difficult process. There are some constitutional problems there and some financial problems, but where there is a will we seem to be able to find a way to accommodate different groups.

I think, if you are asking me where else we can move, there are further areas not only in primary or secondary education, but we are talking about community colleges, which you are very familiar with, Mr. Allen. We are talking about the establishment of a French-language community college starting maybe with Ottawa-Carleton. There is talk about a French-language university; that is something else. Nothing is so important to a minority as education. Those are some of the areas where we can move.

We have made great strides in the courts. I think we are making progress in the area of health and a number of municipalities have made great progress in the area of municipal services. As we move forward, this is what I would suggest can be done. There is a tradition of proceeding step by step in a process. You have Bill 8. As we move along and have the personnel, and as the services are accepted in different areas, the government should not be loath at some point to decide that this is one area where there now should be constitutional guarantees; for instance, in the courts. I do not think there should be a problem there at this particular stage. Maybe the next step is going to be to give constitutional guarantees.

As you move forward step by step, the final step of having official bilingualism will be painless and will hardly be noticed in the province. It will be noticed by some.

**Mr. Breaugh:** Write that down.

**Mr. Roy:** There will be groups, and we know what the groups are, that are going to be very vociferous about their objection. Fear and ignorance is our greatest enemy. Once people understand what the process is and that it is not—you always keep hearing, "You always shove French down my throat," or whatever the expression is, or some of the comments made by the present Premier of British Columbia about corn-flakes boxes and stuff like that.

I just cannot help but feel that the attitude and atmosphere existing in this country and in this province is so different than what it was 10 years ago or even five years ago. I think we are moving. There has to be a continuous involvement of government from practical application to legislative protection to constitutional protection. I think that can go step by step.

**Mr. Allen:** I hear you essentially saying that if you take the fact that there is recourse to the courts and some important legal decisions that have been made, and if we agree to incorporate Quebec, providing the "distinct society" guarantees and strengthening that linguistic community in the bounds of Confederation, then given those circumstances the language of "preservation" can still give us quite a big agenda to work with in terms of promotion and development, and it lies within the bounds of Ontario, regardless of Meech Lake or anything else, at some point to proclaim official bilingualism.

I think we would not get much of a ripple, much of an effect, two days after if we did it tomorrow. With those considerations, "preservation" is really language that still is very helpful and very positive for the French community in our province.

**Mr. Roy:** I suppose the bottom line, when you really get down to it, is that francophones, like every other group, when it gets down to saying, "Where is our protection?" would rather recite it within the Constitution.

**Mr. Allen:** Of course.

**Mr. Roy:** If there were some reluctance for political and other reasons on the part of government, then you would go to the courts. In fact, governments sometimes do not mind saying, "We are being forced into it." It often takes the political sting out of some of these initiatives. Governments, including the government of this province, should not be reluctant to move ahead with some of those guarantees within the Constitution.

**Mr. McGuinty:** I appreciate very much Mr. Roy's comments on the Ontario situation. We owe a great deal to him locally for his fine work in helping to get our French-language school board under way. Indeed there is Bill 8, which we are going to implement gradually, in the immediate future. I would like to ask for his comments, however, on another aspect of this which I think has been a recurring concern for a lot of people with whom I have spoken. It has to do with the situation in Quebec as it may unfold.

Mr. Roy stated in passing that the forces of nationalism are not dead. I am wondering if the concerns people have regarding the phrase "distinct society" may not be a factor which would stimulate and indeed justify the continuation of a kind of nationalistic spirit which in the past we have felt could be a threat to Canada as a whole.

1010

One of our previous presenters used some phrases. We ran out of time before I could ask him to elaborate on them. I thought personally they tended to impute motives somewhat intemperately, but here are the kind of references he alluded to. He said, "What the Quebec government of René Lévesque failed to achieve after its re-election of 1981, the Liberal government of Robert Bourassa was determined to accomplish through political blackmail." Later on, he states, "Bourassa...agreed to the Meech Lake accord because the 'distinct society' clause took precedence over the Charter of Rights and Freedoms."

He goes on to say, "An aggressive and shrewd Quebec government could...according to Morin and Parizeau...disrupt the federal system and move Quebec step by step towards independence." In the same vein, "...a major purpose of the Quebec clause is to bolster the position of the Quebec government in court challenges brought by its linguistic minorities." Finally, along very much the same line and imputing distasteful, but I think not completely unrealistic motives, "By constitutionalizing the Quebec Liberal government's ambitions to create a nationalist state...a state committed to the defence and promotion of the majority nationality, the accord threatens the very fabric of Canada's constitutional evolution since Confederation."

I would like Mr. Roy's comments on that concern that I think is the concern of a lot of people, a concern that the "distinct society" phrase could be taken up and in the future interpreted to justify, condone and promote the kind of nationalism which in the past we have tried to stifle in so far as it would be a danger to Canada.

**Mr. Chairman:** Mr. McGuinty, just before Mr. Roy answers, can I indicate for the record that I believe those quotations were from Professor Behiels's testimony yesterday.

**Mr. McGuinty:** Yes, I did not refer to Professor Behiels because he is not here. I did not want to raise these in a vein critical of his otherwise very thoughtful presentation. Thank you, Mr. Chairman.



**Mr. Roy:** I have heard those comments before, Mr. McGuinty. I really think it is putting far too much emphasis on the so-called "distinct society" clause. First of all, what the clause does is recognize what exists there in fact, a society which is distinct from the rest of the country. It is the only province with a francophone majority. It has fought to keep that status. By recognizing it in the Constitution, it seems to me you are recognizing a fait accompli. We are just saying what is in fact there. I do not see why we should get particularly excited by that proposition if that is one of the concessions we have to make to have Quebec a full partner.

You know how often we have tried that. You will recall Bourassa in 1971. We thought we had an agreement and at the last minute he got nervous and backed off. It seems to me that having this in the Constitution—I think people are putting an emphasis and a concern far beyond what was ever intended or what the court would interpret from that particular section in the Meech Lake accord.

Besides, you have had a number of constitutional experts, I think including Professor Hogg, who have explained to you that they feel and are convinced that this clause would not override the Charter of Rights and Freedoms. Those are some of your best constitutional experts who are saying that. I think most people would subscribe to the fact that because of where the clause is—at no place is it in the accord that the clause should take precedence over other matters within the agreement of 1982 or some of the other matters within the Meech Lake accord.

With great respect for the professor who made those comments, I really think he sees a sort of nationalistic plot, that Bourassa is sort of Lévesque's successor with just another name, and that this is a whole scheme or just another step towards blowing apart Confederation. I think it is completely the opposite. I think we have succeeded in Meech Lake in finally responding to what Quebec really wants and we have made it a full partner by making certain concessions which I say are really not too much.

I understand the nervousness, for instance, of Pierre Trudeau, our former Prime Minister, about this clause as well, a "distinct society." I prefer to subscribe to others, including the Premier (Mr. Peterson), who says, "Basically, what we are recognizing in this clause is what is in fact there." We are saying, "Yes, there is a distinct society there." So what? That does not override some of the major guarantees within the Constitution. I do not agree particularly with

those comments. I think most constitutional experts would not either.

**M. Morin:** Monsieur Roy, une des recommandations qui ont été faites, hier, par l'Association des juristes d'expression française de l'Ontario, était la suivante: Au paragraphe 2(1) — qui présentement se lit comme suit: «la reconnaissance de ce que l'existence de Canadiens d'expression française, concentrés au Québec mais présents aussi dans le reste du pays, et de Canadiens d'expression anglaise» — eux, ce qu'ils recommandent, c'est que le paragraphe se lise comme suit: «la reconnaissance de ce que l'existence de Canadiens francophones, concentrés au Québec mais présents en tant que minorité dans le reste du pays», et aussi la même chose s'applique au côté anglophone. Est-ce que je pourrais connaître vos commentaires là-dessus, votre opinion?

**Me Roy:** Écoutez, Monsieur Morin, je ne suis pas en désaccord avec ces commentaires-là. Je suis d'accord qu'il devrait y avoir un certain équilibre entre les garanties qui vont exister à l'intérieur de la province de Québec et celles qui devraient exister pour les minorités à l'extérieur du Québec, et peut-être que les suggestions faites par les juristes d'expression française seraient une bonne façon de clarifier ce point-là. Je crois que les juristes avaient suggéré aussi d'aller peut-être plus loin.

Pour ce qui est de la suggestion que M. Allen avait faite — qu'on ne doive pas tout simplement protéger mais aussi promouvoir le fait français à l'extérieur de la province de Québec — même si j'ai une certaine sympathie avec ce que M. Allen a dit, en fait, du côté politique, ce ne serait peut-être presque pas acceptable. Mais c'est un fait que si le Québec s'engage à promouvoir et à protéger la minorité à l'intérieur du Québec, les provinces anglophones devraient faire la même chose pour leurs minorités au sein de leur propre province. Alors, pour revenir à votre question spécifique, je suis d'accord et je n'ai aucune objection à la recommandation faite par les juristes.

Maintenant, je ne suis pas certain: Est-ce qu'eux, ils suggèrent de ralentir l'accord du lac Meech, de ne pas l'accepter?

**M. Morin:** Non; au contraire, ils sont tout à fait en faveur.

**Me Roy:** Ah bon.

**M. Morin:** Mais ils voudraient tout simplement y apporter certains amendements.

**Me Roy:** Ils sont d'accord pour accepter l'accord du lac Meech et, comme de raison, que

vous fassiez des recommandations, des suggestions pour l'améliorer. Alors, je suis parfaitement d'accord avec cette stratégie-là.

**M. Morin:** Il y a aussi la question d'authenticité, la question d'interprétation du mot «préserve» vis-à-vis de «protéger». Ils sembleraient avoir un peu de difficulté à associer les deux mots. Avez-vous une opinion là-dessus?

**Me Roy:** On en a discuté brièvement avant de commencer et je pense que vous êtes peut-être plus enthousiasmé par le mot...

**M. Morin:** «Protect».

**Me Roy:** Oui, «protect», «protéger» plutôt que «préserver». Je pense que je suis d'accord avec vous. Peut-être que le mot «protéger» est plus large, il dénote peut-être quelque chose de plus positif que tout simplement préserver. Vous avez donné l'exemple que quand on préserve quelque chose, on le garde là, on le met—

**M. Morin:** Il n'y a pas d'espace pour bouger.

**Me Roy:** Oui, on ne prend aucune initiative, on va juste le protéger dans son état actuel; tandis que si on protège quelque chose, peut-être qu'on est dans une position de le promouvoir, de l'encourager. Souvent, la meilleure forme de protection, c'est de l'encourager, de faire quelque chose de plus positif.

Vous savez, le jeu de mots devient important, surtout sur le plan constitutionnel et surtout par l'interprétation des tribunaux. Alors, ça peut faire une grosse différence.

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**M. le Président:** Alors, Monsieur Roy, j'aimerais vous remercier d'être venu ce matin et d'avoir partagé avec nous quelques points de vue, surtout sur cette question de langue. Je pense que ça est et va continuer d'être très important dans le cadre de nos recommandations. Les points que vous avez soulignés ce matin vont nous aider énormément dans notre rapport. Merci beaucoup.

**Me Roy:** Merci beaucoup. J'apprécie beaucoup l'occasion que vous m'avez donnée, ainsi que l'intérêt et la participation de tous les membres. J'en suis très reconnaissant.

**M. le Président:** Merci beaucoup.

Maintenant, j'invite les représentantes d'Action Éducation Femmes – Ontario et de l'Union culturelle des Franco-Ontariennes à prendre place à la table. Je demanderais à Mme Huguette Léger de présenter les membres des deux organismes. Nous aimerions souhaiter la bienvenue à vous aussi, Madame Léger, ce matin.

Aimeriez-vous présenter les autres membres de votre groupe? Ensuite, vous pouvez faire votre présentation, et nous continuerons avec une période de questions.

#### ACTION ÉDUCATION FEMMES – ONTARIO UNION CULTURELLE DES FRANCO-ONTARIENNES

**Mme Léger:** Donc, je me présente. Mon nom est Huguette Léger. Je suis la coordonnatrice provinciale de l'Union culturelle des Franco-Ontariennes. Le mémoire sera présenté par Mme Claire Peladeau, membre de l'Union culturelle des Franco-Ontariennes, et Mme Thérèse Martel-Smith, membre d'Action Éducation Femmes – Ontario. Je peux bien commencer par vous présenter l'organisme. La présentation sera faite tour à tour par Mme Peladeau et Mme Martel-Smith.

Pour commencer, l'Union culturelle des Franco-Ontariennes a été fondée il y a plus de 50 ans, et ses buts sont les suivants: l'amélioration du statut social des femmes et la promotion de la langue et de la culture francophones en Ontario.

Les 3000 membres de l'Union culturelle des Franco-Ontariennes sont regroupés dans plusieurs régions de l'Ontario, soit les régions de Cochrane, Hearst, Kapuskasing, Timmins, Timisiskaming, Sudbury, Nipissing, Essex, Prescott et Russell, Glengarry et Stormont. J'aimerais avant tout remercier les membres du Comité spécial de la réforme constitutionnelle de nous avoir permis de vous faire part de nos préoccupations en tant que femmes franco-ontariennes. Alors, je cède maintenant la parole à Mme Peladeau.

**Mme Peladeau:** Nous, d'Action Éducation Femmes – Ontario et de l'Union culturelle des Franco-Ontariennes, avons décidé de présenter conjointement un mémoire au Comité spécial de la réforme constitutionnelle puisque nous croyons qu'il est nécessaire que le texte de la constitution soit modifié de façon non ambiguë, de manière à faire respecter le droit à l'égalité des femmes et le droit à la reconnaissance juridique des différentes communautés culturelles de langue française qui existent à l'extérieur du Québec. Nous ne voulons plus perpétuer notre situation doublement défavorisée, c'est-à-dire être femme et francophone en Ontario.

Nonobstant notre position, Action Éducation Femmes – Ontario et l'Union culturelle des Franco-Ontariennes reconnaissent le droit du Québec à revendiquer le statut de société distincte. Étant donné que le gouvernement Peterson semble favoriser un processus de



consultation, nous saisissons cette occasion pour sensibiliser le gouvernement et le public aux faiblesses de l'accord. Nous croyons que les articles 1, 7 et 16 de la Modification constitutionnelle de 1987 doivent être modifiés pour refléter davantage la sauvegarde des droits des femmes et des collectivités hors Québec. Bien que M. Peterson ait affirmé que la constitution peut être changée, puisque la formule d'amendement s'applique à la vaste majorité des articles visés dans la réforme constitutionnelle, il donne nettement l'impression d'être hésitant à l'égard de toute modification.

Nous tenons quand même à dire à l'honorable M. Peterson qu'après avoir étudié la Modification constitutionnelle de 1987, nous sommes toujours convaincus que certains points demeurent ambigus. Nous croyons que les articles qui traitent des dispositions générales (article 16), des programmes cofinancés (article 7) et de l'identité du Canada (article 1) de la Modification constitutionnelle de 1987 ne sont pas complets. Selon nous, l'accord doit être précisé et éclairci pour être acceptable aux femmes et aux collectivités hors Québec.

Dispositions générales, article 16: AEF – Ontario et l'UCFO reconnaissent assurément le caractère distinct de la société québécoise. De plus, nous ne nous objectons pas à la reconnaissance des droits des autochtones et des groupes multiculturels. Par contre, il ne faudrait pas que les droits d'autres groupes de citoyens canadiens et de citoyennes canadiennes soient occultés ou reportés au plan secondaire.

L'article 16 de la Modification constitutionnelle de 1987 comporte actuellement deux dispositions de la Charte et deux dispositions de la constitution qui, selon notre avis et notre compréhension, pourraient mettre des réserves à l'article 1. Les articles 25 et 27, dont il est question dans l'article 16, se retrouvent dans la Charte canadienne des droits et libertés et se rapportent «au maintien des droits et libertés des autochtones, et au maintien du patrimoine culturel», tandis que l'article 35 (engagement relatif à la participation à une conférence constitutionnelle) et le point 24 de l'article 91 (autorité législative du Parlement du Canada – les Indiens et les terres réservées aux Indiens) sont des dispositions constitutionnelles.

L'exclusion des articles 15 et 28 de la Charte, lesquels portent sur les droits à l'égalité des deux sexes, pourrait signifier qu'ils ne s'appliquent pas à l'article 1. Nous croyons que l'article 1, en l'occurrence l'article 2 de la constitution, en tant que règle interprétative, pourrait être interprété

de façon que la reconnaissance de la société distincte du Québec et la reconnaissance de la majorité d'expression anglaise au Canada soient les faits les plus importants à considérer dans la société canadienne. Est-ce à dire que les droits collectifs sont plus importants que les droits de l'individu?

Si nous nous référons au principe d'interprétation juridique qui stipule que l'expression d'une chose signifie l'exclusion d'une autre, certains droits risquent d'être atteints. Prenons, par exemple, le scénario des garderies bilingues versus les garderies francophones. Le gouvernement pourrait mettre sur pied des garderies bilingues qui, selon lui, protégeraient la caractéristique fondamentale du pays, c'est-à-dire qu'il existe une concentration de Canadiens anglais dans la province et seulement une présence de Canadiens français. Dans ce contexte, les Franco-Ontariennes auraient difficilement recours aux articles sur les droits à l'égalité des sexes pour avoir accès à des garderies francophones. L'enchâssement de la garantie de l'égalité des sexes dans la Charte canadienne des droits et libertés fut une victoire pour les femmes. Il ne faudrait pas courir le risque de perdre des droits acquis.

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Cela remet carrément en question le principe de la protection de l'individu et, en particulier, celle des femmes. La question ne devrait même pas être soulevée. Au risque de paraître simpliste ou répétitive, une constitution devrait, dans ses principes fondamentaux, offrir une formulation claire et précise qui incorpore les droits de l'individu et des collectivités. Si la règle interprétative de l'article 1 doit être conservée, nous souhaitons la voir modifiée, tel que suggéré dans le mémoire de l'Association nationale de la femme et le droit, déposé devant le Comité spécial mixte sur l'accord constitutionnel le 24 juillet 1987, dans lequel on recommandait que soit modifié l'article 16 pour se lire comme suit:

«16(2) L'article 2 de la Loi constitutionnelle de 1987, toute autre disposition de la version modifiée de la Loi constitutionnelle de 1867 ou toute autre loi constitutionnelle, modification ou résolution n'a pas pour effet de porter atteinte aux droits à l'égalité des deux sexes que confèrent les articles 15 et 28 de la Charte canadienne des droits et libertés.»

Mme Thérèse Martel-Smith va continuer la présentation.

**Mme Martel-Smith:** Bonjour. Permettez-moi de présenter mon groupe avant de commencer. Action Éducation Femmes – Ontario est un

nouvel organisme de femmes francophones qui existe depuis l'hiver 1987. AEF — Ontario regroupe des intervenantes dans le domaine de l'éducation. L'organisme a pour but d'amener les femmes francophones vers une prise de conscience de leurs conditions de vie et une prise en charge de l'amélioration de leur propre condition par le soutien et la promotion de l'éducation sous toutes ses formes. En Ontario, nous travaillons plus spécifiquement à promouvoir l'éducation non sexiste. Enfin, nous faisons partie du réseau national d'Action Éducation Femmes.

Le droit des provinces de se retirer des programmes à frais partagés, article 7: Les femmes francophones de cette province ont accueilli avec soulagement l'implantation de programmes sociaux. Après la Seconde Guerre mondiale, le gouvernement fédéral s'est engagé progressivement à financer en partie des programmes sociaux pour assurer le bien-être de la population canadienne. Mentionnons ici, entre autres, l'assurance-hospitalisation, l'assurance des soins médicaux et l'exploitation des établissements d'enseignement postsecondaire. Bien entendu, ces politiques sociales ont évolué au fil des ans et nous voulons qu'elles continuent à assurer un minimum d'égalité de services dans ce pays.

Puisque 80 pour cent de la population franco-ontarienne vit à l'extérieur des grands centres et du Sud-Ouest, elle reçoit des services de moins bonne qualité que la population des grandes villes. Il nous est présentement difficile d'avoir d'excellents services en français. Même à Ottawa, l'Hôpital pour enfants de l'Est de l'Ontario n'offre des services en langue française que depuis peu, et ce à cause de revendications formulées par des organismes francophones. Aujourd'hui encore, les francophones de l'Ontario ont difficilement accès à des services de psychiatrie en français.

Il est donc très connu que les services médicaux spécialisés sont disponibles presque uniquement en anglais et sont offerts presque exclusivement dans les grands centres. Imaginez qu'une province se retire d'un programme national cofinancé, tout en conservant des objectifs compatibles avec ceux du fédéral. Pensez-vous sincèrement qu'elle le fera pour offrir un service de qualité équivalente ou même supérieure aux paramètres du fédéral? Nous doutons de la force de cette condition de retrait.

Nous sommes très inquiètes de la portée éventuelle de l'article 7 de l'accord. Nous savons que l'éducation postsecondaire fait partie des

programmes cofinancés. L'éducation des femmes est nécessaire à l'avancement de ces dernières. L'accès aux programmes en langue française dans les institutions collégiales et universitaires est d'autant plus important pour les femmes francophones de la province. Nous savons que la participation des francophones équivaut à la moitié de celle des anglophones en termes proportionnels à leurs populations respectives. L'éducation est une double condition de survie pour nous à la fois comme francophones et comme femmes.

Nous avons toutes les raisons voulues pour nous opposer à l'article 7. Jusqu'à maintenant, les programmes sociaux nous ont plus ou moins bien servis. Nous craignons que, dans l'avenir, les autres programmes qui seront adoptés soient appliqués de façon inéquitable d'une province à l'autre. Pour que nous, les francophones, ayons droit à un minimum de programmes sociaux, nous comprenons très bien l'importance d'obtenir des garanties. Sans cela, nous risquons non seulement de perdre notre «blouse» mais aussi de nous retrouver dans la rue. Pour qu'une province puisse se retirer d'un programme, elle doit souscrire à des objectifs «compatibles» avec ceux du gouvernement canadien. Malheureusement, ce terme n'est pas explicite. Veut-il dire les mêmes critères? Doit-il être interprété dans son sens le plus large? Nul ne peut prévoir ce qu'en serait la règle. Pour que l'accord soit acceptable, il faut remédier à cette incertitude.

Une province peut se prévaloir de cette prérogative dans les cas où elle répond aux conditions établies. Là encore, la question devient litigieuse. Le programme ou la mesure doit être compatible avec les objectifs nationaux. Connaissiez-vous la portée de ce terme? Il signifie simplement que le programme ou la mesure provinciale a pour seule obligation que ses objectifs soient compatibles, soient conciliables ou s'accordent avec ceux du fédéral. Combien de fois dans nos conversations avons-nous à préciser que ce que nous disons s'accorde ou est conciliable avec ce que dit notre interlocuteur? Bref, lorsque les termes utilisés ne sont pas les mêmes, ils soulèvent fréquemment des ambiguïtés.

Les objectifs des programmes ou des mesures devraient donc être les mêmes que ceux du fédéral. Nous sommes aussi inquiètes à savoir si cet article s'appliquerait uniquement aux nouveaux programmes établis après l'entrée en vigueur de l'article ou s'il s'appliquerait également aux amendements des programmes existants. Nous sommes donc loin d'être convaincues



du bien-fondé de cet article de l'accord. L'incertitude qui en résulte, nous rend mal à l'aise au point de rejeter l'entente. En outre, nous doutons que les amendements aux programmes existants soient admissibles à cet article.

**Identité du Canada, article 1: Solidaires de l'Association canadienne-française de l'Ontario,** nous n'acceptons pas que notre existence soit remise en question. Nous voulons aller ici au-delà des propos de l'ACFO en affirmant que les Franco-Ontariennes sont très souvent doublement défavorisées. Là où bien souvent la francophonie souffre, les femmes francophones, elles, souffrent doublement. Au moment où les leaders de la collectivité francophone s'évertuent à obtenir des programmes universitaires en français dans les sciences, mettent-ils autant d'énergie à encourager les filles à poursuivre leurs études dans les sciences?

En matière de langue parlée et reconnue au travail, les francophones en sont à leur début, grâce à l'impact de la Loi sur les services en français. Les femmes, quant à elles, en sont au point de départ. C'est-à-dire qu'elles tentent toujours de s'intégrer au marché du travail et d'obtenir l'équité salariale.

En tant qu'organisme franco-ontarien, nous reconnaissons certes l'importance d'intégrer le Québec dans la grande famille canadienne. Nous acquiesçons aussi à la reconnaissance du Québec comme société distincte du Canada. Le Québec a toujours joué un rôle de grande soeur face à la francophonie de l'Ontario. Sans son influence, nous aurions été véritablement noyés dans une mer d'anglophones. La proximité de cette province nous apporte une certaine sécurité. Par contre, l'accord du lac Meech sous-estime les droits des francophones vivant à l'extérieur du Québec. Nous sommes plus que des Canadiennes d'expression française présentes dans le reste du pays. Nous vivons en collectivité.

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Les femmes francophones sont bien placées pour vous dire ce qu'elles entendent par ces mots. La collaboration, la coopération, le partage et la vie affective sont des critères que l'on attribue habituellement aux femmes. Sans prétendre ne vouloir jurer que par ces caractéristiques, nous pouvons au moins nous en servir, ne serait-ce que cette fois-ci. Voisiner, suivre des cours d'artisanat ou d'informatique, piquer une jasette en allant au bureau de poste ou au centre d'achats sont autant d'exemples de la vie quotidienne qui témoignent de la vitalité d'une collectivité. Nous pourrions également ajouter à cette liste toutes les activités publiques, telles

que: être propriétaire d'une petite entreprise; être candidate en lice aux élections scolaires ou municipales; être présidente de l'Association canadienne-française de l'Ontario, de l'Association française des conseils scolaires de l'Ontario ou d'autres associations professionnelles; être membre actif de l'Union culturelle des Franco-Ontariennes et d'Action Éducation Femmes - Ontario.

Nous n'acceptons pas non plus que les provinces aient pour unique rôle de protéger les francophones hors Québec. Cette expression est, quant à nous, beaucoup trop conservatrice. Elle engage les provinces à assurer un minimum de survie à la francophonie. Or, nous savons fort bien que c'est le voeu de certaines provinces: par exemple, le cas de Léo Piquette en Alberta. En Ontario, la Loi sur les services en français ainsi que la Loi 75 sur la gestion scolaire témoignent de la volonté d'un gouvernement de commencer à véritablement comprendre les besoins de la population. Bien que nous ayons franchi des pas considérables, nous pouvons demander à M. Peterson quand il entend donner un statut officiel au français. Il nous faudra attendre encore longtemps, c'est-à-dire à la fin du XX<sup>e</sup> siècle, selon les paroles retenues par les médias (Le Devoir du 18 février 1988). Rien n'est immuable et rien n'est infiniment garanti.

Nous sommes très inquiètes de l'interprétation de l'article 1, puisque dernièrement, dans les arrêts de la Société acadienne du Nouveau-Brunswick et du Manitoba, la Cour suprême du Canada fut très favorable aux droits des francophones hors Québec. De plus, même si la Charte canadienne des droits et libertés garantit en belles lettres le droit à une éducation dans notre langue, le cas de Penetanguishene n'est pas encore réglé.

Pour ces raisons, l'UCFO et AEF - Ontario demandent au comité de modifier l'article portant sur les droits fondamentaux pour que la Loi constitutionnelle tienne compte des collectivités francophones. Nous maintenons également que le comité doit substituer, au terme «protéger» au paragraphe 2(2), «promouvoir» ou «développer».

**Mme Peladeau:** En conclusion, nous avons été très déçus du processus dans lequel s'est déroulée la consultation auprès de la population ontarienne et canadienne au sujet de l'accord du lac Meech. Le fédéral s'est hâté de clore la discussion sur cette question, et les organismes de femmes francophones ont eu très peu de temps pour réagir.

En Ontario, nous doutons du bien-fondé du Comité spécial de la réforme constitutionnelle.

D'une part, le premier ministre (M. Peterson) s'est déjà prononcé publiquement, affirmant ne rien vouloir modifier de l'accord. D'autre part, le gouvernement semble nettement enthousiasmé à vouloir intégrer le Québec dans la constitution canadienne et veut résolument ratifier l'entente intervenue en juin 1987.

Puisque nous avons des préoccupations majeures quant à l'accord, nous tenions à vous en faire part. Nous savons que d'autres groupes de femmes et des organismes francophones se sont présentés ou se présenteront bientôt devant vous. Cependant, nous venons décrire le caractère particulier des femmes francophones de cette province. Puisque nous représentons deux intérêts, nous avons des préoccupations doubles et nous serons doublement pénalisées par l'accord du lac Meech tel que rédigé présentement.

Nous, les femmes, n'acceptons pas que nos droits à l'égalité soient relégués derrière d'autres principes fondamentaux. Pour nous, cette garantie est tout aussi fondamentale que la dualité canadienne. Nous n'acceptons pas non plus que les provinces se retirent des programmes cofinancés, tel que stipulé dans l'accord du lac Meech. Finalement, nous n'acceptons pas l'entente si elle ne reconnaît pas de bonne foi la réalité francophone à l'extérieur du Québec.

Pour terminer, un simple message: Nous ne serons d'accord qu'avec un meilleur accord.

**M. le Président:** Merci beaucoup. Vous avez certainement soulevé plusieurs questions et plusieurs aspects de l'accord.

Je me demande si je pourrais poser la première question, surtout sur cette question de langue et de culture. En effet, c'est une question politique puisque sans doute, à un moment donné, il y avait autour de la table plusieurs premiers ministres, peut-être même la majorité, qui disaient: «Écoutez, nous en Ontario, au Québec, au Nouveau-Brunswick, au Manitoba, dans les provinces de l'Est, nous pouvons certainement accepter de protéger et de promouvoir». Je ne sais pas, mais disons que l'Alberta et la Colombie britannique disaient: «Écoutez, pour nous, même protéger, c'est quelque chose de vraiment nouveau et nous n'allons pas plus loin que ça en ce moment».

Alors là, comme politicien, j'ai un problème, j'ai une question: Est-ce qu'il vaudrait mieux accepter au moins quelque chose qu'on pense être un pas en avant, peut-être même deux pas en avant, et essayer plus tard de faire adopter ce terme «promouvoir»? Cela n'empêche pas du tout le Nouveau-Brunswick, l'Ontario ou le Manitoba de faire des changements à la législa-

tion sur les langues, que ce soit dans le domaine de l'éducation, dans celui de la santé ou quoi que ce soit.

En faisant des recommandations, en faisant des amendements, nous devons nous demander aussi: Quel en sera l'impact sur le Québec? Est-ce que ce sera le seul moyen d'arriver au but que nous voulons atteindre? Jusqu'à quel point faut-il, en effet, arrêter le processus du lac Meech, ou chercher d'autres moyens d'effectuer les changements que vous aimeriez voir en ce qui concerne la langue? Pour nous, il ne s'agit pas simplement de dire: «Bon, voici les aspects de l'accord Meech que nous n'aimons pas». Nous devons aussi faire des recommandations visant à améliorer l'accord, à changer l'accord. Mais il y a aussi cette autre réalité, à savoir que le Québec, en ce moment, pense qu'on va accepter l'accord du lac Meech; donc, le rejeter aurait un autre impact possible.

Pouvez-vous nous aider à savoir où aller? Probablement qu'en Ontario on aimerait protéger et promouvoir, mais j'ai l'impression que ce n'étaient ni l'Ontario, ni le Québec, ni le Manitoba, ni le Nouveau-Brunswick qui ont rejeté ces mots, mais plutôt l'Alberta et la Colombie britannique, et ça ne changerait pas demain, même si nous disions: «Écoutez, il ne faut pas accepter l'accord Meech sans qu'on y insère, demain matin, ce mot». Y a-t-il d'autres moyens de le faire?

Je ne suis pas sûr si vous êtes au courant du mémoire des juristes d'hier. Ils ont proposé un changement pour plus tard. Pouvez-vous nous aider? Pour nous, ça pose des problèmes.

**1050**

**Mme Peladeau:** Bien, je n'ai pas connaissance du mémoire des juristes à l'heure actuelle, mais pour nous, les femmes francophones, je pense qu'il est très important d'avoir des services en français. Et puis à ce moment-ci, nous désirons fortement que le mot «promouvoir» ou «développer» soit inclus dans les amendements proposés. Je pense que tous les jours nous vivons des situations comme femmes et c'est un point sur lequel nous ne voulons pas faire de concession, vraiment.

Si je pense à la province de Québec, où les anglophones sont extrêmement bien protégés, je ne peux pas voir pourquoi, même en Alberta ou en Colombie britannique, s'il n'y a que onze personnes qui désirent une école française — comme c'est le cas au Québec où, cette semaine, on mentionnait dans les médias que onze élèves anglophones ont leur école bien à eux, avec tous les services possibles et imaginables; c'est dans



le comté de Vaudreuil-Soulanges, si je me souviens bien — alors moi, je pense que même si on vit en Colombie britannique, ou en Saskatchewan, ou en Alberta, on a droit aux mêmes privilèges, aux mêmes services.

Alors, j'insiste fortement pour que ces mots-là soient inclus dans les amendements. Peut-être conviendrait-il aussi que plusieurs personnes s'assoient ensemble. Comme je vous l'ai mentionné, je n'ai pas pris connaissance du mémoire des juristes. Peut-être qu'ils ont une solution à laquelle nous pourrions adhérer, mais à ce moment-ci, je n'en ai pas connaissance.

**M. le Président:** Bon. Je comprends ce que vous dites et je suis complètement d'accord que les francophones, soit en Colombie britannique, soit en Ontario ou au Nouveau-Brunswick, devraient avoir les mêmes droits. Cela, je le comprends, je suis complètement d'accord.

Mais le problème ne se pose pas comme ça. À mon sens, ça donnerait quelque chose aux minorités hors Québec si le Québec était à l'intérieur du Canada vraiment de bon gré. J'ai la forte impression que peu importe ce que nous disons en ce moment, le point de vue de M. Vander Zalm ne changera pas. En ce moment, il n'accepte pas le mot «promouvoir».

Je veux bien vous comprendre. Est-ce que c'est le point de vue des Franco-Ontariennes que ce comité devrait rejeter l'accord si on n'y ajoute pas, par amendement, le mot «promouvoir»? Cela pourrait avoir pour effet qu'on n'aura pas d'accord et qu'on n'aura pas de protection ni même de préservation. La question que je vous pose, c'est vraiment une question politique: Si l'accord nous donne au moins quelque chose, nous pourrions travailler sur les autres aspects lors de la prochaine série de discussions. Il est clair qu'il y a une sorte d'équilibre, et c'est sur ça que je cherche à savoir votre point de vue.

**Mme Peladeau:** Actuellement, le mot «présence» dit: «Nous nous refusons parce que nous avons l'appui des Franco-Ontariennes, des groupes de femmes». Je pense que le simple fait d'être identifié par une présence de francophones... «Présence» n'est pas vraiment un terme positif pour nous. Alors, nous insistons pour avoir un terme, peut-être autre que «promouvoir» ou «développer» mais aussi positif que ceux-là. Est-ce que ma compagne veut ajouter quelque chose?

**Mme Léger:** Avant d'intervenir, je m'excuse mais au début quand j'ai fait les présentations, j'ai oublié de présenter Jacinthe Guindon, la présidente de AEF — Ontario. Je crois que je ne

l'avais pas vue, c'est peut-être l'endroit où elle était assise, mais je m'en excuse et je la présente.

Lorsque vous vous servez de l'exemple de l'Alberta et de la Colombie britannique, il est vrai que ça pourrait peut-être poser un problème lorsqu'il s'agit de promouvoir les communautés francophones hors Québec plutôt que de protéger des gens ou de conserver des acquis. C'est une question de sémantique mais c'est une question très importante, et je crois qu'il faut quand même maintenir la position que l'accord, selon nous, ne peut vraiment pas être accepté sans des modifications. Il n'est pas question de rejeter l'accord dans ses grands principes, mais il y a certaines choses qui sont extrêmement importantes.

Pour être un peu pragmatique et simpliste dans mes comparaisons, si je mets ma maison en vente, moi, je demande peut-être 125 000 \$ mais j'espère recevoir 100 000 \$. Si on demande de promouvoir, même si le terme «promouvoir» est inclus, peut-être qu'à la longue on va finir par avoir une préservation ou ça va être conservé, au minimum. Alors, je ne reculerais pas derrière une question de mots, puisque, en fait, je ne veux pas être cynique et dire que c'est juste une question de jeu de mots, mais on sait combien le mot peut être puissant.

Alors, je propose que oui, comme la minorité anglophone au Québec, dont la culture est promue au Québec et c'est bien explicite, la même chose doive s'appliquer aux communautés francophones à l'extérieur du Québec si on veut vraiment, à la longue, la promouvoir, cette caractéristique fondamentale du pays.

**M. le Président:** Bon. En terminant, si nous avons une autre copie du mémoire des juristes, nous pourrions vous en remettre copie, puisque là, au lieu de «Canadiens d'expression française», ils parlent de «francophones» et de «minorités». Donc, il y a là un aspect de la collectivité qui n'existe peut-être pas dans le texte. Mais si nous en avons une autre copie, nous vous la donnerons.

**M. Morin:** Ma question, en réalité, est une question complémentaire à la vôtre.

Interjection.

**M. Morin:** Je ne le fais pas avec mauvaise intention.

Dans votre texte vous dites tout simplement: «Nous maintenons également que le comité doit substituer, au terme “protéger” au paragraphe 2(2), “promouvoir” ou “développer”». L'entente, telle quelle est écrite présentement, dit tout simplement que le Parlement et les législatures ont le rôle de protéger, tandis qu'au Québec, et la Législature et le gouvernement du Québec sont

chargés de la promotion autant que de la protection.

Oui, il semblerait y avoir une espèce d'ambiguïté, une espèce de confusion. C'est l'interprétation du mot «preserve». À mon point de vue, en français, c'est beaucoup plus fort. «Protéger», ça veut dire prendre toutes les mesures nécessaires pour être capable de donner tous les droits à ce groupe-là, et donner aussi un peu de liberté d'action; tandis qu'en anglais, on dit «preserve». «Preserve», à mon point de vue, veut dire «emboîter, mettre en conserve».

**Mme Peladeau:** Oui.

**M. Morin:** Cela reste là, ça ne bouge pas. C'est peut-être pour ça que quand est venu le temps – je n'étais pas là – les négociations ont eu lieu entre les provinces, et la Colombie britannique et l'Alberta ont dit: «We like the word "preserve". It is not as strong as "protect". It does not mean "promotion". It does not mean "promoting"».

À mon point de vue, ce que M. le Président voulait dire, c'est qu'il y a certainement eu un progrès, un très grand progrès. C'est que ça n'existait pas auparavant. On a réussi à réunir tout le monde; des négociations ont été faites. On s'entend sur le fait que le Québec se joint à nous, quitte à apporter plus tard des amendements, à en discuter; et, à mesure que les gens comprendront bien ce que veut dire «preserve» ou peut-être un mot différent, là on pourra ajouter «protection» et «promotion». Est-ce que vous êtes d'accord avec ça? C'est difficile.

**1100**

**Mme Martel-Smith:** Ce que nous voyons à ce moment-ci, c'est que le gouvernement de l'Ontario, notre gouvernement, devrait continuer à négocier, et il devrait peut-être faire comprendre ce terme-là avant que l'accord du lac Meech soit signé ou complété. On a le droit de négocier encore. On peut demander au gouvernement fédéral de rouvrir les négociations. Lorsque les négociations ont été entreprises, ça a été fait très rapidement, en très peu de temps. Donc, ce serait peut-être le temps de lui demander de rouvrir les négociations.

**M. Morin:** Sans briser l'entente.

**Mme Martel-Smith:** Sans briser l'entente, c'est ça: y apporter des amendements.

**Mme Léger:** Juste pour ajouter à ça, il faut aussi tenir compte du fait que, pour une question de mots, est-ce que ça vaut vraiment... est-ce que ça peut aussi nous amener à des débats de sémantique justement qui peuvent s'éterniser et qui peuvent aller au-delà? Il me semble que ce

serait beaucoup plus facile et beaucoup plus convenable pour tous, à la longue, d'avoir déjà dans la constitution des termes qui sont clairs et précis et non ambigus de part et d'autre. «Préserver» et tout ça là, quand on y revient, ça veut peut-être dire pouvoir prendre des mesures; mais prendre des mesures, ça veut dire quoi?

«Promouvoir», en français comme en anglais, est très explicite. Que fait-on pour promouvoir? On fait des actions positives, et qu'on le prenne en français ou en anglais, le mot lui-même est beaucoup plus fort que «protéger». Alors, en ce sens-là, je dois insister sur le mot.

**Mr. Harris:** Thank you. I hope you do not mind if I speak in English. There are two areas that I want to pursue. I want to follow up with this "protect" and "promote" as well.

You are the second group that has said you want the same as the English-language minority in Quebec, where the government there is to promote. I do not read this that way. There is nothing here that says the government of Quebec is to promote the right of the English-language minority in Quebec. When it says "protect and promote" it refers only to, first, the distinct society. That is how I read it. That is what Quebec is to promote; it is the distinct society of Quebec.

Then, when it comes to deal with the word "protect," where you want to put in "promote," that, as I understand it, deals with paragraph 2(1)(a). That is all of Canada, recognizing that there is an English-speaking minority in Quebec and a French-speaking minority outside of Quebec. The minority is being protected by both sides, as I understand it.

I am not sure. I do not know why we read so much into Mr. Vander Zalm, whether anybody knows if he has objected or not, but my sense is that Quebec would not agree either. My sense is that Quebec would not agree to promote the English-language minority in Quebec entrenched in the Constitution. To me, what you are saying is that you want to scrap this whole deal because you want "promote" in both sections.

I understand what you are saying except, to me, I think this is a great step forward to have all the provinces of Canada, including Quebec, agree to protect—the definition that is used in paragraph 2(1)(a) of duality, if you like.

I think if the word "promote" were not in there for Quebec, probably nobody would be asking for it, but I do not think it is applying to the same situation. I wonder if you have any comments.



**Mme Martel-Smith:** Présentement, ce n'est pas assez fort pour les francophones hors Québec et c'est pour ça que nous demandons le changement.

**Mr. Harris:** OK, I will not pursue it, but I have heard your group say, "We want the same as the English-language minority has in Quebec." I do not see anything in Meech Lake that gives them something that is not given outside. That, to me, is being treated the same. The promotion part is not to promote the English-language minority; it is to promote, in fact, the French-language majority. That is what is different, that is what is distinct.

I want to ask you something else as well. We have spent a lot of time arguing about this promotion and all of these clauses that deal with the distinct society. Many constitutional people who have come before us have said that if we accept something else that you want—in other words, in your case, for women's rights, you want the charter to be supreme; everybody wants the charter to be supreme—then many are saying, "Then you can forget these clauses; they do not mean anything anyway." These clauses are there to help the courts interpret occasions when the individual rights will be overridden for the sake of the distinct society or for the sake of whatever.

If I understand what the experts are telling me, and I am not an expert nor a lawyer, if we accept your argument for charter supremacy, you might as well throw "distinct society" out; it does not mean anything anyway, because you are directing the courts that even though it is there, you cannot consider it when it comes to interpreting any individual rights. Have you given any thought to that?

**Mme Léger:** Mais je crois qu'on a clairement indiqué dans notre mémoire que les droits des collectivités sont aussi importants que les droits de l'individu et qu'il faut essayer de reconnaître les deux droits. Je pense que c'est la raison pour laquelle on a présenté le mémoire de telle façon, si ça peut répondre à votre question.

**Mr. Harris:** As I understand the way this is placed in the Constitution, it is an interpretive clause. Right now the rights of the individual, and the equality rights, if you like, are very much supreme over these interpretive clauses. What I think you are suggesting is to give a total supremacy of all the individual rights. Then that will eliminate these clauses and there is no point of their being there.

**Mme Léger:** Je n'ai peut-être pas compris la question. Pouvez-vous la répéter?

**Mr. Harris:** In your response to me you said you wanted them to be equal, the rights of the individual and the collective rights. So you want the rights of the distinct society to be equal with equality rights?

**Mme Léger:** Je crois que dans le mémoire on demande qu'ils soient inclus. Alors, si vous voulez interpréter ça comme une façon de dire que les droits de l'individu sont égaux à ceux de la collectivité, oui; mais ce qu'on demande, c'est que ces droits soient inclus, qu'ils ne soient pas exclus de la modification.

**Mr. Harris:** I understand what you are saying. I think what you are asking us to do is to exclude totally these rights as they would deal with women's or with equality rights; these will not pertain. In other words, anything to do with the distinct society will not pertain to women's rights. Maybe I am wrong, but that is the way I understand it.

**Mme Léger:** Je crois qu'il y a un problème de communication, puisque ce n'est pas ce que l'on suggère.

**Mr. Chairman:** Before going to Mr. Offer, let me say that in my example of talking about British Columbia and Alberta, I do not know. Mr. Harris may be quite right and I perhaps might have said province A or province B. The reason I used those two by way of example was that, historically, they have perhaps been somewhat more reticent about accepting French language rights; but there were others who were involved at the table.

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**Mr. Offer:** Thank you very much for your presentation. My question has two parts to it. Of course, most of the discussion here has centred on the whole question of preserving and promoting and should it be included. It is your position that without the insertion of the word "promotion," this agreement ought to be rejected. That is, as I see it, a fair statement of your position.

My concern is that we cannot just look at this concern, which you have rightly brought forward, without also bringing into play your concern with respect to the process that has been in existence to this point in time. My question is, first—and it is more of a comment on your part, and I think the chairman started off this line of questioning—the mere fact that there is now a role to be played by not only the province of Quebec, not only the federal government, but all provincial legislatures in dealing with preserving a fundamental characteristic of Canada. I would

like to get a comment from you that this is in fact a step in the right direction.

Second, if there were a process that emanated from all these hearings that are going to take place across this country whereby your concerns as you have brought them forth today could be inputted, could be acted upon, would that change your position with respect to rejecting the accord now? In other words, if a process were in place after acceptance and after the passage of the accord which said, "Yes, we are now going to deal with some of the concerns which have been brought forward and we will talk about the concerns you have brought forward today"—well, only one of them, actually, because you have brought forward others, such as the amendment to insert the word "promotion"—would that not allay your concerns so that you would rather say, "Well, yes, because we now have a process whereby we can make some direct input, we are ready to say yes, this section can go forward with its shortcomings," in your opinion, because it is, first, a step in the right direction, and second, we have a process, so we can continue to take steps in the right direction?

I would just like to hear your feeling whether, if that were the case, your position with respect to rejection of the accord might be somewhat diminished.

**Mme Léger:** La seule inquiétude devant tout ça serait de déterminer le procédé. Quel serait le procédé, quelles seraient les implications du procédé? Est-ce que vous suggérez, si j'ai bien compris, que l'accord puisse être accepté et qu'on puisse continuer à négocier des changements pour rendre les termes de l'accord plus précis? Ce sont mes questions par rapport à votre question. Il n'est pas tellement clair dans mon esprit que, à la longue, on puisse obtenir des termes dans l'accord qui soient plus clairs. Alors, ce sont les problèmes que j'ai.

C'est une bonne suggestion. On ne nie pas le fait que ce sont des pas dans la bonne direction, mais je ne vois pas pourquoi on ne pourrait pas prendre de grands pas qui pourraient nous amener au but plutôt que de s'attarder sur des procédés et des négociations. Pouvez-vous m'expliquer un peu plus ce que vous entendez par le procédé et à quel moment ce procédé aurait lieu? Cela, je ne l'ai pas compris.

**Mr. Offer:** Certainly we have heard concerns from other individuals and from other groups with respect to a part of the accord, but having put all that aside, having put aside your concerns with respect to the insertion of promotion, having put aside your concern with respect to the

implication of the shared-cost programs in section 7, which you brought forward, there seems to be a general concern that there has not been a process for you to bring forward your concerns prior to this being signed, so to speak.

I am not going to suggest a process for you to accept or reject. Rather, I would like to hear from you, because you have brought it forward, how you see a process which would provide the framework for you to bring forward your concerns. If that process were in existence, would your position vis-à-vis rejection of the accord, rejection of this initial step, then be somewhat diminished?

**Mme Peladeau:** Avant de parler du processus que l'on pourrait entreprendre pour reformuler ou éclaircir l'accord, je voudrais attirer votre attention sur un fait. Dans l'histoire des femmes, nous avons appris à ne pas faire confiance à ceux qui veulent prendre soin de nous. Nous sommes certaines d'être bien servies seulement si nous prenons l'initiative d'un mouvement. Alors, en ce qui a trait ici aux expressions que nous trouvons très ambiguës, je pense qu'il y aurait une possibilité que les femmes se concertent et aident à les définir. Mais nous n'avons pas les budgets, nous n'avons pas les possibilités à ce moment-ci. L'accord du lac Meech doit être entériné, je crois, en 1990 ou 1991, si je ne m'abuse.

**Mr. Chairman:** Yes.

**Mme Peladeau:** Oui? Alors, les gouvernements ont les budgets, ont la possibilité d'ouvrir une nouvelle ronde de négociations pour que ces termes qui nous sont actuellement inacceptables soient définis, éclairés et que l'on puisse les accepter.

**Mme Léger:** Ce que je peux ajouter aussi, c'est que sans vouloir offusquer personne ici, si j'ai bien compris, on a été invitées pour intervenir et pour vous dire sur quels points nous n'étions pas d'accord dans la modification. Loin de vous dire comment faire votre travail, nous sommes quand même toujours d'accord pour continuer le procédé. Mais de là à dire qu'on va mettre de côté ce qui nous concerne, les revendications qu'on a apportées aujourd'hui, pour faire passer l'accord et puis y revenir plus tard, je ne crois pas qu'on puisse accepter ce genre de procédé.

On vous dit clairement et précisément ce qu'on voit qui va à l'encontre de la promotion des communautés francophones et ce qui va à l'encontre de la protection des droits déjà acquis des femmes, et je pense qu'à ce moment-ci c'est à peu près la seule chose qu'on puisse vous



donner. De là à commencer à vous dire comment le faire, moi, je pense que ça revient carrément dans l'autre cour. À la prochaine ronde, oui, sans pour autant qu'on exclue rien pour procéder à autre chose. J'espère que ça répond assez clairement à votre question.

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**M. le Président:** Nous avons besoin d'aide de temps en temps, c'est difficile.

Il y a des questions de la part de M. Allen et de M. Daigeler. Le temps passe et nous avons un autre témoin.

**M. Allen:** Je m'excuse si je prolonge cette séance pour vous un peu, mais je suis tout à fait d'accord avec le point de vue de base de votre mémoire: en particulier, avec vos références à la situation doublement défavorisée des Franco-Ontariennes, même triplement et quadruplement défavorisée en ce sens que les Franco-Ontariens sont une minorité, les femmes font partie de cette minorité, mais aussi la plupart habitent une région marginale et certaines familles sont membres de classes marginales: les ouvriers dans les mines, dans les forêts du Nord de l'Ontario, etc. Je pense qu'il est très important, de ce point de vue, de souligner les besoins de ces groupes défavorisés et de ne pas s'attendre avec trop d'optimisme que les hommes politiques de notre pays poursuivent les buts propres aux Franco-Ontariennes.

En même temps, je suis très pessimiste quant à la possibilité de résoudre cette question de «préservation» et de «promotion» des groupes au Québec et hors Québec. Ne serait-il pas plus facile de souligner en ce moment, dans la politique ontarienne, l'obtention d'un statut officiel pour la langue française en Ontario? En ce moment, au moins deux partis à la Législature ont déclaré leur appui de cette proposition; même le premier ministre a suggéré que peut-être, dans un avenir un peu éloigné, ça pourrait se produire.

Peut-être qu'il est important en ce moment que ce comité souligne que c'est le moment d'atteindre ces buts. De votre point de vue, n'est-il pas possible de réaliser tous vos objectifs en Ontario, qu'il y ait ou non amendement de l'accord du lac Meech, par l'obtention d'un statut officiel pour la langue française en Ontario?

**Mme Peladeau:** Ce serait sûrement une très bonne façon d'avoir des services en français si la législation provinciale donnait un statut officiel à la langue française en Ontario. Mais nous pensons aussi aux francophones des autres provinces, qui probablement se sentiraient délaissés, tout comme nous avons eu cette impression-là lorsque le Québec a reçu le statut

de société distincte. Vous savez, les droits sont tellement minimes – je parle en général de tous les francophones hors Québec – que, à ce moment-ci, on parle non seulement pour nous, les francophones de l'Ontario, mais aussi pour les francophones du reste du pays.

**Mme Léger:** Il faut prendre en considération aussi le fait qu'une constitution, c'est un document de base qui est très puissant. Les lois, là, ça se fait, puis ça se refait, puis ça se défait, puis ça disparaît; mais une constitution, si je comprends bien, d'après mes éléments de science politique, c'est quelque chose qui reste et qui est très fort.

Oui, c'est vrai, ce sont des pas dans la bonne direction, la Loi 8. Mais il ne faut pas se leurrer non plus sur la Loi 8. Les services viennent, mais ils ne viennent pas vite. Puis on peut prévoir peut-être la même chose pour le statut de langue officielle en Ontario. Ce n'est pas encore fait, ce n'est pas un fait. Je crois qu'il est toujours très important de s'assurer que certains droits et certains acquis sont dans les documents de base du pays.

**M. Allen:** Je reconnais cette position et, comme je l'ai dit, je suis d'accord avec ça.

J'ai une autre question. Vous avez dit, en conclusion: «Nous, les femmes, n'acceptons pas que nos droits à l'égalité soient relégués derrière d'autres principes fondamentaux». Je reviens aux questions de M. Harris, mais je ne suis pas d'accord avec lui sur la notion que la priorité de la Charte des droits et libertés effacerait les propositions de la société distincte, etc. Je pense qu'il est possible d'harmoniser la Charte des droits et libertés et la société distincte, il n'y a pas de conflit d'après moi, en particulier quand on souligne que dans la Charte des droits et libertés elle-même on insiste, à l'article 15, sur l'action positive à l'intention des groupes et des individus défavorisés. Donc, il est possible d'avoir un régime qui mettrait l'accent sur l'égalité d'un côté, et sur l'action pour les défavorisés de l'autre côté; donc, l'harmonisation des deux documents.

Mais, comme nous l'ont dit les experts constitutionnels – et peut-être vous est-il possible de penser encore un peu à ce point – même si on souligne ou redéclare la priorité de la Charte des droits et libertés, cette Charte est toujours présente pour tous les autres articles de la constitution. Donc, même si une phrase à l'égard des articles 25 ou 27 sur les autochtones ou les groupes multiculturels, au point de vue des articles interprétatifs pour ces groupes, a été inscrite dans l'accord du lac Meech, bien sûr, la

Charte des droits et libertés est fortement présente pour tous les articles de l'accord du lac Meech, comme pour tous les articles de la constitution. Donc, peut-être qu'il n'est pas nécessaire d'insister sur la nécessité d'une autre déclaration de la position de la Charte du point de vue de son impact sur l'accord du lac Meech et les autres questions. Avez-vous des commentaires sur cette suggestion?

**Mme Peladeau:** Je ne sais pas si j'ai bien compris, mais je pense qu'on parle de l'article 16, dans lequel on dit: «L'article 2 de la Loi constitutionnelle de 1867 n'a pas pour effet de porter atteinte aux articles 25 ou 27..., à l'article 35...ou au point 24...». Mais pourquoi préciser ces articles-là? Pourquoi ne pas avoir dit qu'il n'affectait tout simplement pas les autres articles? Pourquoi les mentionner? Quand on stipule ou on précise que tel ou tel article ne sera pas touché, est-ce que ça pourrait vouloir dire que les autres seront affectés par ça?

Alors moi, je pense qu'il y aurait lieu de reformuler cette disposition générale, qui dirait que ça ne porte pas atteinte aux autres articles de la Charte canadienne des droits et libertés, tout simplement.

**Mme Léger:** C'était justement mon intervention. C'était une question à votre question. Si la Charte prime autant que les autres, alors pourquoi avoir insisté sur d'autres articles qui relèvent de la Charte et de la constitution? Je ne suis pas juriste, mais ça me cause des inquiétudes quand même.

**M. Allen:** Oui, les juristes sont d'avis que les articles 25 et 27 sont des articles interprétatifs, mais l'article 28 est un article qui a donné des droits substantiels et il n'est pas possible de les rendre plus fortement par l'insertion de cet article dans l'accord du lac Meech. Donc, les articles existent à des niveaux différents à l'égard de leur force constitutionnelle et juridique.

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Je pense que dans le comité, l'opinion générale est qu'on aurait mieux fait de ne pas y avoir inséré l'article 16, que ça complique la situation. Mais cette insertion a été faite pour des raisons politiques, non pas pour des raisons juridiques, et je pense donc qu'il y a une raison politique pour insérer l'article 28 aussi. Mais de mon point de vue, et, je pense, de celui des experts constitutionnels, on n'améliorerait pas la situation des femmes si on faisait cette addition à l'article 16 de l'accord. Mais c'est seulement une question, et je pense qu'il est important que

nous tous de penser davantage aux conséquences de cette question.

**M. Daigeler:** J'ai une très brève question. Avez-vous déjà discuté de vos positions et de votre questionnement avec des groupes de femmes venant du Québec? Sinon, avez-vous l'intention de le faire dans un avenir rapproché?

**Mme Léger:** En discuter, avant de présenter notre mémoire?

**M. Daigeler:** Oui. Avez-vous eu un échange d'opinions avec vos consœurs du Québec, puisqu'elles ont une autre position.

**Mme Léger:** Oui, nous connaissons la position des femmes du Québec. Pour répondre directement à votre question, nous n'en avons pas discuté mais nous sommes au courant de la position des femmes du Québec. Pour ce qui est de l'avenir, je ne pourrais pas vous dire s'il y aura des négociations, des rencontres.

**M. Daigeler:** Personnellement, je souhaiterais ça très fortement. Il me semble qu'il y a vraiment une absence de ces dialogues-là. Je vous laisse simplement l'idée qu'il me semble important que vous partagiez vous-mêmes, soit au moyen de lettres ou, encore mieux, dans des rencontres, vos positions aussi avec des groupes de femmes du Québec.

**Mme Martel-Smith:** Naturellement, nous parlons avec des groupes de femmes du Québec, mais nous ne vivons pas les mêmes situations que les femmes du Québec. Les Franco-Ontariennes ne vivent pas du tout dans la même situation.

**M. le Président:** Voici une intervention encore plus brève de M. Villeneuve.

**M. Villeneuve:** Très brève, Monsieur le Président. Vous avez mentionné la situation de l'école à Penetanguishene. Croyez-vous que l'accord du lac Meech pourrait solutionner ce problème? Ou, d'après vous, est-ce que ça créerait des situations encore plus nombreuses comme celle que nous avons vue à Penetanguishene, où le gouvernement de la province a fait appel de la décision du juge Sirois à deux reprises?

**Mme Martel-Smith:** Je dirais, à ce moment-ci, que ça devrait tout simplement aider, ça ne devrait pas nuire. Mais pour entrer dans une discussion, pour élaborer davantage, je pense que je devrais m'arrêter là. Cela devrait aider et non pas nuire.

**M. Villeneuve:** Cela devrait aider, même dans son contexte actuel, ou avec les améliorations que vous avez suggérées? Vous aimeriez voir les améliorations pour essayer d'éviter la situation



qui existe justement. Alors, c'est une des raisons pour lesquelles vous avez mentionné la situation.

**Mme Martel-Smith:** Oui.

**M. le Président:** Alors, merci beaucoup. Au nom du comité, j'aimerais vous remercier infiniment pour votre mémoire et aussi pour vos réponses à nos questions. Pour nous, c'est une sorte de voyage que nous entreprenons avec l'accord du lac Meech pour essayer de savoir quelles devraient être nos recommandations et où aller avec cet accord. Alors, nous vous souhaitons bonne chance et nous vous remercions pour vos suggestions.

Maintenant, j'appelle Mme Monique Riese. Je m'excuse, nous avons pris un peu plus de temps que prévu, mais nous allons certainement vous donner le temps nécessaire pour présenter vos points de vue, et nous allons prendre le temps aussi de vous poser des questions. Alors, je vous demanderais de faire votre présentation. Je pense que tout le monde en a copie maintenant. Quand la lumière rouge s'allume, ça veut dire que ça marche. Alors, si vous voulez commencer, nous allons poser des questions par la suite.

#### MONIQUE RIESE

**Mme Riese:** Je voudrais commencer par vous remercier de me donner l'occasion de vous exprimer la grande inquiétude que j'éprouve à l'égard de l'accord constitutionnel de 1987. Je suis Canadienne française, née et élevée dans la province de Québec. Je suis une personne au foyer qui demeure maintenant à Nepean.

I do not represent anybody else, but I may well be representative of a large number of men and women who feel uneasy about the accord or, indeed, who are opposed to it and who, for one reason or another, hesitate to speak out.

I was reluctant to appear before you, but I love Canada and I love Quebec, and although we must allow for evolutionary changes, there is a real danger that the accord may start the gradual dismantling of the Canada we know.

That Quebec is different nobody will deny, but can you proceed to ratify the accord before Canadians have been told what the long-term effect of the "distinct society" and opting-out clauses may be?

On November 25, 1987, the Attorney General, the Honourable Ian Scott, told the Legislature:

"The 1982 Constitution failed to make good on the promise we had made in the referendum that there would be adequate protection for the distinct identity of Quebec. When we promised that, those words caused no difficulty."

My recollection of the promise made during the referendum is better reflected on page 308 of René Lévesque's memoirs, where he quotes some of the "no" advocates in the referendum debate as follows:

"We, MPs from Quebec, ask Québécois to vote "non," and at the same time we warn Canadians in other provinces that this "non" should not be interpreted as proof that all is well here, or that there are no changes to be made. On the contrary, it is with the aim of getting things changed that we are putting our seats on the line."

"Change, OK. But what change? That remained a mystery...."

"Every chance we had to speak in public over the next days we demanded specifics. In vain."

Many people remember the promise as "a 'no' would not be a vote for the status quo but a vote for renewed federalism," whatever that was supposed to mean.

We are also told that the new section of the accord is an interpretative clause. But is it really only interpretative? There is no doubt about subsection 2(1), "The Constitution of Canada shall be interpreted in a manner consistent with (a) and (b)." But what about subsection 2(3), which reads, "The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph 1(b) is affirmed"?

I do not recall having been given any hint of what some of the ramifications of this subsection might be from any of our leaders, except the Premier of Quebec.

On November 25, 1987, the Attorney General also stated in the Legislature with regard to section 2:

"This section does not confer any power whatever. It is an interpretative provision which will be used by the courts where other constitutional provisions are unclear or ambiguous...."

The opinion that "this section does not confer any power whatever" does not appear to be shared by the Premier of Quebec, who is a lawyer and signatory to the accord; and a number of constitutionalists admit clearly to the possibility of the redistribution of powers by the courts, as does the report of the joint committee of the Senate and the House of Commons, which I deal with later.

On June 18, 1987, Mr. Bourassa, a strong supporter of the accord, made the following statements in the National Assembly. This is an unofficial translation of excerpts from pages 8707 and 8708 of the Quebec Hansard:

"Mr. Bourassa: Mr. Chairman, I am taking the liberty, contrary to my practice, as you know, to use written notes because of the interpretation that may be given by the courts. According to jurisprudence, the statements, the intentions of the contracting party may be useful. Therefore, I will try, in this respect, to be as precise and concise as possible...."

He went on:

"The French language constitutes one fundamental characteristic of this uniqueness, but the latter includes other aspects such as culture and political, economic and legal institutions. As we have said on numerous occasions, we did not want to define precisely to avoid diminishing the role of the National Assembly to promote this uniqueness. It should be noted that this Quebec uniqueness will be protected and promoted by the National Assembly and the government, while the duality will be preserved by the legislators.

"It must be emphasized that the whole Constitution, including the charter, will be interpreted and applied in the light of this 'distinct society' section. The exercise of our legislative powers is intended, and this will allow us to consolidate our vested rights and gain new ground."

On May 28, 1987, on CBC's Morningside, the Right Honourable Pierre Trudeau quoted Mr. Bourassa as having "been saying...this the accord» strengthens our hand in international affairs."

This view is also held by Robert Décarý, who is reported by the Honourable Donald Johnston to have told the Quebec National Assembly committee on the accord, "The role of the Quebec government as such will definitely add strength to Quebec's position, including in international affairs." This was taken from the minutes of the joint committee, August 5, 1987.

Mr. Décarý, described as "among the most eminent constitutionalists in the country" by Senator Lowell Murray, also appeared before the joint committee to support the accord and participated in the following exchange on August 6, 1987:

"Mr. Ouellet: A member of Parliament who is not a member of this committee...implied that you think that under the accord, Quebec is obtaining powers that go far beyond those contained in the present Canadian Constitution. Do you really believe that if the accord is agreed to, Quebec will henceforth have powers in the fields of transportation and communications and that, in fact, through the acknowledgement of a

distinct character, Quebec will eventually be able to achieve de facto separation?"

"Mr. Décarý: It must be borne in mind that this concept is a rule of interpretation, at the outset. It is a rule of interpretation that will have to be applied to the division of powers within the federal state of Canada. Under it, certain powers could be assigned to the provinces, by virtue of the fact that Quebec, as a province, is a distinct society. The division of powers could, in case of doubt, be decided by the Supreme Court. Because it is possible that this dimension of power relates to the concept of a distinct society in Quebec, the court could decide that a power lies within provincial jurisdiction. Thus this power would fall within the purview of all the provinces, and not only within that of Quebec.

"This is how I interpret the accord."

It will be noted that Mr. Décarý did not directly answer Mr. Quellet's question as to whether he believed Quebec will have powers in the fields of transportation and communications and ignored the question regarding the possibility of Quebec's separation. However, he does admit unequivocally the possibility of the redistribution of powers as a consequence of the "distinct society" provision and that in case of doubt the Supreme Court would decide. Should we not be disturbed by Mr. Décarý's suggestion that not only may Quebec gain considerable powers, but should the court decide that certain powers lie within the Quebec provincial jurisdiction because of its "distinct society," the court may therefore also decide that those powers lie within the provincial jurisdiction?

Gérald-A. Beaudoin, who, as members of the committee are probably aware, has had a distinguished legal career and, among other things, pleaded for different governments before the Supreme Court of Canada in constitutional law cases, appeared before the joint committee. Mr. Beaudoin's written brief, appended to the joint committee minutes of August 4, 1987, reads:

"...the distinct society declaration.... It is an explicit rule of interpretation, admittedly an important one, but a rule which does not materially alter the division of powers or the Charter of Rights. It can, however, like any rule, tip the scales to one side or the other in certain cases, in particular under section 1 of the charter or in a grey area of the division of powers."

Former Senator Eugene Forsey, widely recognized as a constitutional expert, who initially supported the accord, said before the joint committee on August 4, 1987:



"The possibilities are infinite. I do not know how to limit them. You undoubtedly have the possibility of a very aggressive provincial government of any stripe in Quebec saying they are going to push this thing as hard as they can."

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In connection with this statement, it is interesting to note that in 1974, under the Liberal government of Mr. Bourassa, the Quebec Public Service Board of the Department of Communications tried to extend its powers by authorizing companies to establish and operate cable distribution undertakings in specific areas. The Quebec Court of Appeal unanimously set aside the decisions of the board and declared them *ultra vires* in so far as they applied to the cable distribution undertakings of Dionne and d'Auteuil, the Communications Department Act, the Public Service Board Act and the cable distribution regulations.

The Supreme Court of Canada, in a majority decision, held that, "Exclusive legislative authority in relation to the regulation of cablevision stations and their programming, at least where such programming involved the interception of television signals and their retransmission to cablevision subscribers, rested in the Parliament of Canada." This was taken from the Supreme Court record, 1978, page 191.

Paragraphs 63 and 64 on page 44 of the joint committee report, under the heading "Distribution of Powers," read as follows:

"63. It has been held repeatedly by the courts that the Constitution Act, 1867, exhaustively divides the entirety of legislative competence between Canada and the provinces. It might therefore appear difficult to see how the 'linguistic duality/distinct society' clauses could affect the division of powers without derogating from the powers, rights or privileges of one level of government in favour of the other.

"64. Nevertheless, the joint committee was advised that the definition of the scope of a legislative power is an ongoing process of allocating subject matters to heads of jurisdiction. Take, for instance, the regulation of markets for financial securities. Would such a law be classified as an aspect of the federal 'trade and commerce' power, as some say, or of 'property and civil rights' within exclusive provincial jurisdiction, as others contend? And what about a new law purporting to regulate the content of radio or television broadcasting? As new laws are made and challenged before the courts, this process of classification of laws into federal or provincial jurisdiction continues. The

court docket is limited only by the imagination and productivity of Canada's legislators and lawyers. The ongoing process of the constitutional 'classification' of laws by the courts is one of the important areas where the interpretative provisions of the 'linguistic duality' and 'distinct society' clauses will come into play. Indeed, if this were not so, then the 'linguistic duality' and 'distinct society' interpretative provision would be meaningless, a result that can hardly have been intended by its framers."

If the term "classification of laws" used in the context of the quoted paragraph 64 is synonymous with redistribution of powers, as it appears to be, what is the meaning of subsection 2(4), which reads, "Nothing in this section derogates from the powers, rights or privileges of Parliament or the government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language"?

In effect, the joint committee report states that the interpretative provision of the "distinct society" is meaningful and that the classification of laws, which appears to be tantamount to a redistribution of powers, will be decided by the Supreme Court of Canada. Should our country be moulded by an appointed judicial body, even the highest in the land, rather than through the normal democratic process?

Clearly, there are considerable differences between the opinions expressed by different constitutional experts, as shown earlier. This is also reflected in the report of the joint committee. Notwithstanding that, ordinary Canadian citizens are expected to be reassured by such statements as, "There is great virtue in ambiguity," or "It is only an interpretative clause," and to be content to let the Supreme Court sort it all out eventually.

With regard to opting out with compensation, which René Lévesque considered to be the most crucial of his demands, according to his memoirs, page 332, he writes in the same memoirs, on page 325:

"...for Quebec, which in all likelihood would have to use it more often than the others, the exercise of the opting-out provision should be made as easy as possible. This way, I speculated, might we not, little by little, be able to build the associate state we had been refused?"

How many Canadians, indeed how many Québécois who voted "non" in the referendum, realize that the opting-out clause in the accord will allow the evolution of an associate state, and little by little may bring René Lévesque's dream

to fulfilment? The "distinct society" clause will help this process along, and more than that, through effective redistribution of powers, may produce not only one associate state but a federation of associated states.

In conclusion, may I pose the following questions? If you believe in a strong, united Canada, are you not disturbed by the possibility of the accord creating a federation of associated states? No matter where you stand vis-à-vis the accord, are you not also disturbed by the fact that Canadians not only are not consulted as to whether they would favour a fundamentally different Canada, but are not even told about the possibility of its emergence?

I respectfully submit the committee recommend that:

(a) The Legislature postpone the ratification of the accord until:

(i) first ministers have convened once again at a public conference to respond to the questions that have been raised before your committee; and

(ii) the federal government has referred section 1, enacting the proposed section 2 of the Constitution Amendment, 1987, to the Supreme Court for interpretation; and

(b) The Legislature be given a free vote on the accord resolution.

If I may add, the proposal to reconvene the first ministers was put forward by Dr. A. W. Johnson, professor of political science at the University of Toronto and a former Deputy Minister of National Health and Welfare, before the joint committee on August 21, 1987.

The proposal for referral to the Supreme Court was made by the Honourable Donald Johnston to the British Columbia-Yukon joint Canadian Bar Association meeting on February 6, 1987.

All of which is respectfully submitted.

**Mr. Chairman:** Thank you very much for a very clear and thoughtful presentation in which you have brought together a number of points, some of which we have had brought before the committee. Certainly in going over some of the testimony before the joint committee, you have brought forward some issues that we have not specifically addressed. I think that is most helpful.

**M. Allen:** On dirait qu'il y avait une espèce de mascarade dans votre description de vous-même, au deuxième paragraphe, comme «home-maker». On dirait plutôt que nous avions affaire ici à un expert constitutionnel «in disguise».

**Ms. Riese:** I just feel strongly about it.

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**M. Allen:** Votre mémoire est vraiment si clair et net, vous avez précisé la question de la division des pouvoirs dans la constitution et son impact sur la société et vous avez donné l'interprétation de cet article avec une telle délicatesse et une telle finesse que je suis très impressionné par cela.

Even with the refinement you have brought to the committee around that whole question, the notion that while there would not be any direct and dramatic movement of one heading or another under section 91 or section 92 under the interpretative force of the "distinct society" clauses, the course of interpretation in areas of shared jurisdiction or where jurisdiction is obscure would none the less over time have a significant impact on the division of powers and, in particular, the powers of the province of Quebec—I personally think something of that kind would happen, and to that extent, I agree with you—is it fair to press that argument to the point where one projects an entire redistribution of Canadian power so that one ends up with what I think you referred to at one point as a series of associate states, rather than what would remain essentially still a unified Dominion with spending powers and with powers under "peace, order and good government" and all the headings under section 91 which appertain to the federal power?

**Ms. Riese:** If Mr. Lévesque considered that the opting-out section made as easy as possible that he could achieve an associate state, does it not follow that the rest will have the opting-out clauses too? If Quebec can become an associate state, cannot the other ones do so as well? Do we not risk to have a checkerboard Canada? If it is within the provincial field, they can opt out and get the money. If they go into a shared-cost program or initiative, what does it mean? Again, they can almost go home with the money and very little else. We are going to end up with a checkerboard Canada.

Those are my views. Obviously, not everybody is in agreement.

**Mr. Allen:** Others have certainly projected that possibility, but does the wording that is in the Meech Lake accord not essentially reflect the practice of the Trudeau government and of the shared-cost programming that prevailed in those years? There is nothing in principle that seems to be very different, apart from the fact that, on the one hand, the federal power has been strengthened by making it clear that the government can spend money in areas of exclusive provincial jurisdiction. There is a clarification that has never existed in the Constitution before, but at the same time, since it is an area of exclusive



jurisdiction, the province naturally—one would have to concede that—may have to have the right to opt out.

Still, the Meech Lake accord proposes that that government, even though it is within its jurisdiction, would have to construct something which presumably at the present moment it does not have to do, although the force of spending power and the money being there and not having it makes a difference, but now it does say that something will have to happen as a result of the federal government moving into that exclusive provincial jurisdiction. I get a sense that that is essentially what was going on in the politics of the Trudeau era.

**Ms. Riese:** Yes, I think it was, but I hear they are going to make it almost a law. Before that, at least there were some powers that the federal government had kept. As it is now, they seem to make it open—at least, this is my interpretation—that the province could get some money by doing a minimum of a program. What does the word “initiative” mean? That they are thinking about it and they get the money?

**Mr. Allen:** Obviously, they would have to do more than think about it. They would have to do something.

**Ms. Riese:** I am exaggerating, naturally.

**Mr. Allen:** Yes. I must say that I do not want to press the questioning on the issue, but I think what I appreciate most in your paper is the way in which you have underlined for us the way in which the course of interpretation in areas of disputed jurisdiction, shared cost and shared jurisdiction could drift in a certain direction. I think that is a refinement we have not often had in the briefs that have come before us on that point. They have often been rather gross assertions that a power would move or that there would be clear transfers of jurisdiction, etc. I appreciate that very much.

**Ms. Riese:** Thank you.

**Mr. Chairman:** Can I just follow up perhaps one aspect of that question, and maybe from the devil's-advocate position that you were setting out? In effect, in that section we are talking about exclusive areas of provincial jurisdiction; not exclusive areas set out by Meech Lake, not exclusive areas set out by the 1982 constitutional changes, but those set out in 1867.

Could one not argue that it makes very great sense that there should be some clearly spelled-out provision, if one level is going to be moving into another level's area of exclusive jurisdiction, that there needs to be some framework or

parameter? Over the last 20 or more years it is not just Quebec but, really, at every constitutional or series of constitutional discussions that we have had the question of the federal spending power, shared-cost programs and opting out have all been there and have been raised, sometimes vociferously and even more strongly by other provinces than Quebec?

When it is suggested that having section 106A inserted into the Constitution is somehow taking away from the strength of the national government, could one not also argue, first, that it sets out for the first time a right of the federal government in fact to move into areas of provincial jurisdictions and, second, that it clarifies how that might proceed and that, in effect, it might be a good thing?

**Ms. Riese:** I think by making it like that, opting out, you can do it. Otherwise, before that, if you wanted to opt out, you were going to give me something else. Now there is nothing else. They go away with the opting-out clause and the money. Before that, they would have had to make a concession.

**Mr. Chairman:** I understand that.

**Ms. Riese:** Am I interpreting your question correctly?

**Mr. Chairman:** You are. I am pushing it, if you like, to the other limit. In 1867 there was a division of powers and those were set out. Courts interpreted what some of those meant as we have evolved through the century, but none the less we have arrived at a position where, for example, education is provincial. Some people feel it ought not to be, but that is where we are at.

It seems to me that one could argue, in terms of a system of effective and healthy federalism in this country, that the federal government should not be able willy-nilly to go in and spend money in that area and put a province at a disadvantage by saying, “We are going to do this anyway whether you like it or not.” What this does is, in effect, protect more clearly in part of the clause the province's right to some form of reasonable compensation. One could view that as a healthy sign because it admits, on the one hand, that the federal government, as a right under the Constitution which it did not have before, may now develop a program, set national objectives and move into an area of exclusive provincial jurisdiction. On the other hand, it says that where that happens, the province may receive reasonable compensation where it has a program that is compatible with those objectives.

I understand your argument and I think it is a valid one, but it seems to me that there is also

another side of that coin which speaks to the nature of our federal state, not just in terms of Quebec but in terms of other provinces.

**1210**

**Ms. Riese:** I think you are right. That is a point of view, but as Canadians, I think we have been functioning quite well. I visualize a checker-board Canada from now on and that we will be weakened by it. This is the way I view it.

**Mr. Chairman:** Thank you.

**Miss Roberts:** Thank you for your fine presentation. As Mr. Allen said, it was much better than most likely I could do, and having some background in the law.

**Ms. Riese:** You have not been working at it for a whole month.

**Miss Roberts:** I think we have been here for a couple of years, or it just seems that way.

What I would like to do is draw to your attention your last page, page 9. You have been very specific about the recommendations. If indeed the first ministers got together again and said, "Here is what we meant. The Meech Lake accord is like this and answers all the questions, but it is going to go through. We are not going to change a word of it," that would still upset you, would it not?

**Ms. Riese:** Right. I think at least if they came and said, "This is the Meech Lake accord; this is what we did and this is what we expect," and gave us some idea of what some of the ramifications are, then it is their prerogative to sign this, obviously. There is nothing too much we can do. We can talk. At least they should tell us. Do you not think they should tell Canadians what some of the ramifications will be?

**Miss Roberts:** My question to you is that you still would not like the accord. You would accept it. Your problem is maybe in the process that occurs in getting to the accord. If they had been more open instead of being behind closed doors, whatever their negotiations were, and they came to this agreement, you would still be prepared to say, "I do not like it, but they were open about it and I could accept it."

**Ms. Riese:** No, I do not think I reject it because they did the whole thing in a marathon session. I reject it by studying it. Whether open or closed, I do not think it changes what is in the text of the Constitution. If they told me why they have done it, it might frustrate me the other way, but as it is now, I have to guess. I have to go to the committee reports and I have to read different things and come to my own conclusions, which may be wrong.

**Miss Roberts:** The second part of my question deals with your second recommendation, which is to refer section 1 to the Supreme Court for interpretation. I assume that is the term "distinct society."

**Ms. Riese:** Correct, yes; what the implications of that are.

**Miss Roberts:** Have you thought about what it would be? What would you say to the Supreme Court? What does "distinct society" mean in the Constitution?

**Ms. Riese:** I am sorry. Whatever the federal government does when it refers a question or, in conjunction with the provinces, they could work out a number of questions, which is what they did in the Constitution in 1980, I think.

**Miss Roberts:** We have specific laws to deal with this. If you are going to think of "distinct society," you might ask a question, I assume with respect to a particular law or a particular question, and you would have to be very particular about that. I do not know how you could get a general answer from the Supreme Court saying, "'Distinct society' will mean this and this." They always say "and including something else we could think of later on."

**Ms. Riese:** But even at this stage, when you hear Mr. Bourassa talk about all the things he has gained in law and all the things he is going to do in law, it seems, to me anyway, that Bourassa reads an awful lot of power into this. Everybody else says: "Oh, no. There is nothing." Ian Scott said that no powers whatsoever are gained. There is so much confusion and uncertainty. Would it not be wise to ask the Supreme Court how it would interpret that?

**Miss Roberts:** I do not mean to belabour this, but if you look at the charter itself, it can be very well written like, "A person may not be detained." The Supreme Court has had many, many, many actions already before it and has made many decisions on what that means. No matter how often you do it, we are always going to have to go back and say, "In this particular situation, does this occur?"

All I am trying to do is get from you your understanding of the situation. What you are basically saying, if I am right, is: "I want some more clarification. I would like clarification, whether it is through the first ministers or through the court. Clarification would make me feel better about the wording." Is that appropriate?

**Ms. Riese:** Yes, that is one thing. Another is that ambiguities in laws may occur eventually, but should they be built in from the beginning?



This is our Constitution and laws are going to be made based on that. If this is obviously faulty, what is in store for us?

**Miss Roberts:** Thank you very much for your comments.

**Mr. Harris:** I thought it was an excellent presentation and I do not disagree with your recommendations.

**Ms. Riese:** Thank you.

**Mr. Harris:** I am not so sure I disagree with the conclusions you have drawn as to what could possibly happen to Canada. I want to ask you two things, though. One is that the opting out does not bother me nearly so much as it appears to bother you. You tie the opting out with "distinct society." That concerns me a little more. If the province of Quebec is able to opt out, if you like, on the basis of "distinct society" or to challenge existing rights or federal powers that are there on that basis, that would concern me more than the opting-out right of provinces in what really are areas of provincial jurisdiction. In isolation it does not bother me, but when you tie it together with "distinct society," maybe it takes on a new meaning, if that is the interpretation of that section.

**Ms. Riese:** If you read Mr. Bourassa's interpretation of the accord, he seems to be saying that he is gaining an awful lot.

**Mr. Harris:** Let me ask you this: Let us say the scenario you have laid out for us is possible under a Constitution amended by Meech Lake. It strikes me that if you wanted to separate from Canada, there would be easier ways to do it than the long and very calculating process you would have to go through using the Constitution to work your way out. I am not saying that what you are saying here is not perhaps potentially possible if all the interpretations go the way you have said them, and it concerns me. Yet I say to myself that there has to be an easier way to get out of Canada than this way—than coldly, calculatingly challenging over a period of 10 or 20 years, doing everything that would have to be done to work your way out. Do I make any sense?

**Ms. Riese:** Yes, I think you do, but to me, I think this is the best way out because they would have everything in place. Gradually, they would have their laws. They would work everything. They would get a lot of money from the federal government in the meantime, and when the time comes that they have their own laws always giving this slant-of the distinct society, then perhaps the will of the people will have been

eroded. What is the difference? What is left? We have our own laws. We have everything.

**Mr. Harris:** In order to do it, using the Constitution to do it, there would have to be a cold-hearted will on behalf of the government of Quebec to say: "We are taking you out of Confederation as it now exists. Here is how we are going to do it. We are not telling you we are doing it, but there has to be a cold, calculated plan of action to do that."

**Ms. Riese:** Yes.

**Mr. Harris:** Do you believe that is there?

**Ms. Riese:** It is not far. To me, it is.

**Mr. Harris:** I am not questioning—I am very concerned when I am asking you that.

**Ms. Riese:** Maybe not with Mr. Bourassa, but do not forget Jacques Parizeau is coming on the horizon now. He said he was going to grab all the powers he could under the Meech Lake accord. If he is talking about all the powers he can grab under this accord, it is because they exist; it is not because they are nonexistent. How can he be talking about powers he is going to grab if there are none to be grabbed?

**Mr. Harris:** Thank you for a very thought-provoking presentation.

**Mr. Chairman:** On that one thought, we are asking, what might Parizeau do with Meech Lake? We are also being told by many thoughtful Quebecers what may happen if we do not do this. There is almost a catch 22 here. I suppose that ultimately what we have to do is look at the accord and the various points of view that have been brought to us and try to find some commonsense balance, if we can, in that we are not "experts." But it becomes very difficult, because on the one hand you say, "If we do this, will it lead to certain things, and if we don't do it, will that also lead to certain things?" Of course, there is no answer that we or really anybody can give to that; it just makes the task more difficult, I suppose.

On behalf of the committee, I want to thank you very much for joining us today. We always find that when we think maybe we are starting to understand a certain part, somebody comes forward and raises yet another series of questions that we have to sit down and think through carefully. We are indebted to you for a very thoughtful presentation. Thank you for coming today. Again, I apologize for the length of time you had to sit, but I hope you found it interesting as well.

**Ms. Riese:** Yes, it was very interesting.

**Mr. Chairman:** Before closing off, I am going to move us in camera because the clerk has a few administrative announcements to make. Following that, we will be having a lunch served

here. We thought it might be simpler to do it that way. I will now move the meeting in camera.

The committee continued in camera at 12:23 p.m.



## AFTERNOON SITTING

The committee resumed at 2:03 p.m. in Algonquin Salon A, Delta Ottawa Hotel.

**Mr. Chairman:** Good afternoon, ladies and gentleman. We can begin this afternoon's session. I would like to call Professor Theodore F. Geraets, a professor of philosophy from the University of Ottawa. We are pleased to have you with us this afternoon. We have a copy of your paper. If you would like to open this afternoon with comments on your paper or proceed however you would like to, then we will follow that up with questions.

## THEODORE F. GERAETS

**Dr. Geraets:** I want to thank the honourable members for giving me the opportunity to explain orally what I have transmitted to you in writing already, quite a while ago. I hope you have been able to read it. I see you have just received a second copy of it. I do not intend, given the relatively short time we have, to read through the whole document, but I think it warrants careful reading. I have shown it to a few people. It is entirely my own, but, for instance, Eugene Forsey had the opportunity a while ago to read it and declares himself in full agreement with it.

My main argument, of course, is that the present system of constitution-making which is sometimes called "executive federalism"—for instance, this term is used in the report of the special joint committee—is really a bad system to make a Constitution. I do not think I have to repeat anything on the first six pages of my brief.

I want, however, to stress a little more explicitly two points that I alluded to but did not develop in the brief. The first point is that in this system called "executive federalism," we have 11 elected representatives who decide for all practical purposes what our Constitution is going to look like. We know, as even the special joint committee recognizes, that with party discipline back home, it is not too difficult in general for a Premier to have his Legislature approve what he has signed at first ministers' meetings.

We should be well aware that 10 out of those 11 men who take those decisions have been specifically elected to look after the particular interests of their particular provinces. I do not think I exaggerate when I use the term "conflict of interest" here. We hear a lot about that, but we should ask ourselves whether we have not enshrined in the present process of constitution-

making something that looks quite a bit like conflict of interest.

The second point I want to make is about the temporary and contingent character of the provincial legislatures and the premiers. We presently have the case of Manitoba, for instance. If the one New Democrat who voted against the government had not voted against the government, Premier Pawley would still be speaking for Manitoba.

The *Globe and Mail* wrote not so long ago, "It is depressing to think that Manitoba's stand on such matters"—meaning the Constitution and meaning also free trade—"will be shaped by the timing of a disgruntled back-bencher." What this underlines is that it just does not make sense to have the government of the day decide the Constitution of a country.

One of the major issues in Manitoba, of course, is going to be the increase of premiums for auto insurance. That is typical of the type of thing that may sway the population of a province in the election of its next Premier, who then if he has a comfortable majority is going to participate in the first ministers' meetings and decide together with the others on the Constitution of the country.

This is certainly not, as you know very well, the only system possible. Look at Australia, which is within the British tradition. As you know, the politicians argue and negotiate a proposal, but then the proposal does go to the population and an overall majority in the whole country is required, as well as qualified majorities, meaning, in Australia, a majority in the majority of states.

We have a formula and I am not at this stage ready to put into question the formula as such, although I do not think it is a good amending formula. I do not put it into question, initially at least, as far as the relevant weight of the provinces is concerned. What I argue, however, is that instead of giving the final say to these 11 people, 10 of whom were elected to look after the particular interests of their provinces, it is the population of the whole of Canada, the people of Canada and, according to whatever formula there would be, the population of the provinces that would have the final say.

In fact, I want to draw your attention to a very important principle and I would be so happy if, frankly, elected politicians were to accept this principle explicitly in their report. The principle

is the following: to be elected does not mean to receive a blank cheque. In other words, what can be done legally by a government may lack legitimacy.

The report of the special joint committee recognizes this when it says on page 134, talking about the proposed standing joint committee of the Senate and the House of Commons on the Constitution, "Such a committee would orchestrate a level of public involvement in the constitutional process that is vitally necessary"—they do not mince their words—"to confer legitimacy on constitutional change."

What I maintain is that such a committee is not enough and that, like in Australia, it is the people of Canada who should have the final say.

That, as I said, is the main principle, and I would be very happy and I think Canadians would respect you for this—I have been talking in the same way to the Senate, but I could not say this to the Senate because they are not elected. You are elected and I think it would make a very great impression on the Canadian people if this committee, composed of elected representatives, would recognize that there are limits to what they legitimately can do.

#### 1410

The main question you have, as the Senate has—I made essentially the same presentation some time ago to the Senate—is, is the proposed strategy of which I start talking on page 8 of the document a realistic one? I am somewhat an odd man out here, I think, because most people you hear are here to defend specific interests: of women, very legitimately; of francophones outside Quebec; and so on. What I am trying to defend is that the Canadian people should have the full exercise of their democratic rights where the nature of the country is at stake.

As far as the strategy I propose is concerned, it is a bold one, and I recognize that. It is very unusual for a provincial Legislature to take the initiative of proposing a resolution for constitutional change. However, you are very well aware that you do have this right. The Senate has the same right. You do have this right. I am somewhat hopeful that I will have the opportunity of making essentially the same presentation when there will be hearings elsewhere in the country. I do not know whether in Manitoba, if there will be hearings there, or in New Brunswick, they will allow people from outside, but I will try to make the same points I am making here. Although what I propose is a bold initiative, especially if it comes only from one

Legislature, I have a feeling you might very well not be alone if you went for this course of action.

I do not want to go through the whole flow chart, so to speak. I propose several points spaced out in time. I want to concentrate on the main point, which is the first one, and maybe say a very few words about the second one. The first one is exactly what I was talking about, the transfer of the final say about constitutional change from the first ministers to the people of Canada and the people of the provinces. I do not think anybody can see in this an attack on Quebec, which is one of the preoccupations when you start talking about the Meech Lake accord.

In fact, it is very interesting to see what the Quebec Minister responsible for Canadian Inter-governmental Affairs of Quebec wrote in 1983 in la Loi constitutionnelle de 1982. I would recommend that you read especially his introduction to this issue, which is of March 1984. Gil Rémillard writes there about the Constitution of 1982. I think there is simultaneous translation; I will read it in French: "Il est difficile de comprendre comment un pays démocratique comme le Canada a pu amender aussi substantiellement sa constitution sans cette consultation." What he means by "consultation," of course, is asking the people to ratify whatever was being proposed. It is possible that in Quebec there would be less opposition than elsewhere to the move I am proposing to you. In fact, you may recall that in November 1981 there was at one time, a very short time, an Ottawa-Quebec axis when Prime Minister Trudeau proposed that they would negotiate a little further, but if they could not agree they would go to the people.

In the same issue, Rémillard gives an overview of what happened at the time; this is on page 91. The other quote I gave was on page 10. Rémillard writes here: "Cependant, dans le contexte de cette conférence de la dernière chance, cette idée de référendum provoque la colère des premiers ministres anglophones, qui rejettent toute idée de référendum, considérant qu'ils ont le mandat de gouverner et que le peuple ne se préoccupe pas de ces questions."

This, of course, is the main argument against what I am proposing, but I think that if you have read my brief and listened to the remarks I made at the beginning, it becomes quite clear that they do have a mandate, but I do not think they have a blank cheque.

Is what I am proposing an attack on the first ministers? It would be a significant reduction in the exorbitant powers that they have now, but it is



not an attack. They would always continue to play a key role in the preparation, obviously, of any proposed change, but they would not have a final say. That is, I think, how things ought to be. If a proposed change had to be ratified by the Canadian people, politicians would have to listen to the people so that their proposals would have a chance to pass. What I propose in number one is a transfer of the final say, but I do not speak at all about the relative weight of the provinces. That could remain exactly the same.

Number two, I propose that together with such a binding referendum on the transfer of the final say, we could find out whether a majority of Canadians do or do not agree with the proposed amending formula in the Meech Lake accord. That would be a possibility. It would cost hardly any more money to do this and it would be very interesting to see what the majority of Canadians think. As I say in my text, until this is done, nobody, but really nobody, knows what Canadians want.

There are two visions of Canada. I talk about that briefly in my text. Sometimes they are exaggerated on both sides and it is easy to reject something that is exaggerated, but we know that Canada is already the most decentralized federal state. With issues like abortion now, for instance, I think many people have become aware that maybe we are going too far in the direction of decentralization.

I am aware that it is a federal state and it should remain a federal state. However, I think it is only fair to give Canadians a final say about this choice between two different, not exaggerated visions of Canada.

One last point on this: what sort of majority should be required if the Canadian people were asked in a binding referendum whether they should have the final say or whether the first ministers should continue to have, for all practical purposes, a final say? As I wrote in my text, I think only a simple majority is required, because there is no question of transfer from the provinces to the federal government, or more provinces or fewer provinces being needed to have a change. It only drives home that a Premier does not, on all issues, especially on those very important, vital issues, speak for his province. I think the premiers should be fair enough to recognize that.

The last point: this brings home the paradoxical situation in which we are. The main difficulty for such very reasonable change by which we would adapt more or less our system to the Australian one—it is not to go somewhere on the

moon or just a dream—is that it would require the approval, not only of the Legislature of Ontario but also of Parliament, of the House, of the Senate and of all the other legislatures. The Canadian people, in order to have the full exercise of their democratic rights, have to receive the approval of their own elected representatives. I hope you do feel that there is a paradox in that.

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Now you can say: "What chance is there? With all those legislatures, unanimity is so difficult to obtain. Provincial premiers will get angry." Yes, they may get a little upset, but for any politician to come out squarely against such an eminently democratic move is also a difficult thing to do. In any case—and that is my last word right now—it is worth trying. Courage is required because it is something unusual. Maybe it would be possible to put out some feelers as to what the feeling would be in other quarters, in other legislatures for instance, but I do think this committee, and hopefully later the Legislature of Ontario if it makes this move, would earn the gratitude of the people of Canada.

**Mr. Chairman:** One of the issues we have increasingly felt we have to wrestle with is the whole question of process. Certainly your paper addresses that very specifically and puts forward a very interesting concept in terms of where we ought to go. I think it is very useful in that respect because it does focus very clearly on what is one way of obtaining that consent.

**Mr. Breagh:** I think you have hit on one of our difficulties, and that is how do we stop this kind of executive federalism getting even further entrenched than it is and put in place some other kind of a process which makes more sense to us. I think we share a great deal of the concern that you have put forward in your paper.

I want to explore a couple of areas with you that disturb me a little bit. First, I would argue that what we have at work here is a parliamentary system malfunctioning, not functioning the way a parliament should. When the premiers roll out to Meech Lake and sign a deal and then go back home and say, "But this deal is in stone and no amendments can be even considered," that is a bastardization of the parliamentary system that I know. That is some other kind of system. That is a totalitarian state. That is a dictator laying down the law. That is not a parliament at work.

So that is my first problem, to somehow work into this process what I would call a more legitimate role of the parliaments, all of them. It seems to me that if they did that across the

country we would do a great deal of service. For example, if every one of our legislatures was required to go through a long, painful, public hearing process like this one, that is what we are here for. It is not just an entertainment piece for the members but it is a vehicle for the public to put their views forward, and the members, I think, have an obligation to respond in whatever way they can to legitimate concerns that have been raised.

I would like to kind of stop there and see if you feel that kind of making the parliamentary system work would resolve much in the way of the problems that you have raised.

**Dr. Geraets:** You are quite right. What we have now is a really excessive situation and that, in fact, is why I dare to make this kind of proposal. Of course, if it had been done differently, as you know, if the standing joint committee proposed this, that would be a very significant improvement. Still, it would not do away entirely with the essential point that I have been making.

I still think the government of the day is too contingent, so to speak, and even the elected legislature of a province is too contingent to decide for generations to come what the Constitution should look like. The Constitution is like the self-image of the nation. That is something that has to be revered, that has to be dealt with very carefully.

Now I agree with you, even without going into the Australian system for instance with ratification by popular vote, it can be done more democratically.

I regret that it is not being done more democratically, but in a sense I think this gives us an opportunity to go to the heart of the problem because the word "more" means that there are degrees. I think finally, the bottom line is that this is a question of essence rather than of degree. I think a constitution should be ratified by the people.

Now about the ways there can be discussions. You can say, "Of course, these are such difficult points and people do not bother about it." I admit that. But I do think that basic issues can be put to the people for a vote, so I agree with you that many partial improvements would be possible. Apparently they are not in too much of a hurry to go in that direction because there still is no joint committee. The report has been out quite a while now but I think we now might have a chance. If proceedings had taken place in a relatively more acceptable way people would not get so upset.

**Mr. Breaugh:** I want to just pursue one other point because a number of people have come before us and talked about referendums in some form. I guess in the end nobody can have a real complaint that democracy would break out and people would be for or against it, but there is a distinction which does have to be made.

The people who elect me expect me, rightfully, to read all of these briefs. They expect me, rightfully, to seek out all the expert advice that I can find. They expect me to know, not all the answers, but to be informed on these constitutional matters and that is a rightful expectation they have and the Legislature of Ontario gives us staff and there are all kinds of people who want to advise us on this, that and the other thing. The guy who works in a truck plant has none of those. He does not expect them, does not want them, does not give a damn about them. But he certainly has an opinion on a matter.

My reluctance about going full tilt into a referendum process is very simply this. Why the hell would the majority in Canada ever vote for a minority group? In the Second World War when we interned Japanese people in this country, the vast majority of Canadians said, "Yes, put them in jail." Somebody had to look at it from a different perspective. If we are always going to the noble idea of a ratification by means of a referendum, the concern that I have is they all have an opinion and I know that but it is not always an informed opinion. There is no way to make them informed and I know that, in Oshawa, they will look at me, Ed Broadbent and Allan Pilkey and say, "What do those three jerks think about this?" Depending on whether they like us or hate us, they say: "Yes, right. Ed has always done right by me before. Breaugh has never lied to me hardly. Pilkey is an OK guy so we will go with whatever way they are going on it." But there will also be people out there who say: "Well, I do not give a damn whether he was right, I cannot stand that guy, and if he is for it I am agin it." That is how the vote will be cast.

So the referendum route which sounds very attractive has some pitfalls in it and I am concerned about how you would ever convince the population of—let us pick our own province—nine million people in Ontario. You put it to them. "Do you really want to spend money to develop the Maritime provinces?" They are quite likely to say: "No, thanks. We do not want to do that just now." The Americans, for example, who do use referendums a lot have this very same problem. Everybody wants you to build a school in their area, but they do not want to pay for a



school in somebody else's area so schools tend not to get built. That is a problem that is inherent in using the very noble, democratic idea that this all goes to a referendum.

Not the least problem will be how does one word the referendum? How do you put this question to the people? We are aware that one can get quite skilled at eliciting an answer that you want by means of how you word the referendum.

I am not opposed to the notion that some formal ratification process takes place. I am somewhat concerned that we deal with all of these other little problems, these nuances that you meet on the way through; and I see more hope for that in a parliamentary system working properly than I do at kind of putting this all out to a great vote. I am really concerned that if that were the case, if we opted for a referendum system, that in the end minorities would always get hammered in that process, that the majority of people are not always right. We know that. Part of the reason that a parliamentary system is reasonably good is, for example, I know one or two things.

#### 1430

The vast majority of the people in my riding do not agree with me. They tell me that at the Midtown Mall every week that I am wrong about this and I am wrong about that but, on balance, they say, "You are an idiot but you are OK." That is the parliamentary system. It is that on balance you are wrong about nine things, but you helped me last week get a job or got my compensation problem solved so you are okay.

I am interested in how you would deal with all the little nuances that are in there. Is it reasonable to expect the entire Canadian population to sit down with something like the Constitution, go through it word by word, and really give a damn what a Supreme Court might do two years from now with that kind of wording, or care about the rights of a minority.

We had an interesting discussion this morning with a group of francophone women who were here. They did not like the Meech Lake accord. I would hate to be the one to break it to them, but they would also not much like the accord that came out of the truck plant in Oshawa having to do with francophone women's rights; I do not think they would be real happy with that one either.

So somewhere between these two extremes we do have to strike the balance that is reasonable to us. I would like to hear your response on how you would handle the problems that are there on a referendum.

**Dr. Geraets:** I think you made your point very well. This, I think, is the strongest argument against what I am proposing. First, I am not in favour of what is called direct democracy, people sitting at a television, something that is being proposed, with a "yes" button and a "no" button, and on every single question the whole population would vote. This, of course, is completely out of the question.

What I am advocating, however, is different. I am not even talking about questions like francophone women's rights, capital punishment or giving money to the Maritimes. Obviously, those questions are to be dealt with by the elected representatives. I fully agree with that. But I think we should see that there is a basic difference between all those questions and very general principles that the Constitution should express.

I am actually concerned with the process that we have now, that we will have a hodgepodge Constitution because of the particular interest of provinces, that we will get all sorts of things in the Constitution. This is not good for the respect that people should have for a Constitution. So my first answer is to make a clear distinction between very basic questions like equalization, for instance. Do you not think that the majority of Canadians, even the majority in all provinces, are in favour of some system of equalization?

Maybe I am an optimist. Maybe I have too much confidence, but with your Oshawa people, if you talk with them I think they would understand that. That is the only thing that they have to understand, not the legal niceties of the thing. But should we have a system of equalization, should we have a Charter of Rights and Freedoms, should we have this amending formula?

That seems the most abstract thing. Who is interested in an amending formula? But I think people are starting to be more aware of the fact that an amending formula really gives us the image of the country, what the country looks like. That is how we see our federal system. That is what the amending formula expresses.

I talked earlier about the two visions of Canada. We now have a sort of intermediate vision with the present amending formula. If we take the Meech Lake amending formula, with an increase in the number of items that would have to be decided by unanimity, we go quite a bit to one of the extremes, and maybe the majority of Canadians would wish there to be a move in the opposite direction, that it is quite possible.

I do not know whether I should talk about it, but during the patriation period, I had several conversations with ministers. I know that the short text that I presented to the joint committee of the time went as far as Mr. Trudeau. What I was proposing then was that the proposals for constitutional change would go to Britain, but with the proviso that the Canadian people would have to ratify whatever would come out of it. Whether some provincial premiers were opposed to it would become completely irrelevant because it would be the Canadian people who would have the final say.

My feeling is that there could very well be a majority of Canadians in each of the provinces who would prefer to reduce the number of items for which unanimity is required. Do you get what I am saying here? Maybe a majority of Canadians say: "I am first of all a Canadian. I want a united country. I do not want to go much further in the direction of decentralization. That is what I want." So I think the principle of the equality of provinces, which sounds very nice but in a sense can very easily become some kind of invitation to blackmail, may be thrown out by a majority of Canadians. Maybe there would be a few items that would require unanimity.

Basically, what I am saying is, first of all there is a distinction between the essential great principles which should be enshrined in the Constitution and all sorts of other questions, and I am not in favour of having a referendum every day on all sorts of questions. Second, I do think that people can get informed. Imagine if we had a debate, a country-wide debate on some of those basic questions, I think it would be a real educational venture.

In certain provinces the teachers are asked to tell people about privatization, and the virtues of privatization. I think it would be great if the Canadian people were to realize, given this responsibility they would have, the vital importance of certain principles, and in the Constitution there should be nothing else than that. There should only be those great principles.

**Mr. Breaugh:** You are kind of opting for what, in the auto workers' union, we call a controlled democracy. We manipulate the question, and we sort out—

**Dr. Geraets:** Oh, excuse me; that is a point I forgot. Of course that can be easily set. For instance, on the amending formula the people could be asked, "Do you approve or not?" I think that is a straightforward question. I do not see how they could be manipulated. Then, of course, people could make propaganda on one side or

propaganda on the other side. That happens all the time whenever there is an election also. But if it is done honestly, and in consultations through, for instance a joint committee, the question can be worded in a way that it is a fair and clear question.

If it only concerns those basic principles I do not think you would have a lot of problem in your Oshawa riding talking about this with your people. It might be an extremely interesting experience.

**Mr. Breaugh:** They think an equalization formula means that Gretzky has to play for Toronto for half a season.

**1440**

**Miss Roberts:** It would take more than Gretzky.

**Mr. Chairman:** I am almost tempted to suggest we adjourn to Oshawa. It would resolve everything.

**Mr. Chairman:** I have Miss Roberts, Mr. Offer, Mr. Harris and Mr. McGuinty. Before moving on, I just remind the committee members that we have an extremely full afternoon and we might be guided by that in our questions.

**Miss Roberts:** I am always very brief. My questions are going to be straightforward.

Do you think the charter is legitimate?

**Dr. Geraets:** I think the whole Constitution, as it is now, is legitimate, but it is kind of border legitimacy. It is legitimate because there has been no overt and very vocal and very widespread opposition. As I said in my paper, this is not good enough. You would have to make an awful lot of noise, almost a revolution, and go out into the streets like the women did, more or less, during the negotiations in November 1981; and it does not make sense that you would have to do things like that to make yourself heard.

**Miss Roberts:** You are using Australia as an example, but as you are aware, Australians must vote where we here do not have to vote. How would you be able to force the participation of even the majority of people to vote, get 50 per cent of the people to vote on the referendum you are suggesting? Are you saying that because this is such a basic principle, everyone must vote; if you do not, you get to pay three times more taxes or something? You are sort of forcing people to take part in something that is not right now part of our federalism.

**Dr. Geraets:** You are right. I think it is a civic duty to vote even if there is no sanction, but again you say maybe we would not get more than 50 per cent who actually would express a vote. You



have a lot of elections where, in fact, because we do not have any element of proportional representation, either provincially or federally, we can have a majority government that has never had the support of more than 40, 42 or 43 per cent of the population. So, of course, we would have to hope and do our best to get people out to vote. I am not advocating at this stage an obligation to vote.

**Miss Roberts:** It would not concern you then if only 30 per cent voted, just as long as there was some legitimacy behind the referendum?

**Dr. Geraets:** It would concern me an awful lot, and I think if that were to happen we might have to think seriously about changing this point, but at this stage I am not advocating financial sanction for those who do not vote.

**Miss Roberts:** Just one brief comment. With respect to constitutional affairs, you said that the Premier (Mr. Peterson) does not speak for this province in particular—

**Dr. Geraets:** I did not say that.

**Miss Roberts:** That the Premier would not necessarily be able to bind his province?

**Dr. Geraets:** I said only this: that we should not take for granted that the Premier speaks for the majority of the population. He has been elected and he should represent his province, but I think the very fact of being elected Premier of a province has some effect on the person who is elected. He has a task now. He has a task to look after particular interests of a particular province, and I think that means that it is not a very rational thing to have 10 out of 11 who are in that situation decide about the nature of the country.

**Miss Roberts:** So you would say that the Prime Minister does speak for Canada then?

**Dr. Geraets:** Hopefully.

**Mr. Offer:** I must say I have some concerns with respect to how a plebiscitary type of democracy might impact on minority rights. I am wondering if you could comment on your proposal vis-à-vis some of the concerns we have heard from people, representations from the Northwest Territories, the Yukon, aboriginal rights, aboriginal persons and how they would fare with respect to your particular proposal.

Much of the discussion, though not all, has centred on the unanimity formula. The unanimity formula in this particular section has 10 subsections. What is it that you are suggesting we put to the people?

**Dr. Geraets:** I distinguished between the binding referendum, which would only be on the

transfer from the executive federalism system to the population of the provinces. The second point is to put to the test the proposed formula in its entirety. I do not propose at this stage another formula than the Meech Lake accord formula, but people may think this relates to a decentralized country and that is one reason they would disagree with it.

Your first question was about the aboriginal people. If questions concerning them, like self-government, were put to a universal vote, if my information is correct—and I had a conversation about this with George Erasmus a while ago—they at least have the feeling that they have a majority of Canadians behind them; a majority of Canadians feel that the native people should be given much more of what they call self-government. Of course, that would have to be spelled out more clearly, but I think it can be done in certain ways that do not immediately affect land rights.

Land rights, of course, is a very complicated issue, and I do not think the land rights of a particular band should be put to a plebiscite. I am not advocating that at all, but again, some very general principles about the place that those distinct societies ought to have within Canada should be in the Constitution. My conviction is that a majority of Canadians would not have much of a problem with that.

**Mr. Harris:** I will be very brief. I am not sure that what you are proposing is any better or any worse than what has happened. A lot of us have problems with the process. I guess in 1981–82 Bill Davis spoke for Ontario and he got somewhere around 25 per cent of the eligible vote. This round, David Peterson was speaking for Ontario and he got something less than 30 per cent of the eligible vote, so there is something wrong there as well with the way we are utilizing that process with party discipline and what not.

I think I understand what you are saying, where you are coming from. I do not want you to take offence at the question. Most people who ask me to put something to a plebiscite do not like what is happening. That is usually when people come to me and ask: "Why can't we have a referendum on this? Why can't we get a say?" Usually they ask me that because whatever system we are using is not coming to the result that they want. Are you in that category?

**Dr. Geraets:** No, categorically not, and I think I proved that by what I just said very briefly about the patriation period. When Prime Minister Trudeau had not much support from the provinces and had to go to Britain and was encounter-

ing those difficulties, I was in favour of the type of constitutional change he was proposing, and I made proposals exactly in the same direction.

I have reservations—I did not want to talk about that—with regard to certain aspects of the Meech Lake accord. My main reservation, however, is with the amending formula. That is why it is the only point that I really mentioned to you. I would have preferred, for instance, to see Quebec, as well as the native peoples and the Acadians, recognized in the preamble to the Constitution rather than have this interpretive clause that we have now about the distinct society.

I am not a constitutional lawyer and I did not want at this stage to go into a discussion of any more specific points, but I am not sitting here because I am against the fact that Quebec has willingly signed this document. I have certain apprehensions. I share the apprehensions of women. I think, for instance, that the Charter of Rights should be above any other law and I do not agree too much even with the derogation clause, but that is not why I am sitting here.

**Mr. Harris:** OK.

1450

**Mr. McGuinty:** I think much of what you have said is based on the premise that had to do with the alleged conflict of interest of the premiers in presuming to move beyond their mandate, which should be limited to particular interests and concerns of their provinces, and to extend that mandate to deal with the types of things dealt with in the accord.

I am wondering, first, if there is not quite a series of precedents in Canadian history which indicate that provincial premiers have indeed assumed that right without being questioned. But even if we were to assume that they did exceed their mandate, I am wondering in a sense what that has to say about the deliberations that we are up to, because we, my colleagues on the committee, have listened to numerous briefs that deal with francophone rights in Ontario, women's rights and native rights, all to be considered within Ontario, but also I think much more substantive issues which have implications that transcend provincial boundaries and which deal with the very fabric and the very future of Canada.

If we accept your premise that the premiers really have no business in exceeding their mandate which is limited to provincial matters, what does that say about us?

**Dr. Geraets:** I did not say that their mandate is limited to provincial matters. In fact, if we continue with the system of executive federalism

and this is definitively enshrined in the Constitution and accepted by the Canadian people, of course when they are elected they will be elected to be part of this group of 11 people and that will be part of their mandate.

However, what I am arguing is that it is not a desirable and very rational situation. I do not know whether I make myself clear. I am not so much saying they are overstepping their mandate. We do have a Constitution that gives them a certain responsibility. They exercise that responsibility. They could do it in a more democratic way, as Mr. Breagh said before, but they do not as such overstep their mandate.

However, I think in constitutional matters it is very important to distinguish between the legal aspect and the aspect of legitimacy and the government of the day, the Premier of the day and the Legislature of the day. We have seen again what can happen, and I mentioned Manitoba. I do not think it is a rational and very defensible way to have them decide on the very nature of the country; again, this difference between the Constitution and any other specific law.

You talked about precedents. Of course, yes, there are precedents; but I think we should not continue to create more of them in a sense, but try to get out of the system.

**Mr. Chairman:** I want to thank you very much on behalf of the committee for joining us this afternoon. I think you have raised in some detail an aspect of the whole issue of consultation which certainly has not been put before us in quite that way. I know that is going to continue to raise a number of questions as we pursue it and we thank you very much for bringing that perspective this afternoon.

**Dr. Geraets:** Thank you for having me.

**Mr. Chairman:** I might now call upon Donald Warren, the deputy reeve of the township of South Crosby, if he would be good enough to come forward. I want to welcome you this afternoon. We have, I understand, one copy of your brief so we will make copies and circulate it when we get back to Queen's Park. If you would like to present it to us, then we will follow up with questions, as has been our habit.

DONALD M. WARREN

**Mr. Warren:** I feel a little embarrassed sitting here after the scholarly discussion that has just taken place, but I rather suspect that many of you have rural backgrounds, and if you have a rural background you will understand that we do not muss and fuss around too much.



**Mr. Villeneuve:** That is a good way to do it.

**Mr. Warren:** That is right. First, let me thank the committee for allowing us to express the feelings of the township of South Crosby and some 60 other municipalities from across Ontario who have joined us in requesting the Premier of Ontario to reconsider the stand he has taken on the Meech Lake accord. In rural Ontario, we take politics seriously and we are inclined to speak out vigorously when we feel that our democratic rights are at stake. Hence our strong objections to the Meech Lake accord in its present form.

To thousands of us in Ontario and to literally millions of people across Canada, the Meech Lake accord poses a real threat to what we believe to be the roots of a democratic society. One of our major objections to the said accord was the manner in which it was spawned and thrust on an unsuspecting Canadian public. I am sure you have heard this argument many times before.

Eleven men, some new in the role of leadership, many of whom were at rock-bottom in the popularity polls, and none of whom, to our understanding, had requested a mandate to make a decision which could have such far-reaching effects on who and what Canadians should become, gathered at Meech Lake and after a prolonged bargaining session reminiscent of a union-management deal came up bleary-eyed and in secret at 3 a.m. one spring morning with a conclusion that had eluded more skilled politicians for over 120 years.

Even township councillors, who from time to time meet for long hours, soon learn that decisions made after midnight are not worth a damn. Surely this is not the way a Constitution of a democratic society should be changed. However, the real failure of the democratic process came when our own elected representatives in Parliament were told in no uncertain terms by their leaders that the accord was a fait accompli and that any party member who broke ranks would suffer for it.

We know that one federal member who did, in conscience, break ranks and spoke out publicly against the Meech Lake deal was chastised and demoted by his leader, and another with more guts left the party altogether. Obviously, with a conspiracy of silence by the premiers of the provinces seeking greater power, and the ruling and opposition parties of the federal House jockeying for Quebec votes, there was no legitimate place for the great mass of ordinary Canadians to express their disapproval of the

deal. That is probably why we jumped into it, because it was not in our jurisdiction either.

To many of us in Ontario, it was reminiscent of the issue of separate school funding when the then Premier William Davis unilaterally dictated to Ontario his edict on the matter and left Ontario citizens with no place to protest until the next election. If we wish to carry this analogy further, we might speculate it was a sleeper issue that decimated the Conservative Party last year and is leading to massive unrest and religious problems in our school system now. Surely, constitutional fiddling on a national scale such as that at Meech Lake is more disturbing than the provincial matters just referred to. But there is a startling similarity to the process, a process we find intolerable.

Many of us, when we were informed through the press of Meech Lake, felt that we had been betrayed and that this just could not be a democratic Canadian government's approach to constitutional change, but rather an approach one might have expected from Stalin's Russia. We also believe that in a democracy at least one opposition leader should have given the dissenters someplace to hang their hats. However, in this instance federal government leaders, fearing to annoy Quebecers because of their voting power, blithely decided to ignore their responsibility to the remaining 20 million of us who live elsewhere across this land.

#### 1500

Please do not misunderstand our position. We sincerely welcome Quebec into Confederation, but we feel that the democratic price other Canadians will have to pay is too high.

It appears to us that our political system is in jeopardy when 11 men attempt to control the destiny of our nation by muzzling the elected representatives and in that way curtailing the rights of the people to have meaningful input into matters of such grave significance to us as a country.

I was following with interest the discussion this gentleman over here was having with the last person who was speaking. It seems to me that a far more reasonable process would have been for the premiers to go back to their legislatures after the proposition had been given to them and discuss with the members in the legislatures what their feeling was on this particular matter and then make their decision afterwards, instead of making a decision and then forcing everyone else to accept that particular decision.

Had it been done the other way—and you may argue that it could not have been done that way—I

rather expect that many Canadian people would not be as upset about the Meech Lake accord as they are. This way, the way it happened, the people I helped to elect had no real voice in what was going to happen. Therefore, they did not really represent me in this. If they had had an opportunity to have represented me by at least having this discussed with them before a decision was made, then I would have felt that the democratic process was indeed working. This way, it was not.

We believe that not only was the process of constitutional change flawed but the actual document as well.

We are concerned that each province is to have a veto over certain constitutional matters, whatever these happen to be. We doubt that even the designers of the accord know what this expression signifies. Does it mean that some of our provincial leaders can now use this device to blackmail the federal government on certain national issues?

It appears to us this has happened already. During a free trade discussion in Toronto in November 1987, Mr. Peckford, after receiving certain assurances from Mr. Mulroney, decided to opt for free trade. It does not go unnoticed either that 24 hours after Mr. McKenna of New Brunswick opted for free trade, the media announced that a large shipbuilding program had been awarded to his province by the central government. We cannot help wondering what goody Mr. Buchanan was fishing for as his payoff for free trade consent.

Does this mean, then, that some of our reactionary, loose-cannon premiers—and if you like, I will name them—or those of the future will be able to hold all Canadians up to ransom to gain special concessions for their provinces? Could a small province such as Prince Edward Island, for example, frustrate the will of 25 million Canadians on some important issue of the future?

Our political leaders say, "Trust us" or, "Take our judgement on faith." Let me remind you that the only thing most Canadians accept on faith is their religion and their God, not politicians, whom we have all too often found to speak with two voices.

We believe, as every leader from Sir John A. Macdonald through Pierre Elliott Trudeau did, that a strong central government is essential to Canada's welfare. Indeed, the renowned Canadian historian Donald Grant Creighton, in *Dominion of the North*, echoes what used to be taught all children in Ontario schools of my generation. This was basically that the Fathers of Confedera-

tion, having seen the American Civil War erupt because each US state was too powerful or sovereign, saw the flaw in such a system and deliberately set up the British North America Act with strong federal powers to prevent the same from happening here.

Surely the provincial veto and further rights granted to the provinces under the accord which allow them in effect to control who shall become Supreme Court judges and members of the Senate further erode the power of the central government. It is difficult for us laymen to imagine a provincial Legislature suggesting names of persons for any of these important positions who have not been tied to their party in some devious political way. This federal concession alone would appear to weaken not only the central power but also the fairness of the Supreme Court of Canada.

Another clause in the Meech Lake accord that concerns us is the opting-out clause. This suggests that the provinces that meet national objectives, whatever they may be, will be able to work around national programs set up by the central government, as long as they have a program in their province that corresponds in some degree, and still be able to collect federal funds, whether their plan meets the spirit of the national program or not. This, of course, means that the chances for a consistent, country-wide federal program would be almost impossible.

We object to the fuzzy language entailed in "national objectives" and would like to see them defined clearly and precisely so that ordinary Canadians like myself would know what was meant.

We cannot help but contemplate what might have happened to old age security and medicare programs had the Meech Lake accord been in place at their conception. Certainly, provinces such as Alberta would now have extra billing and would still have been able to collect full federal funding, something a former federal government had the power to disallow and courageously did. With some of the right-wing leaders we are faced with today, we suggest that millions of ordinary Canadians would have been deprived of these indispensable programs for the poor and the elderly or, at best, offered a watered-down version.

It is interesting to note that the federal government, in its proposed child care program, has placed few if any restrictions on the provinces as to how our tax dollars are to be spent. Does this mean that children in one part of Canada will have less chance of a fair child care



program than those in another? We believe it does, and this is not right. There is no reason a child born in Newfoundland or the Yukon should have less care than one born in Toronto. In all fairness, the program should be consistent country-wide.

Fourth, we join the women's organizations across Canada who fear that this accord will dilute their new-found rights set out in the Charter of Rights and Freedoms for all Canadians. They fear—and we agree—that in all Canada, but especially in Quebec, their rights may be in jeopardy.

We believe a serious precedent was set when the Toronto Board of Education took Ontario to the Supreme Court of Canada over separate school funding because they felt that Mr. Davis's dictatorial decision breached the charter. The board of education lost its case on the basis that the British North America Act, our erstwhile Constitution, superseded the Charter of Rights.

Just recently, when the people of the north took the Meech Lake accord to task in the courts on the basis that it interfered with their rights and freedoms, the court indicated that the Constitution overruled these rights and they lost their case on that basis.

As Quebec's "distinct society" is now to be enshrined in our Constitution, is it unreasonable to believe that a Quebec government would not be required to honour the charter if it so wished? We have seen little in modern politics to convince us that politicians will follow the high road if the low road favours their designs.

Therefore, women across Canada are uneasy with this deal because they feel, as do many minority groups, that their only protection lies in the Charter of Rights and Freedoms. With the examples given above, it would appear their fears are justified. We regret that leading politicians appear to be so nearsighted when it comes to the rights of these groups who are being overlooked.

This accord appears to be particularly unfair to the people of Canada's north. Not only are the people of the Yukon and Northwest Territories denied the opportunity to suggest names for the Supreme Court of Canada, but for the Senate as well. Their concern that they may never be able to become provinces is completely justified in our eyes when they say that they will never be able to get all provinces to agree for them to reach this state.

With British Columbia perhaps hoping at some time to absorb the national wealth of the Yukon, and with some of the prairie provinces

perhaps casting surreptitious glances at the rich natural resources of the Northwest Territories, it would seem highly improbably that any of these western premiers would support provincehood for either area. Indeed, it is even now impossible for them to accept the justified rights of our native peoples to certain lands because they want the rich resources of the disputed lands to fatten their provincial coffers.

Under the Meech Lake accord, it appears to us that the northern peoples have been shafted. We know we have no need to remind the committee members that our native peoples were indeed our founding peoples and that they deserve far better treatment than the accord allows them.

Finally, we object to the blank cheque the accord gives the province of Quebec by making it a "distinct society." If fuzzy language is a characteristic of the accord, this indeed is the vaguest. We expect that no one, including the politicians of Quebec, know what is really intended and we see very serious problems when the courts begin to wrestle with this phrase.

## 1510

Does the phrase "distinct society" mean that Canada is now two distinct countries, one for Quebecers and one for the rest of us? If press reports are even vaguely accurate, it would appear that way. Mr. Bourassa was reported as having said immediately after the accord was hustled through the Quebec Legislature that Quebec had achieved its greatest political victory in 200 years. Later, he was reported as having warned Canada's Senate not to hold up the accord. Why the rush and the pressure if it is a fair document?

Even our Prime Minister reportedly said in one of his speeches on the benefits of free trade that it was good for Canada and good for Quebec, a sentiment echoed by Mr. Turner in precisely the same words in a CBC year-end interview. Any serious student of English could tell you that the co-ordinating conjunction "and" joins words, phrases and clauses of equal value. Therefore, in the minds of the present party leaders, are we already considered two equal countries? To us, this is an unacceptable conclusion. We believe in the concept of one Canada from sea to sea, probably an old-fashioned idea but one we fail to apologize for.

As we understand it, the accord would be unfair not only to the English-speaking people in Quebec but to the French-speaking people across Canada. When Canada became an officially bilingual nation, hundreds of thousands of English-speaking children became involved in

French immersion programs. If Quebec is to become a French-speaking ghetto, of what use will it be for the other Canadian provinces to increase their costly services in the French language? What protection under a less fair government in New Brunswick would the Acadians have, or the francophones in Manitoba, Ontario or elsewhere? In effect, what rights in Quebec would English-speaking Canadians have?

Mr. Bourassa is already making noises that he is considering backing away from his election promise of allowing advertising in English. According to the Meech Lake deal, he is probably justified in doing so. Is it not the accord's direction for Quebec to promote its distinctness? All this arouses our concern that our country will be divided even more than it is along linguistic lines. It will be French in Quebec, English for the rest of Canada, and we shall all be losers.

Indeed, the organization APEC—I do not know whether you are acquainted with that or not, but it has been running rampant down through our area; it is called the Association for the Preservation of English in Canada—has been making headway in Ontario in the past few months. This organization is attempting to split the country on linguistic lines, and in the area where I reside it has many dedicated followers. We understand that it has branches in other provinces where English-speaking people also seem to feel threatened. We fear that the accord and the “distinct society” clause are giving more credence to their approach. It is too bad that something intended to bring Canadians together is having just the opposite effect because of the basic unfairness to so many of our citizens.

Furthermore, what safeguards are there in this accord to prevent a new wave of separatism from sweeping through Quebec? It appears to us that the roots of separatism run deep in Quebec's culture and need only a little spark to ignite them. In a realistic world, political parties change and, inevitably, they will in Quebec. We see both the “distinct society” clause and free trade as invitations for a future Quebec government to leave the Canadian family.

Let us reiterate. We welcome Quebec as a full-fledged Canadian partner, but we feel the price is too high. We believe in a Canada where Canadian and Canadian have equal rights and privileges under a strong central government. There should be no exceptions to this equality because of the divisive potential. If the results of the accord are to mean increased racial pressures

and unfairness to a large segment of Canadian citizens, we feel that the price paid for Mr. Bourassa's signature was out of line.

Unless Quebec is prepared to reopen the accord for amendments that would make it a fair document for all, we wish no part of it. We do not feel that Ontario should support the deal until its basic flaws are remedied.

In conclusion, the resolution passed by our council in early June requesting Mr. Peterson to kill the accord was supported by some 60 municipalities across Ontario. I have that here, and I would like to leave it with your secretary at the end of my presentation. These municipalities came from across Ontario, from Red Lake to Renfrew. Their endorsements were sent to the Premier and to their members of Parliament.

We have been in municipal politics long enough to know that many resolutions pass through Ontario's municipalities, and we consider that having 60 support our resolution in its rough form on June 1 was a pretty good indication that there is a lot of opposition to this particular accord in rural Ontario.

Those of us who are of Second World War vintage can see a parallel in this accord between the reaction of our leaders to the demands of Quebec as a price for its signing the Constitution and Neville Chamberlain's remarks when he came back to England after having made his repugnant deal with Hitler and announced triumphantly, “We will have peace in our time.” We did not see that peace and neither is there any guarantee that, with the Meech Lake accord, we shall see that peace in Canada. Instead, many of us across the land see it as an invitation to Quebec to seek sovereignty more than ever before.

As rural Canadians, perhaps set in our ways but with a long record of opposing injustice wherever it rears its head, we would rather face the unpleasantness now than leave it for our children. That is one reason our council respectfully petitions the Premier of Ontario to refuse to sign the accord for this province until at least the amendments are made that will make it an acceptable document for the people of Ontario before its bizarre and unequal laws are carved in stone.

We understand that there are three years for each province to make up its mind on the accord. We respectfully recommend to the Premier that he delay signing the document until after the next federal election before committing us to Meech Lake with all its discriminatory flaws or at least to allow a free vote in the Legislature so that the



people of Ontario can at last make their voices heard.

We feel convinced that, were these conditions to be met, those who support us would feel that the democratic process had been satisfied and would be prepared to live with the results, whatever they might happen to be.

Thank you. That is the presentation.

**Mr. Chairman:** Thank you very much. I may have missed it, but did you read the motion that the 60—

**Mr. Warren:** No, I have it here, included with my paper. Would you like me to read it?

**Mr. Chairman:** Yes, please. I think just so we can have that entered.

**Mr. Warren:** "It is moved by Don Warren, seconded by Wayne Sly, to pass a resolution that the corporation of the township of South Crosby appreciates the importance and desirability of Quebec's joining in the Canadian Constitution; however,

"Whereas it believes in a strong central Canadian government and;

"Whereas it believes that the concept of two Canadas is unacceptable to the Canadian people and;

"Whereas it believes that no province in Canada should have power to veto over matters agreed to by a majority of Canadian provinces and;

"Whereas it believes that, were the Meech Lake accord to be supported by the province of Ontario, many social services could be curtailed in provinces less fortunate than our own;

"Be it resolved that the corporation of the township of South Crosby go on record as opposing the changes in our Constitution suggested by the Meech Lake accord and further requests other municipalities in Ontario to join us in urging the Premier of Ontario and his government to oppose these changes to the Canadian Constitution when it comes before the provincial House for ratification."

There are copies of this resolution and that is pretty well the end of it.

**Mr. Chairman:** Thank you very much. Mr. Cordiano.

**Mr. Cordiano:** Thank you for being very frank and certainly very concise in what you have said to us today. Your message comes out loud and clear.

I just want to deal with this question. We have heard from many groups that may have difficulty with various aspects of the accord. Correct me if I

am wrong, but you totally oppose the agreement; you want no part of it. Is that correct?

**Mr. Warren:** We want no part of it unless it is amended. That is correct.

**Mr. Cordiano:** I see. So you are advocating certain amendments?

**Mr. Warren:** If it were amended, I think that most people, any reasonable people, would probably accept it.

**Mr. Cordiano:** OK. I do not recall you making specific recommendations in your presentation. Perhaps you could just go over those again for me. Did you make specific recommendations with regard to amendments? You would like certain changes made?

**Mr. Warren:** Yes, we did in the last paragraph, sir.

**Mr. Cordiano:** OK. Can you just reiterate those for me, so I can be very clear in my own mind about what it was that you wanted amended?

**Mr. Warren:** The conditions we had hoped would be—

**Mr. Cordiano:** Yes, the specific amendments you were recommending.

**Mr. Warren:** OK. The thing that really annoyed us was the process.

**Mr. Cordiano:** Yes, OK, but—

**Mr. Warren:** Then we got into the veto. We do not believe that each province should have a veto. We feel that it is weakening the central government too much.

**Mr. Cordiano:** Yes.

**Mr. Warren:** We do not agree with the opting out because we feel that it is a problem in so far as certain provinces sometimes have loose cannons rattling around in them, and our concern is that you never really and honestly know what a loose cannon is going to do. If nine premiers wanted something or felt that something would be good for Canada and the 10th did not, then it appears to us this would be a little bit of an overbalance. In other words, we do not like the idea of one province being able to veto. I know that now there is a seven-three vote or something like that.

1520

**Mr. Cordiano:** There are certain aspects of the Constitution which now require unanimity and there are others, the majority of which require the 7-and-50 rule. What we are talking about is bringing under the unanimity rule certain other aspects, such as the Supreme Court and the Senate, etc., and increasing those elements.

**Mr. Warren:** That is right. Perhaps our difficulty is with the Supreme Court. We do not like the idea of one province being able to veto. It does not really matter what it is; we just do not like the veto. We have accepted it in Quebec for a number of years, I know. In that particular instance, it is probably OK because it was something that came in a long time ago. If you get all the provinces able to veto certain matters—it does not matter what they are—you still have a hodgepodge, and how do you ever get anything done with the broad spectrum of provincial leaders that we have across this country?

**Mr. Cordiano:** We have in Quebec what most of us would consider, of the two leading parties—and obviously over the years there have been various parties represented in the Quebec National Assembly—but certainly the Liberals are considered by most Canadians to be a moderate party, let us put it that way, when you compare them to the separatist party, the PQ. They have come out with a set of proposals which formed the basis of the Meech Lake accord.

If we are saying to Quebec at this point in time that we cannot accept the moderate, modest proposals which they have brought forth, then what are we asking them to do in terms of the kinds of proposals that we are willing to accept? I hear what you are saying and certainly other groups have pointed that out. My difficulty is, do Quebecers not have a say as well in what should be part of the Constitution as they see it? We have asked ourselves this question for a number of years: What do Quebecers want?

**Mr. Warren:** All I could say is that I think, as I mentioned before, that we believe in a Canada where Canadiens and Canadians, if you wish to call them that, have equal rights under a fair and strong central government. We do not believe in privilege for anyone. I think perhaps that is the case.

Maybe I am just reflecting my own thinking on this, but I believe that we have been in this country together for a long time and I do not think any specific group should have privileges that other groups do not have. I accept that the Canadiens and I are brothers. We are the same country, the same people, we live under the same conditions. Why should one brother have more than another?

**Mr. Allen:** I think, Mr. Warren, most of us on the committee, like many of those who made presentations like yours, have some very severe reservations about the process, which I gather is your central concern. We have wrestled with that

a good deal. I personally think it is perhaps a little extreme to characterize the process with metaphors that relate to totalitarian regimes of one stripe or another.

One knows, for example, that what we got in the Meech Lake accord came out of an impasse of debate that took place in the early 1980s and that there was a good deal of government-sounding back and forth and discussion in the country around questions pertaining to how Quebec would get back to the table in our federal system and that, over time, governments evolved positions and responded to other propositions such as the five points that came out of Quebec.

Therefore, there was a fairly extensive process around that, notwithstanding the fact that it did not ever get back to legislatures for formal decisions and for perhaps local debate in our communities, which probably it should have done. I think we are very strongly of the opinion that in the future the process should never get so far ahead of the legislatures and the elected representatives of the people and of the communities out there themselves that there would not be an opportunity formally struck for that debate to take place in the public mind before things get cast in stone. I think we are very strongly with you on that particular concern of yours.

I will not pursue some of the questions that I think were implicit in Mr. Cordiano's questioning, although I think there is more to follow up there. I would like to come back to the question of your concern about consistency of national programs and what Meech Lake implies in that regard. You remember, as I do, that there has been a lot of discussion back and forth, "Should it be national objectives or should it be national standards?" That seems to be the critical terminology we are wrestling around. I wonder whether it really makes any difference as long as we have one of those two words. I will tell you why and see what your reaction is to this.

One can have a federal government that can set out, as this one has done, for example, a day care program and it may enshrine that the national standard has to be that there virtually is no national standard. They can say the standard has to be that there is diversity, accessibility and different kinds of programs, and phrase the language of standards in such a way that there is a minimum standard required, if you like, or a diversity of standards as part of the standard.

On the other hand, one can have a government that would say, as we did with the Canada Health Act, there has to be national equality of application, accessibility for all people, there has



to be public funding and it has to be universal in all respects and that extra billing cannot pertain and so on. But does that not depend on the politics of the government as to how language like "standards" or "objectives" gets applied? Does it, therefore, make very much difference as long as we have something there in language that says either "national objectives" or "national standards" and then any government will take it from there in terms of its own particular political stripe as to how far it wants to go?

**Mr. Warren:** I suppose that is the case. However, in my mind, I see standards and objectives as being rather different. For national standards, in my mind's eye I visualize a list of things, maybe a slim list of things, that are necessary and that each province would have to adhere to if it expected to get federal funds for this particular program. National objectives, to me, are rather like what you make on New Year's Eve; they are my good intentions.

Obviously, my fear is that many of the provinces would simply say, "Yes, we will meet national objectives," but how are you to tie them down if you do not have something there that says, "You will have this and this and this"? It may be a short list, but there should be certain fundamental standards you feel a program should produce in a province before it gets federal funds. If it is national objectives, in my mind, it is too airy-fairy. It is something altogether different from, say, a code of standards.

**Mr. Allen:** I guess I have yet to see any definitive statement which tells me it would not be considered national objectives if a government were to say that our objective is the establishment of a publicly funded, universally accessible, parent-participatory national day care program.

**Mr. Warren:** But these are the standards that we expect you to follow.

**Mr. Allen:** I can see that language being incorporated in objectives, and I am not sure that anyone has told us yet, definitively, that could not hold in the courts.

**Mr. Warren:** I am no lawyer, sir, and my language is something I studied for a few years many years ago. It appears to me that, in my mind, standards and objectives are somewhat different. I still see a standard as something that is a fairly concrete code of conduct, if you like, whereas an objective is something that perhaps I would like to see but I will not necessarily meet the ideal that I see in this particular objective.

1530

**Mr. Allen:** You do have other people on your side in this debate. There is no question.

**Mr. Warren:** I am sorry, I have been out of the country for a month and I have missed a good deal of it.

**Mr. Chairman:** I want to thank you on behalf of the committee for joining us this afternoon and also for leaving with us the motion that was circulated from your council and that will become part of the record of our hearings. As Mr. Allen said, you have expressed a number of views which others in the last month or so have expressed as well and you did so with vigour and I think we got the message loud and clear.

Perhaps as one last comment, I would say I do not think there is anyone around this table, and indeed from discussion with some members of the federal joint committee, who in terms of process does not emphatically agree we would not want to have to go through this again. Whatever is involved in the process for future constitutional amendment, the period of listening to people in the broad sense must come before and not after.

We have been wrestling with that in terms of what we might, in fact, be recommending. That was a point you made very strongly and I think I can state quite categorically that we share that very firmly.

**Mr. Warren:** Thank you. If you are successful in your endeavours to have this take place, we shall be most thankful, I am sure.

**Mr. Chairman:** The clerk will take the petition.

I now call upon the representatives of the the Public Interest Advocacy Centre. I believe Glen Bell, the associate general counsel, is with us this afternoon but not Mr. Roman.

I apologize. In our afternoon sessions, I am afraid as we get to the middle of the order we start to slip a bit in our time, but that will not curtail the time you will have before us. We want to welcome you here this afternoon. I am covered here in paper but I believe we all have a copy of your brief. If you would like to proceed in the discussion of it, we will follow up with questions.

#### PUBLIC INTEREST ADVOCACY CENTRE

**Mr. Bell:** The title of the brief is Living with Meech Lake: The Supreme Court of Canada.

As you might guess, the Public Interest Advocacy Centre wishes to restrict its comments to the provisions of the Meech Lake accord that

deal with the Supreme Court of Canada and specifically with the appointment process. The Public Interest Advocacy Centre takes no position on some of the larger issues that we have been discussing here this afternoon.

First of all, a few words about the centre. The Public Interest Advocacy Centre is a private charitable organization that represents groups across Canada which would otherwise be under-represented or not represented at all in judicial and regulatory proceedings. The Public Interest Advocacy Centre has represented low-income and disabled consumers, as well as native groups and environmental groups before the various regulatory tribunals and courts in Canada. Public Interest Advocacy Centre lawyers have also appeared before the Supreme Court of Canada on several occasions.

Ordinarily, PIAC, if I can use the acronym, does not speak in its own name but on behalf of others. However, where a policy affects the interests of PIAC's usual client groups, as does the question of appointments to the Supreme Court of Canada, we feel obliged to comment.

Let me first say a few words about the role of the Supreme Court of Canada. The court's role in constitutional matters changed dramatically with the coming into force of the Canadian Charter of Rights and Freedoms. Whereas, in the past, the court's main task in constitutional law was to arbitrate disputes over the division of powers, now the Supreme Court is also the final arbiter of the relationship between the individual and the state and of the merits of some legislation. The recent decision of the court in the *Morgentaler* case is an example of the new role the Supreme Court is being asked to play in public policy debates.

It is therefore more urgent than ever that we recognize the need to have a Supreme Court in which the people of Canada may have the greatest possible confidence. Its members must be seen as being the brightest and the best among our judicial contingent, and their independence from the political process must be assured.

The accord contains six main features relating to the Supreme Court of Canada. I would just like to focus on one of them, which is the fourth one. Where a vacancy occurs on the Supreme Court, the federal government will fill it from lists of nominees supplied by the provinces, thus creating the so-called double veto.

This is the only feature of the accord relating to the Supreme Court whose substance has not been tested in past practice and this relatively new process is a focus of our concern. The provinces

will now have a large voice in the appointment decision. We believe that steps can be taken by Ontario to ensure that the appointment process is strong and fair.

In our view, there are three main areas of concern with the process as proposed by the Meech Lake accord. The first problem, as you have probably heard about already, is deadlock, the second one is patronage and the third is the exclusion of federal judges and territorial judges and lawyers from consideration for appointment. I would like to deal with each of these in turn, if I may.

First of all, the problem of deadlock: The obvious risk of the double veto system proposed under the Meech Lake accord is that the provinces and the federal government will be unable to agree on the person to be appointed to a vacancy. This could lead to delays in the work of the Supreme Court, as well as unseemly wrangling over the qualifications of particular individuals. The appointment could become a bargaining chip in federal-provincial negotiations so that factors unrelated to a candidate's ability could weigh in the decision. Highly qualified candidates might refuse to allow their names to be put forward if they foresaw that they might become the ball in a game of federal-provincial ping-pong.

The second problem is patronage. Patronage is an assault on a taxpayer. It says to him or her, "We are going to use your money to pay our friends." Judicial patronage compounds the evil by undermining the public's trust in the organ of the state that embodies the rule of law. The deleterious effect that even the suggestion of partisanship could have on the credibility of the Supreme Court makes it an unacceptable risk. Unfortunately, the Meech Lake accord does not address this issue.

By delegating the nomination function to the provinces, it actually increases the risk that an individual's partisan loyalty may creep in as a factor in the preparation of the lists of candidates. The Supreme Court of Canada now plays a vital role in the definition of individual rights and freedoms and in the review of legislative policy. It will be called upon to examine the constitutional merits of legislation which was once part of the program of a particular political party. Even a hint of partisan bias in the court will undermine the absolute trust that Canadians must give to it.

The third area of concern is the exclusion of federal judges and territorial judges and lawyers from consideration for appointment to the Supreme Court. As you are aware, there is no process by which judges of the territorial courts



or members of the territorial bars may be sponsored for appointment to the Supreme Court of Canada. This problem has been recognized by many commentators.

A further problem which has not been widely recognized is the fact that judges of the Federal Court of Canada may also be overlooked by provincial governments when nominations are being sought for a vacancy in the Supreme Court. The tendency will be for the provinces to nominate judges from their own provincial superior courts or senior lawyers practising in the province. This will leave judges of the Federal Court without provincial sponsors. The talent pool will thus be artificially restricted.

#### 1540

If I may just depart from the text for a moment here, one has to wonder whether a current member of the Supreme Court, Mr. Justice Le Dain, who was promoted from the federal Court of Appeal, would be on the Supreme Court now if the Meech Lake process had been in force at the time he was appointed. He is a distinguished jurist and can only be said to be a definite contributor to the credibility and quality of the Supreme Court of Canada.

The creation of a reliable screening mechanism by the government of Ontario would eliminate all of these risks, at least as far as Ontario nominees are concerned. The Public Interest Advocacy Centre believes that an appropriately constituted nomination advisory committee would provide the solution.

PIAC recommends that the government of Ontario establish an advisory committee which would submit to the Premier the names of qualified individuals for placement on the province's list of nominees for appointment to the Supreme Court of Canada.

Recently, Ontario's Attorney General (Mr. Scott) announced his intention to establish such a committee for provincial court appointments. There is no reason that this worthwhile initiative could not be extended to nominations for the Supreme Court of Canada.

We believe that such a committee would function best if it had the following composition, procedures and legislative status.

I am dealing, first, with the composition of the committee. The composition of a nomination advisory committee is the key to its success. A properly composed committee will assure the selection of the highest calibre of candidate and will avoid any hint of partisan bias. In our submission, the nomination advisory committee should be composed as follows: a retired judge of

the Supreme Court of Ontario, the Federal Court of Canada or the Supreme Court of Canada, and if from the last two courts, with some substantial connection with the province; the delegate of the federal Minister of Justice; the delegate of the provincial Attorney General; the delegate of the Canadian Bar Association; the delegate of the Law Society of Upper Canada; two distinguished laypersons appointed by the Premier; and the delegate of the deans of the law schools of Ontario, making a total of eight members.

I will not go into detail as to the rationale for including all these particular persons on the committee. I will just mention one, however; that is, the delegate of the federal Minister of Justice. It may at first seem unusual to have a delegate of the federal government on a provincial nominating committee. However, I believe that by doing so we gain two benefits.

First of all, the committee process gains credibility in the eyes of the federal government, thereby reducing the risk of deadlock. In the second place, we provide a channel for bringing members of the Federal Court to the attention of the committee, thereby increasing the talent pool available for appointment to the Supreme Court of Canada.

Just a few words about the procedures of the committee: It would be best if the nomination advisory committee were allowed to establish its own procedures. However, I would just like to make some suggestions about two concerns; first of all, publicity. We believe that at this stage of the process, the nomination stage, there would be no need for publicity. Indeed, publicity would probably be harmful at that stage. It should be said, however, that a confidential nomination process would not be inconsistent with a public confirmation process if the federal government decided to go in that direction.

The second procedural suggestion concerns the recruitment of women and visible minority groups. They have always been underrepresented in appointments to Canadian superior courts. We therefore suggest that the nomination advisory committee adopt a practice of encouraging the recruitment of qualified women and members of minority groups.

The third aspect of the committee we would like to comment on is its legislative status. It would be open to the province to establish such a committee on an informal basis. However, we believe it would be better if the committee were enshrined in legislation. This would lend the support of the Legislature to the procedure and

thus accord to it greater legitimacy in the eyes of both the public and the federal government.

In the Public Interest Advocacy Centre's submission, the proposed committee would effectively avoid the risks of deadlock, patronage and the exclusion of Federal Court judges. Any provincial list composed of nominees put forward by such a committee would leave only the smallest of politically safe openings for the exercise of the federal veto.

A nomination advisory committee thus composed would also protect those individuals nominated from any suggestion of partisan bias. Indeed, it would open up the process for those qualified candidates who were actively involved in politics and who would otherwise be seen to be too close to the government. It would also provide judges of the Federal Court, at least those from Ontario, with a means of acquiring provincial sponsorship.

The only concern that is not dealt with by the concept of a provincially constituted nomination advisory committee is the exclusion of qualified members of the territorial courts and members of the territorial legal professions from consideration for appointment to the Supreme Court of Canada.

When it comes to something as important as the composition of the Supreme Court of Canada, our choice of candidates should not be artificially limited. We therefore recommend that the government of Ontario at the earliest date following the ratification of the accord, should it be ratified, sponsor an amendment to the Constitution which would provide a mechanism through which members of the territorial courts and legal professions may be considered for appointment to the Supreme Court of Canada.

In conclusion, the provisions of the Meech Lake accord which permit the provinces to nominate appointees to the Supreme Court of Canada provide an opportunity for Ontario to take the lead and set the salutary precedent in the establishment of a fair and strong nomination process. A properly composed nomination advisory committee, established by legislation, would go a long way towards ensuring the independence and high calibre of, and public confidence in, the Supreme Court of Canada.

All of which is respectfully submitted.

**Mr. Chairman:** Thank you very much. I think that is a particularly interesting proposal on a very specific subject, one which has been put before us as a potential problem by a number of people: how the judges would be selected, if the

provinces would simply name party bagmen and the like.

As you mentioned, the Attorney General has been making some suggestions regarding appointments of provincial court judges. We have received as well a copy of the Canadian Bar Association's proposal, to which we now add yours. We really appreciate the specifics, because that is one of the things, in a number of these areas, we are going to want to deal with when we come to our report. Thank you, and we will begin the questioning with Mr. Breaugh.

**Mr. Breaugh:** You have elaborated on some things we have discussed before. Most of us are now aware that the Supreme Court is taking on a different role, having mostly to do with the basic idea that we now have a Constitution and that there are rights which will be interpreted by the courts in a way which is a little different from what courts have previously done in this country.

Most of us are looking for some kind of system, such as you have outlined here, not just as a means of trying to determine that these people who would be appointed would be eminently well qualified but as a means of knowing a little bit about them. Many of us would advocate—at least, I certainly would—that that is going to take on increasing importance as constitutional arguments continue to go before the Supreme Court, and Supreme Court decisions really have a major impact on the way that the federal government and the provincial governments conduct their business.

You stop short, and were rather critical of the notion of some kind of—well, you are basically making the argument that you ought to do a preselection process and then leave it alone. Could you elaborate just a bit on why you rejected the notion of any kind of confirmation proceedings? I am intrigued by that. I think many of us on the committee have taken a look at what the Americans do in the way of confirming.

**1550**

They actually, in my opinion anyway, do both. There is a great deal of preselection work done and there is a huge elaborate process at work to kind of work up the names of who might be appropriate nominees for a given position. But then they also maintain that you must have some kind of public confirmation process after the fact, that the best preselection process in the world does not do its job well unless you have a public face to that, and that is some kind of a confirming process. They seem unconcerned about the notion of deadlocks and things like that.



I think history kind of says they are right. Although it looked like, in the Bork case, for example, the President's choice was not going to go anywhere and that there would never be a solution to that, there was in fact a solution to it. It did work its way through the system. I would be interested in hearing why you stayed away from the notion of a confirmation process.

**Mr. Bell:** We have not specifically addressed our minds to the merits of a confirmation process and we take no position on it. It is a matter for the federal government, I think, to decide on. At this stage, which is the provincial nomination, we think it is not an appropriate stage for a public examination of the potential candidates. We have no serious opposition to a public confirmation process by the Parliament of Canada or a committee of it.

I think the nomination advisory committee would help in removing some of the weaknesses we see in the American system. In the American system there is no prescreening provided for, with the consequence that unsuitable candidates get nominated, with predictable results. As we say in the brief, there is a better way to eliminate the unqualified than the political stoning to which candidates are subjected in the US. I believe that kind of process simply discourages highly qualified candidates from putting their names forward. Who would want to subject himself to the kind of excoriation that Judge Bork, for example, recently went through? No doubt there would be those who would not mind, perhaps whose vanity was greater than their self-respect. But we would not get—

**Mr. Breagh:** Present company excluded.

**Mr. Chairman:** You are still aiming for a judgeship.

**Mr. Breagh:** I am hanging in there.

**Mr. Bell:** We would not get the highest-qualified candidates that way, but I think that with the nomination advisory committee a public confirmation process would be hard pressed to reject or even seriously question a person who had gone through that initial screening process. I think there are advantages to having these people out in public and having them questioned about their views on particular issues. I think the public needs to know who these people are. Even perhaps some of the guys in the truck plant in Oshawa would like to know.

**Mr. Breagh:** Let me pursue that a bit because a number of us have looked at how American jurisdictions go about this. The first thing many of them would say is that they do a

very extensive preselection process. It is not a public one, but they are very concerned about the background, the qualifications, what people have done. They are very aggressive, far more so than we ever would contemplate in this country, about field investigations, income tax returns, what you did last year, where you got your law degree, how you practised law, all kinds of things. They really do turn their whole bureaucracy loose on this kind of stuff. The Federal Bureau of Investigation agents get right out there in the field and knock on the doors. They do a lot of that. I think they would argue that they do a preselection process, which may not be a public one, and is not put together in the way you suggested, but it probably does all of those things.

The other side of their argument is that they must have some kind of public confirming, that there must be a process which the public can see. Their basic argument is that if this person is going to screw up, they would rather have him do that in the middle of a confirmation hearing than sitting on the bench a year from now when there is no chance to kind of remove him. Their basic argument is that once you put someone into a position of trust of this kind, and it really is, it is virtually impossible to do anything about it. Once you have made your decisions, if this person goes to the Supreme Court he is there until he croaks, and that is game over.

I am not thrilled with the process but I begrudgingly admit that their process of a public confirmation by a joint committee, or whatever, of the Senate, or in our experience perhaps a committee of the House of Commons, would do some public confirmation process. I am not afraid of that. Although we have used words such as a public stoning of a particular candidate, it does seem to me that, if I am going to put someone in a great position of trust, it is not unreasonable to ask that person to go through some kind of public confirmation process. Basically, I am accepting the American argument that, if they are going to foul up, I would rather have them do that in front of a committee of the House of Commons, before we put them on the Supreme Court, than two years later when they are august members of the Supreme Court and we cannot do anything about it. I would be interested in your response to that.

**Mr. Bell:** I agree there is a lot to be said for that approach and we do not oppose the public confirmation process. I think there are some weaknesses in it and it may just relate to the American system, I do not know. There certainly

is a large degree of competition between the executive and the congressional branches of government, which I think tends to lead to the appointment of some mediocrities who might be acceptable to both sides. I think that, without naming names, there are a number of them who have been appointed over the years as a result of that.

Now they may not corrupt in the big sense that you talk about, but if they are not making a real contribution to the credibility of the courts, or to the advancement of the law, how do we deal with that problem?

**Mr. Breagh:** The only hesitation I have, about suggesting that a House of Commons committee does this confirmation, is that I am not so sure that the Canadian psyche can handle this yet. I know several lawyers who would go absolutely bananas if you suggested for a moment that there had to be a public confirmation process. They would think this just awful, degrading, and certainly not the way we do it in this country. I am not quite sure how Canadian politicians would react to it either. The Americans have used this system for a long time and it is part of their process. I am uncertain as to how a federal committee would cope with this. I would imagine that the first few confirmations would be very dainty affairs. I am not sure about that.

**Mr. Bell:** I would think it would be something we could probably get used to. As you may be aware, a public confirmation process was recently proposed for appointments to the Federal Court, in Bill C-235, and there did not seem to be much of an outcry about that. Of course the Federal Court has kind of disappeared from public view and nobody really cares about it. I suppose that might be the answer, but it is not without precedent.

**Miss Roberts:** I have a question that is very brief.

**Mr. Chairman:** Do you want to declare a conflict of interest first since you are a lawyer?

**Miss Roberts:** Yes, but I do not think I am on anybody's list.

**Mr. Breagh:** It's OK, she's not competent.

**Miss Roberts:** No, I am a politician, I cannot be competent. Unfair; truthful but unfair.

With respect to your comments about the committee that you are suggesting, are you suggesting that would be a committee that would meet on a regular basis and that a list of 10 names might be required, or 15 or 30 names?

**Mr. Bell:** The way I saw it, it would exist and it would not necessarily meet on a regular basis,

but it would meet at the request of the Premier, who would ask for one, two, three or four names. The committee might have developed procedures by which it would have a store of names, or it could then initiate the process at that point. I think it would be up to the committee to decide how it wanted to handle it, but it would react to a request from the Premier.

**Miss Roberts:** I see. Then you are not suggesting that a list be set up and that there always be 10 names available to the Premier of the province?

**Mr. Bell:** No, I think that is something that could be worked out as we go along.

**Miss Roberts:** Your other comment with respect to the second-last page, getting lawyers or judges from the territories somewhere into the Constitution: How would you suggest that be done? What amendment would you suggest to make that change?

**Mr. Bell:** That is a good question. As you found in the brief, we did not take any position on that. But, like most lawyers, I believe that everybody is entitled to my opinion. I think some combination of federal-provincial representation could be devised which would allow for nominations from the territories before they achieve provincial status.

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**Miss Roberts:** But you said, "would allow for." I would assume that you would say it should almost demand they be there, because it is allowed for now, except that politically it might not be done.

**Mr. Bell:** I think that is why we need an amendment to the Constitution, to provide a process which would allow for it, which would require it, yes.

**Mr. Chairman:** Mr. Bell, thank you very much for your presentation. I think you have raised a process question around one of the items of the accord that is very interesting in terms of demonstrating to people that there would be a fair process in terms of the choice of judges. I suppose it is something which Ontario could proceed with or with some similar system which, if we were doing it, could then serve as a potential model for other provinces to use or certainly put pressure on other jurisdictions to open it up, if they wanted to continue to keep it closed.

I thank you very much, on behalf of the committee, for the various proposals, the approach and detail you have put into that.



**Mr. Bell:** Thank you for hearing me. Good afternoon.

**Mr. Chairman:** I now call upon the representatives of the Native Council of Canada: Louis "Smokey" Bruyère, the president; Chris McCormick, the past president; and Robert Groves, special adviser, I believe. Gentleman, if you would like to grab a cup of coffee or a glass of water and join us at the front table.

We thank you very much for coming this afternoon. We apologize for running a bit behind, but that will not interfere with our study of your comments and the questions that will follow. Perhaps with that, Mr. Bruyère, I could simply turn the microphone over to you. If you want to lead us through your brief, we will get into questions at the completion of that.

**Mr. Bruyère:** Sure. I am running a little bit late myself. I just got in from Calgary.

**Mr. Chairman:** Well, we are glad we were late, too.

**Mr. Bruyère:** I left somebody out at the airport to pick up my luggage and bring it downtown. I did not realize, in terms of the time schedule you have, that it is only an hour or half an hour to the groups for their presentation.

**Mr. Chairman:** We exercise a liberal approach. Right?

**Mr. Breugh:** They cannot tell time, either.

**Mr. Chairman:** Only in Oshawa.

**Mr. Bruyère:** I guess the presentation will be presented as read into the minutes. What I will do is just summarize it as I go through it rather than reading the whole thing.

**Mr. Chairman:** This will certainly form part of the record of the meeting. In fact, both your documents will.

#### NATIVE COUNCIL OF CANADA

**Mr. Bruyère:** You received in advance our paper entitled Companion Resolutions. This paper has now been in the hands of premiers and the Senate for some months. I know you are interested in hearing more about our proposal that the Ontario provincial Legislature initiate or support several companion resolutions to alleviate some of the critical shortcomings and imbalances that could result from the proposed Constitution Act, 1987.

The aboriginal reform process from 1983 to 1987 was based on an understanding: aboriginal matters were number one, the first round of reform. It was assumed that concerted effort would be given by all first ministers until the basic issues were resolved. Section 42 also

provided an agenda of other reform items that could be addressed, but we were assured that we were the number one priority of Canada. Aboriginal peoples were, finally, to get top billing. Aboriginal people felt assured they would get a secure place in Confederation. Clearly, we were wrong, all of us.

The Meech Lake accord proposes to cut the aboriginal rights provision and forestall, possibly for ever, the completion of the circle of Confederation just when we were getting close to an understanding and making a breakthrough. The first three meetings in 1983, 1984 and 1985 were spent largely in educating Canadians and Canadian politicians. So, in fact, we only had really one shot at serious and informed discussion on reform, and that was pre-empted by preparations for Meech Lake.

You must remember that the Prime Minister asked all premiers in August 1986—seven months before the last first ministers' meeting—to put all reform matters on the back burner until Quebec's five demands were addressed and resolved, so there was really no possibility of movement in March 1987. We had been pre-empted.

Northerners, totally unrepresented in the meetings, have lost any real chance to become provinces. They remain fiefdoms. If they do seek provincehood, then they would be held to ransom and blackmailed for part of their homelands and for their right to participate fully in the Constitution. This is a virtual certainty under the accord.

Logic tells me that to apply unanimity to things that do require reform is to invite major trouble. Either those reforms will not happen or someone is going to have to pay, and pay big. I have already told you how I think northerners will have to pay under unanimity.

I am not surprised that Brian Mulroney thinks seven out of 10 is good enough in Baie Comeau on free trade. He knows how rare the Meech Lakes of the world really are. So why did he allow it to be imposed on the north?

What holds for free trade also holds for aboriginal rights, Mr. Mulroney said. It appears the other first ministers have not really grasped the reality of the special relationship that the national Parliament has with aboriginal peoples. The Constitution clearly provides that, if and when necessary, the federal government can exercise a tremendous amount of autonomy in protecting aboriginal rights, up to and including amending the Constitution through treaties and land claim agreements.

We all know that provinces are necessary players if self-government is to be effectively

implemented. That is why we have been using the 7-and-50 rule for the last five years and that is why the aboriginal reform process was written into the Constitution the way it was. The first ministers have now allowed that process to die. This simply highlights how imperfect their grasp upon the intent of the Constitution really is.

You must remember that the aboriginal reform process was put into the Constitution for the reason that it was too complex, important and controversial to leave to ad hoc processes. Without a formal process, little would be accomplished since at least some governments had a vested interest in avoiding action.

Now, what about the argument that the lack of success on self-government over three conferences means that a formal process is not the best way to address the issue? This line of thinking is very revisionist and ignores history. Aboriginal leaders agreed to facilitate the patriation process on the condition that there would be constitutional guarantees, that our rights would be identified, defined and included in the Constitution. Section 35 was put in as the basis for a full charter of aboriginal rights.

Contrary to what Senator Murray's version of history would have, the Native Council of Canada did, in fact, table a draft amendment—in effect, a charter of aboriginal rights—at the beginning of the process in 1983. Aboriginal leaders, again in an effort to compromise, agreed in the short term to narrow the large number of items in the Charter of Rights and Freedoms down to the item of self-government. This was done at government request. Now, we find that all items—self-government included—are pushed off the national agenda. The 1983 constitutional accord has simply been ignored.

Some of you know that the federal government shut down our capacity to work on constitutional reform last June by cutting off all our funding. The all-party joint parliamentary committee on Meech Lake recommended immediate resumption of that funding and a resumption of talks to put in place an agenda and a schedule of talks on a self-government amendment. Even with that kind of support, we have not been able for over six months to get either a response from the government on the funding issue or a meeting with ministers to discuss a new proposal that all aboriginal leaders have agreed to in order to renew efforts for an amendment.

As some of you know, Mr. Turner last week made another forceful statement on this issue by announcing that a Liberal government in Ottawa would not only support a meaningful recognition

of our inherent right of self-government, but would call a first ministers' meeting on this matter within six months of forming a government.

As to premiers, the response to our initiatives over the last year has not been encouraging. Mr. Peterson has avoided any specific commitment, although he has indicated that he will raise the issue of resuming aboriginal reform discussions when first ministers next meet, supposedly in June. Our view is that suggestions are just not good enough. The time has come for action, and that is where the companion resolutions come in.

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You have all had a chance to look at the companion resolutions option. We have been raising this idea for almost 10 months now, and the paper we have provided tries to flesh out, in concrete terms, how it should be implemented. All that the approach asks is that the legislatures of this country fulfil their constitutional duty and defend the clear interests and rights of aboriginal peoples, people who were the first citizens of Ontario, as in all other provinces in Canada.

The means to carry out this task is straightforward, it is legal, it is without pretence. I am asking provincial legislatures—and failing them, the Senate—to start the ball rolling. It will be left to others to see through the course you set if you choose to initiate, but the task cannot be started, let alone completed, without the initiative and support of legislatures. After all, is that too much to ask? If you look at the Constitution of this country, it does not say that first ministers have the charge of constitutional reform; it says that legislatures have that responsibility.

What does the companion approach ask? The proposal asks legislatures, the Senate and the House of Commons to pass resolutions to reinstate the aboriginal rights procedure that was terminated last year, and it asks you to do this now, while there is some realistic possibility of getting broad acceptance of such a change.

The companion approach also asks you to correct the disfranchisement of northerners in the Supreme Court nomination process. It is important to note that the accord actually strips northerners of a right they have under the current Constitution. That is the essential reason for this amendment, to undo disfranchisement in a way that does not open the accord itself for amendment.

Finally, you are asked to put an end to an antidemocratic and colonialist imposition of the unanimity rule on the territories. This is the toughest one of the lot and it may not fly, but we



feel it must be at least initiated. If it does not make it, then at least the revived process triggered by the first companion amendment could address it in public.

With that, I will leave it and answer any questions you have.

**Mr. Chairman:** Thank you very much, both for the submission and particularly for the option and the companion resolutions, which are certainly set out in very clear form, and not only that, but also in the two languages. As you noted, you have had that out for some 10 months. I guess, as a committee, it was first brought to our attention in some detail by the Metis association that was before us perhaps a month ago. It is certainly an interesting and innovative approach that we want to follow up on very carefully.

**Mr. Breaugh:** To be blunt about it, you know that the committee has a bit of a political problem in that the Premier has said he does not want to hear any of this amendment stuff. So part of what we have been doing in the course of the hearings is searching about for options that would not break anybody's word and would not offend people.

It strikes me that this concept of companion resolutions fits very nicely into that mould of things. Nobody has to go back on his word. It seems to me there is a very clear, straightforward approach that can be taken here that is not going to offend any of the premiers, at least, or the Prime Minister—or should not, in my view.

The only concern I have is, having had a chance to look at them now, do these companion resolutions really go far enough? You are kind of the sponsoring agency here, so I just want to give you the chance to put on the record today any kind of reservations you might have, because I think we have had a little difficulty, particularly with aboriginal groups, determining exactly what they are after here. Not everybody is speaking exactly the same language nor asking for exactly the same things. The range is from groups who have—

**Mr. Bruyère:** Like those around this table.

**Mr. Breaugh:** Yes, we all have different opinions on things.

Some groups have been in front of the committee and said basically, "We don't really give a damn what you do; we're going to court, and that's not affected by any resolutions you pass or anything else."

I like the idea, to tell you the truth. It seems to me that this is one of those things where we have found a mechanism which in a sense is face-saving, no one has to go back on his word about

the Meech Lake deal, but it allows us to handle what we consider to be very legitimate problems in a way that is palatable.

Does it do what you want it to do, or do you have reservations about it?

**Mr. Bruyère:** What we would like to see is the Constitution Act changed the way we want it.

**Mr. Breaugh:** Join the crowd.

**Mr. Bruyère:** Exactly. So in that sense, to answer your question, no, it does not do what we would like it to do, but it goes in some measure to satisfy what we consider to be at least appropriate to put in the Constitution at this point in time and then allows you other first ministers' conferences to bring out the rest of whatever you want.

I say that in the sense that this paper was initially brought forward by the Native Council of Canada some 10 months ago. We circulated it among all the aboriginal groups in Canada and got agreement, basically, that this was the approach to take; not necessarily the only approach to take, but it was an approach to take. So we started pushing it.

We met with the Senate and the Senate was quite excited about it. The chairman of the group, Senator Molgat, said, "How come, with all the experts we have in this country, nobody else has come up with this idea?" It is something that the Senate can initiate. Since 1982, it can do this. It has never done it before. It would be precedent-setting. What concerns a lot of premiers is that it would be precedent-setting. They do not like to see that happen, but it is a possibility that it still can happen through the Senate.

What we would really like to see, so that it has some real meaning to it, is that it comes from a province. When it comes from a province, the Senate can legitimately say that it is not acting on its own in the sense that it is not going above and beyond what it normally should do. In terms of the law of this country, it has the right to do it. Regardless of whether some Legislature does it or not, it can, but it would be nice to have a province start the process.

**Mr. Groves:** Perhaps I can just follow up on two specific points.

One is the court issue that has been raised many times. I think you have already heard testimony that there is an issue with regard to whether or not section 35.1 of the Constitution has been triggered by the Meech Lake accord. Essentially, that provision is a political commitment. It politically commits the governments of the provinces and the federal government to have a first ministers' conference with aboriginal leaders prior to the amendment's passing.

The concern that has been raised is because of, basically—one can argue sloppy or deliberate, it is difficult to say—the drafting of section 16 of the accord with regard to the noneffect of section 2 on sections 25, 27, 35 and 91.24 of the Constitution; two of them in the charter, two of them outside the charter.

The question is raised because it does not refer to part II being exempted; it refers to subsection 35(1). Part II includes section 35.1. Section 35.1 is therefore technically not exempt, either from section 2 or, more important perhaps, from section 50, which is the new process. That could give rise to an effect or a change in the constitutional nature of part II, which could require a first ministers' conference.

That is there. That is an option, the court option. Frankly, a first ministers' conference is going to be required anyway. The Prime Minister has said already that he is going to hold one. What he is doing is holding aboriginal groups hostage to when that might take place. What he said is that when their conditions are conducive to success, he will announce the date for a first ministers' meeting.

Yet as Mr. Bruyère has pointed out, for almost a year now aboriginal groups have been working from their end to put the conditions conducive to success, but they are not even allowed to actually promote bringing into place those conditions because of the attitude of the federal government, which is to shut down all discussion on the whole matter.

The second issue is on the range and scope of the companion resolutions. Why do we not do this for everything, all the issues that have been raised? In the presentation—it was not read in—you will find some of the answers to that. I think there were four basic reasons.

First, a limited number of amendments obviously is preferable to a large number, simply because the ones that are more important get lost in the rush. You can make only so many trips to the well. That is one issue, although technically I should point out that these three companion amendments and any others, if they are companionable, are separate amendments. In other words, they are not voted on as a single package so that if opposition to one of the amendments is present, the others die. They would be presented as quite separate companion amendments. You would have three in this case—three votes, three initiated resolutions—because they do involve three separate procedures.

The second reason is that there should not be any reasonable opposition to the ones that you are

advocating, “reasonable” being that there is a reason to oppose them. With these three, we have found no one willing to say that he is opposed to them. No one was willing to get up publicly and say, “We do not like the effect of these resolutions.”

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Third, there must be no reasonable doubt about their objectives or their effect or necessity in the Constitution. That is one of the reasons, for example, that one amendment has been very much sought by the Native Council of Canada and other groups, to balance the “distinct society” clause with recognition of aboriginal societies as being distinctive and also to promote and preserve them to overcome the two founding nations myth.

That could be done and it could even be drafted as a companion amendment, but would it have a certain, clear, known result? The answer is, unfortunately, in terms of companion amendment strategy, no, because we do not know what the result of section 2 of the accord is and you would not know the result of introducing an equally uncertain amendment. Again, it does not meet that strict test of companionability. It will be something aboriginal groups will be pushing for in the next round. The question is, will they ever get a next round? That is what number one is aimed at.

Numbers two and three are aimed at equally clear, precise, known-effect changes that no one has really opposed. No one has stated he has opposed.

Finally, as I have said, they must not compete. They must be companionable. They must be drafted in such a way, presented in such a way, that Quebec does not have to go back and restart the whole process, Saskatchewan and Alberta do not have to go back and restart the whole process on the accord, and this legislative committee does not have to go back and start all over again. You continue on and you dispose of the accord as a separate matter. These are linked, certainly politically and also in terms of time, but they are not legally linked in terms of offsetting the so-called seamless-web argument about the accord.

**Mr. Breagh:** There are a couple of other things I think it would be helpful if you would comment on. There are many of us who felt an agreement was very close at the last conference on aboriginal rights, that with a little more persuasion and a little more time, something would have happened, but nothing did.



I am perplexed as to exactly where the federal government is on this. I get different messages, some saying, "They have basically withdrawn funding and we are supposed to kind of dry up and blow away," and others indicating, as you have done, that there is a little game being played about the timing. The temptation is to work the process in a way that says, "First call another first ministers' conference and deal with this aboriginal rights question, and when you have done that, then come and see us about ratifying the Meech Lake accord." That temptation is there, but it does not really tell me how they are going to deal with the aboriginal rights question.

I have not heard you say that you want something like that attempted. Other groups have. Some have said by 1992 and other groups have said: "What the hell has 1992 got to do with all this? We have been around for a while and we will be around for a while longer. Timing is not that important." I take it from what you have said today that now you have basically settled, at least your group has settled, on the idea that you will do the companion resolutions routine. That is your preferred option and you would like to see that given priority by this committee.

**Mr. Bruyère:** That is certainly one of the reasons we are here. We see it as being necessary because there is no other way out at this point in time. In terms of what is actually there and having the first ministers' conference before they ratify the Meech Lake accord, it would be preferable, but it is not necessary if this kind of thing can happen. If we had another first ministers' conference tomorrow, I do not think we would be any closer than we were last March to getting an agreement, simply because, at the last first ministers' conference, the Prime Minister was not prepared for an agreement.

If you look at how the Prime Minister dealt with all other first ministers' conferences in this country, he has always put forward his position first. At this first ministers' conference, he would not do that, and we, the four aboriginal leaders who met with him, asked him quite specifically the night before to put his position on the table so that the provinces and the aboriginal groups would have something to respond to. He said, "No, what we would like to see first is where the provinces are coming from." We told him: "Then it looks like an exercise that is doomed to fail because you are not putting your position on the table. You are not coming up front with the rest of the country in terms of the possibilities that you can see happening." From that moment on

the conference was doomed, in my view. Nothing was going to happen.

The only way it can happen is if the Prime Minister of this country comes out and says what he would like to see the provinces agree to with the aboriginal people. He got off quite easily by coming out with a draft amendment that went some way to satisfying some of the provinces and satisfying some of the things the aboriginal groups wanted, but he knew the provinces would not agree with what he put in there for the aboriginal people and he knew the aboriginal people would not agree with what he put in there for the provinces. That was a known. Still, that is what he came out with at the last minute when the conference was doomed to fail. The last afternoon, before things shut down, he came out with his proposal and it was not going to go any place at that time.

**Mr. Breagh:** Just to stop you there, as an observer of that conference, I saw a lot of people playing: "After you, Alphonse. You show me yours and I'll show you mine." It would be nice to know that we all got on the same track this time and that we had one common goal. If in the final result that were to be these companion resolutions, we could all push on the same side of the wall for a change and maybe we might get somewhere, but I think most of us are going to be really upset if we decide these companion resolutions are really good and we are very interested in pursuing this, and having done that, we find another voice or two saying, "Yes, but that's not what we want." I am just trying to fish out here—

**Mr. Bruyère:** You are going to find that regardless of who you talk to, what race of people you talk to.

**Mr. Breagh:** It is not that we are not used to that.

**Mr. Bruyère:** I realize that. You should be used to that. That is reality. You are dealing with people and people are the same no matter where you go. Everybody has his own opinion and everybody has organizations to represent him in that sense. Organizations are built because of what people's beliefs are. If you happen to live in the city of Toronto, you have a different belief than I would have, coming from Atikokan, in terms of how the government should react to the concerns you have in your community. That is only normal. You cannot expect everybody to come under the same umbrella and be satisfied with it. You yourself, as a party member, certainly are not satisfied with what the Liberals

are doing or with what the Conservatives were doing.

**Mr. Breugh:** Amen.

**Miss Roberts:** Or even the NDP.

Interjections.

**Mr. Breugh:** Let's hear it for the Supreme Court. You're on.

**Mr. Bruyère:** Why should we be any different? Why should we all say we are going to agree on everything we say? It is only normal that you are going to have differences.

**Mr. Breugh:** I think we are not afraid of differences of opinion. What we are concerned with is that this concept of companion resolutions fits nicely within our own needs as a committee to do something to resolve a problem. I think we are all in agreement that something should be done. This would appear to get, if you will excuse me for saying so, my Liberal colleagues off the hook. They will not be banished to the back benches for life, just for 10 to 20 years, so it might be a useful thing to pursue.

**Mr. Cordiano:** We are there already.

**Mr. Breugh:** No need for a mea culpa, Joe.

**Mr. Groves:** Perhaps I could just respond to one line of your question. First of all, on the companion resolution, the first one on the first ministers' conference process, it is a process resolution, a process answer. You are resolving a substantive problem through a process, so that is one of the reasons it has broad support among aboriginal peoples. There may be bickering about whether it should be every three years as opposed to every five years, or whether it should be one year.

For example, to the principal companion resolutions, I think the national chief of the Assembly of First Nations has said, "Yes, if we can't amend the Meech Lake accord, companion resolutions are the next best thing to do." The Innu have basically taken the same position, so you have broad support for the vehicle.

There is going to be debate, as I said, about one, three or five years. We have suggested five years simply because, frankly, we have to keep in mind Saskatchewan, Alberta, British Columbia, Newfoundland and so on.

As to what happened last year, it was Newfoundland more than any other province that played the game of, "After you, Alphonse." In fact, they did not even play that. They took the position up front, before the meeting even began, that they would not allow anything to proceed on aboriginal self-government until they had agreed that fisheries would be on the next agenda.

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They all knew, of course, that Meech Lake was coming along. We all knew it because we had asked to be observers at the deputy ministerial level meetings on it. We were almost invited. Manitoba agreed to sponsor the idea. It was shot down by several other delegations because of the close association between the effects. In fact, if you look at the amendment on immigration, it begged, borrowed and stole from much of the work on the aboriginal side of it. I think Senator Murray has now admitted that in print. He is quite happy to admit it.

The wording of the number one amendment is actually based on a Nova Scotia proposal that was taken to the first ministers in April and then again in June. It did not make it to the table, largely because there was a sense that if one more thing came on that table, the whole table was going to collapse at three o'clock in the morning, as it were. At the time, however, Ontario, Manitoba—we had assurances from Prince Edward Island and New Brunswick that they had no opposition whatsoever to adding it in.

It builds upon what has happened since 1981-83. It is very consistent with what the Constitution has had in the past and its process provision. The only difference from the previous process provisions is that it is a permanent one. But of course, as we realized in Meech Lake, there is nothing permanent in the Constitution. As long as you can get the 11 first ministers together, they can change it, even only eight of them.

The added value of this is that they can do that, sure, but they have to have a first ministers' conference first, publicly, with aboriginal leaders to say why they are going to eliminate it. What has happened is they have eliminated it in secret, behind the doors. It has just been wiped out. This puts the process back upon the agenda.

**Mr. Morin:** Is there anything in the accord which could preclude the Prime Minister from convening the first ministers' conference to address aboriginal rights as may be necessary? Is there anything in that which prevents him?

**Mr. Bruyère:** There is in the sense that in order for the Prime Minister to call a first ministers' conference on aboriginal issues under the present system, if the Meech Lake accord is accepted, you have to have all the premiers agreeing. If you just have one Premier not agreeing to it, there is no meeting.

**Mr. Morin:** If he wishes to have one.

**Mr. Bruyère:** He can have it, but if one Premier does not show up or one Premier



disagrees with it, then nothing happens because under the unanimity rule they all have to agree.

**Mr. Groves:** It raises an interesting question. If such a conference were to be held, and the Prime Minister decides he will not call it a yearly constitutional conference or he will do it in addition to the once-a-year or twice-a-year first ministers' conference—there is one on the economy and one on the Constitution—if he could do that, then you would have three first ministers' conferences in the space of one year, a highly unlikely event because of the preparatory work required for a first ministers' conference. Also, if there is going to be a constitutional conference, other premiers are going to insist that it be considered under the agenda provision, section 50.

The question has been raised that if it is unanimous consent for adding agenda items, does that not give Premier Peterson or some other Premier leverage to go in and say, "Look, goldam it, I want aboriginal issues on the agenda, and if I do not get them on the agenda I will not have anything else on the agenda."

In fact, there is some precedent for this. Premier Blakeney in 1981 effectively did that with women's equality. With all the pressure between early November 1981 and late November 1981, when women's sexual equality rights and aboriginal rights were dropped from the constitutional package, all the premiers decided, "We have to get sexual equality rights back in." There were still three provinces that refused to move on the aboriginal rights clause. Blakeney basically said, "If you do not go for the aboriginal rights clause, we are not moving on the sexual rights clause and the whole thing will collapse."

He has been blamed by women's rights groups for a long time for being anti-sexual-equality. It was not the case. He was trying to hold one to the other, ransoming it. It worked. The three provinces opposed to it did back down. The question is, would that happen again? If it is not unanimity, maybe it is consensus. If it is consensus, you cannot really have that kind of agenda blackmail going on. It is much more difficult for a Premier to go in and demand his own item at the exclusion of others if you are talking about consensus. Either way, it is an extremely difficult situation if you have two, three or four provinces opposed.

**Mr. Allen:** I am not sure I hear what you are saying, but I do not see where you justify that on the basis of the Meech Lake accord. We have had some hint that some people might consider that aboriginal self-government, for example, as the

most extensive claim possible, might conceivably come under section 91, class 24, and therefore be an amendment to federal institutions, but most experts do not think that is the case. I do not see anything in the list of unanimity items that pertains to the agenda of first ministers' conferences, so where are you coming from?

**Mr. Groves:** What you are taking me to say is that if it means unanimity, then the setting of the agenda of the first ministers' conferences on the Constitution would be placed under section 41, or the new section 40 of the Constitution Act, along with the creation of provinces in the territories and elsewhere.

It is an interesting point because if it is not unanimity, if you take that argument, then it must be the general amending formula which is two thirds of the provinces. It must be, in all cases of agenda matters; it must be the general amending formula. That is even in an area where the amendment involved only concerns one province and the federal government. The same problem I think drives people to suggest that you have to read the accord as a whole because the accord involves three different types of amendment procedures.

It rolls them all under one and uses unanimity for all of them, even though unanimity is not required for some of them. You have to take that into context, that and the fact that premiers, many of them, think that in fact unanimity does apply because it says "as agreed upon." By whom? By the premiers who agree upon this accord, all 10 of them, plus the Prime Minister.

You are right that it is going to be debatable. It is going to end up in the courts, it seems to me, because of that very fuzziness. There is no real way of telling how, but it probably will not be less than two thirds, or there might be some sort of dubious consent rule. If so, we are back to square one without the formal process being there, locking all first ministers in at least to having to meet publicly on the issue on a regular basis, as they have been doing. Then you can be nickel and dimed on this issue from here to doomsday.

**Mr. Chairman:** We will now move to a nonsupplementary question.

**Miss Roberts:** It might be a supplementary, Mr. Chairman; I am not sure.

**Mr. Breaugh:** But it will be brief.

**Miss Roberts:** It will be very brief.

I think the important comment that I am hearing from you today is that if we cannot open

the Meech Lake accord, then the important thing is to get Quebec in as a part of the Canadian Constitution, at least get that particular round over, so that when you do go back, if indeed a companion resolution or some other type of amendment is set out, you are talking to 10 instead of nine. Is that not correct?

**Mr. Bruyère:** It is and it is not because Quebec was at all first ministers' conferences on aboriginal issues. The Premier was not there, but he always had his ministers there. Quebec was never out of the Constitution. It was always a part of it. They just did not recognize it; that is all. There was an amendment to the Canadian Constitution without Quebec, and in the same sense there could be an amendment without Quebec at this time.

We are not arguing against Quebec at all. What we are arguing for is for people to recognize that the aboriginal rights issue is just as important as the Quebec issue, if not more important, because Quebec was and always has been part of the Constitution, whereas the aboriginal peoples have not been.

**Miss Roberts:** Is it not to your advantage to have Quebec in as a full—whether or not it is in or out is not the question; it is what it thought it was and how it acted. You can argue the legal points of it from now to doomsday.

**Mr. Bruyère:** If you look at it from past experience, in terms of the aboriginal rights issue, of having Quebec in, Quebec has always been blamed because it was not part of the Constitution in terms of the aboriginal rights. Quebec was always blamed by other first ministers, saying, "We cannot make any agreement because Quebec is not here." But when you look at how Quebec has treated the aboriginal peoples in the past, I do not think we have very much to look forward to by having Quebec there.

If you look at the James Bay agreement, the federal government and the provincial government in Quebec have not lived up to the agreement to date. That is why they are in court. What have we got to look forward to with having Quebec there?

**Miss Roberts:** It is not helpful to you.

**Mr. Bruyère:** It is not that it is not helpful. It is just that it is not going to make the process any easier.

**Mr. Groves:** It could be very helpful to have that extra first minister there because it does break a logjam which has occurred about self-government. Saskatchewan has in the past found itself in the make-or-break position.

Premier Devine has thought he is in charge and largely through abdication by the federal government, he has been put in charge. That would displace Saskatchewan, if Quebec were in, because Quebec is not Saskatchewan; they have different views. However, it does not automatically say things are going to be any easier. An amendment was made without Quebec.

**1640**

It should be pointed out, interestingly enough, that Premier Lévesque showed up for every first ministers' conference. Bourassa did not show up at the one just prior to the Meech Lake meeting, apparently because of a scheduling conflict, he said, but it is debatable why. The real issue becomes, "That's all very well and good," but is that not just a reason to argue, "Wait until 1990. Wait until the accord is in place. Then you have our solemn commitment," which we do not have from any premier, let alone Mr. Bourassa? We talked to him last May when they had hearings on Meech Lake. We do not have commitments such as: "We'll do something for you. We'll have a first ministers' conference that will be supportive." We do not have those commitments.

Very few premiers, unfortunately, are willing to give that kind of upfront commitment unless the kleig lights are on, unless the process is required. That is why we had movement in 1984, we had agreement in 1984. We got very close, as you indicated, Mr. Breaugh, in 1987. We were very close because of substance. We were not very far apart. What happened was that the whole process fell apart because Meech Lake was banging at the door saying, "Let us through."

**Miss Roberts:** That is my point, that Meech Lake had become more important because of the fears of what happens to the nine provinces and the 10th that does not feel it is a signatory to it.

**Mr. Groves:** That is why companion resolutions are the approach we are taking; we have to recognize that reality. But they are companionable. They are not post-Meech Lake; they are tied to Meech Lake.

**Miss Roberts:** The other question is with respect to funding. I assume, and I am not too sure about this, that you have had no funding from the federal government and no indication that funding is going to be forthcoming until—is there even an "until" setup?

**Mr. Bruyère:** Not at this point in time. All we have to date is the Prime Minister saying he will convene a conference when it is conducive to success. We went as far as having a conference ourselves, among the four aboriginal groups, in



January of this year, sending a letter off to the Prime Minister saying, "This is the way we'd like to see things take place." It follows what took place in terms of the Meech Lake accord. They said it would be much easier if we followed that process. We did and we have not heard anything. We are getting the response back from the Prime Minister, his ministers and their staffs that nothing is going to happen at this point, so we do not even have the "until" in terms of the funding.

**Mr. Groves:** They are now even considering shutting down the federal-provincial relations office's capacity in this regard, getting rid of the office of aboriginal constitutional affairs, because they do not see it as being relevant any more, they do not see it as an issue any more. They have adopted the guise of "when conditions are conducive to success," but they have not provided the resources or the political support to get the conditions conducive to success going. It is a real big question.

Ironically, some provinces are continuing to fund the regional organizations, or considering continuing to fund regional organizations for their participation. There is no federal support. What is more than money is the machinery, the bodies, having the contact, the continuity, the liaison capacity there. Without that, the whole process gets very rusty and very hard to start up again when some Prime Minister in the distant future decides the conditions are conducive to success. Perhaps that means it is conducive to success when the aboriginal groups are so battered down and battered that they come crawling to the federal government with a proposal that will gain easy acceptance from BC and Alberta.

**Miss Roberts:** My problem with respect to success is, what is the success? Is success what they want to have happen, or what would be the appropriate negotiated settlement?

**Mr. Chairman:** Just as a closing quick question, did you present the companion resolutions idea to Bourassa? Have you presented it to McKenna? Has there been any discussion in that regard?

**Mr. Bruyère:** With McKenna, we have sent it out to him. We have not had a chance to sit down and talk with him.

**Mr. Chairman:** He has been busy.

**Mr. Bruyère:** That is right, very busy. Bourassa has had a copy of it as well. We are going to be meeting with him on April 13 to explore it further with him.

**Mr. Groves:** I was just going to add that, as I said earlier, this comes as no surprise to the premiers because it is something we have been trying to get going since the first ministers' meeting which met in Meech Lake. Of course, everybody is playing a game right now and saying: "Not us. Get Quebec to do it. Get Ontario to do it." Ontario has also been pointed out as the one to do it because Ontario is kind of the broad shoulders of Canada, as it were, constitutionally speaking. That is true; Ontario has played that role.

**Mr. Morin:** That is what Mr. Kwinter said.

**Mr. Groves:** You have played that role. Mr. Davis played that role on the aboriginal side and Mr. Peterson has attempted to do the same, but Quebec of course is appointed. "We will get Quebec to do it because then no one will assume that the initiative is anti-Meech Lake."

That also places Quebec in a very powerful position. As we said, Quebec does not necessarily have an assertive, promotive aboriginal rights position. Witness the shotgun diplomacy that gave rise to the James Bay agreement. The bulldozers were there on your front door and they said: "Are you going to negotiate an agreement or not? If you are not, we are going to continue to bulldoze."

**Mr. Chairman:** I would like to thank you very much on behalf of the committee for coming here this afternoon. I think it has been extremely helpful to us and very informative. We very much appreciate the two documents and the companion resolutions. We have some way to go yet before we get to our report, but we really appreciate what you have brought to us today.

**Mr. Bruyère:** If we can help in any other way possible in terms of explaining something further through writing or phone calls, whatever, please let us know. If we can be of any help at all, we will be more than glad to do so. We see our role as trying to get this process going and helping people understand why we are doing it. If we can be of any help at all, please call on us.

**Mr. Chairman:** Thank you very much.

**Mr. Groves:** Perhaps just further to Mr. Breaugh's earlier question, there is a little package here trying to explain why other issues are not companionable. That might be of use to the committee.

**Mr. Chairman:** The clerk will take that and we will have that. Thank you.

If I might, I call upon Professor Richard Simeon, director of the school of public administration at Queen's University. Professor Simeon,

I apologize. I guess it always happens to the person who is last in the afternoon. Somehow, we inevitably get behind time, but we certainly will not be taking away from our time with you.

As many members know, prior to your current responsibilities, you spent a long period of time involved with intergovernmental relations. If I have the title correct, I believe you were the director of the school of intergovernmental relations at Queen's. As such, you have been involved in one form or another with all of the various constitutional discussions that have gone on over the last long while.

We are very pleased that you could join us this afternoon. I understand that you have a paper, some remarks. If you would like to proceed with that, we will follow up with questions.

DR. RICHARD SIMEON

**Dr. Simeon:** Thank you very much, Mr. Chairman. I am really very pleased to have the opportunity to appear before the committee today to give you some of my views on the accord.

I might as well state at the outset that in general I am a supporter of the accord. I gather you have not heard from many of us, so I may at least be a little different. I do hope the committee will recommend to the Legislature that it be approved.

I summarized my general views on the accord before the parliamentary joint committee last summer and, with your indulgence, I will leave that statement with you, so I will not go into much of the detail of the accord itself today. I am also a signatory to a statement by a group of academics from Queen's and other universities, which I believe you have.

What I would like to do in my presentation today is to grapple, and I think that is the right word, with some of the criticisms of the accord which have appeared both here and in other forums and, in particular, to address myself to two crucial sets of questions which go to the heart of the legitimacy of the accord.

First, what is the appropriate process for constitutional decision-making? Does the process that we have followed here meet our current standards of democratic legitimacy for constitutional policy-making, or is it so flawed really that the results are unacceptable? Second, what is an appropriate standard for judging the outcome of such a constitutional process? What are the kinds of tests that we should apply to the results of constitutional decisions?

I think I should say at the outset that the critiques of both the process and the substance of

the accord are indeed very troubling and powerful ones. As I have read them, more and more I have found my own confidence in both the process and its outcome pretty severely tested. I really have found myself wrestling with these issues very much in the past few months.

Certainly, I suspect very few of us would say that this is the ideal way to go about changing a constitution. All of us can imagine better ways to do it. All of us can probably see in Meech Lake elements that we wish were not there, and all of us probably feel that, left to ourselves, we could devise a more ideal blueprint for Canadian federalism, but one that would secure a very broad agreement is a different question.

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My defence of Meech Lake, therefore, is a more pragmatic one. I do not really ask whether it is the best that we could have done but rather, is it an acceptable, workable compromise or not? The question is not, "Is the process ideal?" but "Does it meet our basic standards, and could we imagine in the real world of politics a much better way we could have done it at this time?"

I also do start all my thinking about Meech Lake with the fundamental premise that it really is essential to find some way that is acceptable to Quebec and to the rest of Canada to secure Quebec's voluntary accession to the Canadian constitutional order. Certainly, I see this as the Quebec round; I see that as the great achievement of the accord and that is the characteristic of the accord which we would really not want to lose, although it has to be done, of course, in ways which are sensitive to our other constitutional values.

The pragmatic question becomes, is there another way in which we could have secured this Quebec accession, and is the way we have done it such an affront to other values that it should be rejected anyway?

My own feeling is that the recognition of Quebec as a distinct society we find in the accord—and that, of course, has been the *sine qua non* for all Quebec governments in modern times—is the very minimum that we could have expected from any conceivable Quebec government, this one or any other. It is really less than any modern Quebec government has sought, so I think to say no to Meech Lake—at least in its general outline, perhaps not in all its specifics—is to say no to Quebec.

Implicitly or explicitly, I think most of the critics of the accord really are telling us that this goal of achieving Quebec's consent really is not very important, or if it is important it is certainly



not as important as some other constitutional objectives. I know many of the critics have said that they do not wish to upset the agreement with Quebec and that they too wish to see Quebec brought in, but I think relatively few of them have shown how those objectives, meeting their concerns and bringing Quebec in, could be reached.

Let me first look at the question of procedure. As we all know, and I am sure it has been said many times around this table, constitutional decisions are not like ordinary decisions. We somehow expect higher standards of them than we do in other kinds of political decisions.

Until 1982, I think it is important to remind ourselves, we had no agreed formula for amending the Constitution of Canada. Indeed, if one worries about the rigidity here, as one perhaps should, we should realize that for a very, very long time we worked on the assumption that any constitutional change affecting essential features of federalism required the unanimous agreement of all 11 governments. That was the assumption we worked on for years and years and years.

In that sense, what we did in 1982 gave us a bit more flexibility, and we should remember that in the past, constitutional agreement did not require any sort of popular or legislative ratification process, it was only a process of executive authority.

So 1982 did give us a constitutional amending procedure, one which required that most amendments could be made with the consent of Ottawa and seven provinces with 50 per cent of the population; it did provide for opting out of amendments which infringed on existing provincial powers, with the very limited right of compensation, which we have now expanded; and it required the unanimous agreement of all governments for a limited but crucial, and again now expanded, set of amendments, including changes to the amending formula itself.

It is certainly worth noting that the formula of 1982 was indeed criticized for being too rigid and too provincial as to formula, but that is the one we got and, of course, what we got in 1982 did add one more democratic element to the amending process, and that is the requirement of ratification by all the legislatures, so it was no longer a purely executive process.

The way we are dealing with Meech Lake is following that amending process of 1982 precisely. In that sense, I suppose, it meets the first test of legitimacy: is it following established procedures? The answer is that yes, it is. So some of

the criticisms of the process have to be directed not at the way this process is going particularly, but at what we did in 1982 and the process that we created then. In so far as the amending process we agreed to in 1982 was consistent with federalist norms, so is the process we are now following.

Nevertheless, a number of very powerful criticisms have been levelled at how we are doing this. First, of course, is the idea that constitutional change should only be undertaken with the fullest possible public debate of the alternatives and issues. It is illegitimate for a group of decision-makers to spring major change on an unprepared population. Of course, the criticism here is that the 11 first ministers met at Meech Lake and then in Langevin and somehow invented or created a brand-new agreement out of whole cloth which was sort of sprung on us.

There are elements in Meech Lake, such as the provisions with respect to provincial unanimity on the creation of new provinces—although that, I believe, was an element of the Victoria charter—which have indeed received relatively little previous attention. But I think in most respects this notion of somehow this all being new and sprung on us is unfounded.

First of all, the elements in Meech Lake have really been the central elements in Canadian constitutional debates since at least the early 1960s; such things as limits on the federal spending power, provincial role in the appointment of judges and senators, opting out of shared-cost programs. All of them have been extensively debated, have been part of formal constitutional proposals both by the provinces and by federal governments in the past. In many cases, even federal governments have suggested they were willing to accept a considerably greater provincialization in these respects than is found in the accord. In that sense, we have had a long tradition of debating this set of issues.

Second, the fundamental elements of the Meech Lake accord were clearly set out by the current Prime Minister in the 1984 election campaign and, indeed, formed a major part of his appeal for national reconciliation. In that sense, he was not springing it on us.

Third, Quebec itself had publicly stated its conditions for constitutional settlement a year before the Meech Lake accord, and we all had a year to think about that list of five conditions. A few months later, the premiers meeting together had pledged to address that agenda in this round of discussions. So again the issues were not sprung on us.

Fourth, both major federal opposition parties had debated the issues around Meech Lake within their own party forums; admittedly not without some internal division and some soul-searching, as we well know. Both the federal opposition parties had endorsed resolutions well before Meech Lake which were generally consistent with the way in which it went.

While there was indeed a secret process of seeking the optimum conditions for reaching agreement which went on before Meech Lake, and while those two meetings were indeed held behind closed doors, the ideas and alternatives being canvassed were pretty well articulated beforehand. I think the instantaneous commentary we got after the draft agreement was published after the first meeting is a good indication of how well prepared, in fact, we all were. I really do not see this in that sense as a constitutional coup d'état, to use one of the phrases which I have heard said about it.

It is also argued that the legislative debate and ratification of the accord is fundamentally flawed in that it is presented to the legislatures as a fait accompli which has to be voted up or down without change. The reason for this is entirely pragmatic. If one government makes changes, then the issue must inevitably be thrown back into the intergovernmental arena, since all governments, in the end, have to approve the identical text. The question is—and it is a serious question, I think, for the future of how we operate executive federalism—how do we get around that difficulty? I think this is probably the most troubling aspect of the procedure. Of what use is parliamentary and legislative debate that cannot produce change?

I think, though, there are a number of answers. I am not going to articulate them with great conviction, but there are a number of responses to that criticism. First of all, legislatures do have power here. They have the power to say no to the whole agreement, which as I noted, is not a power they had before. This agreement is going to have to survive 11 legislative votes. That is a high set of hurdles for a constitutional change to meet and a very traditional and important expression of democratic politics in this country.

Second, under the Canadian form of responsible party government that we are all so used to, like it or not, what we are doing here is standard practice. Governments using party discipline are normally able to secure passage of legislation which they put before their legislatures, and governments choose which amendments and changes they are going to accept.

Third, there are ways of putting additional items on the constitutional agenda for future discussion. Indeed, the previous discussion with the Native Council of Canada, I think, raised a series of very interesting possibilities there.

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I guess as I look at the procedures we are following here, I would say that the procedures for passing the accord do meet the test of consistency with the established constitutional procedures, are consistent with the norms of a federal system, and are consistent with representative, parliamentary democracy as we have developed it in Canada. According to these norms, it has received really a very high degree of consent from all parties in Ottawa, from the government and, we will see, from most of the provinces.

On what grounds could it still be argued that this high degree of consent by accepted, legitimate, political authorities still does not meet our current standards of legitimate consent? I think there are two basic arguments here. The first I have already mentioned, that parliamentary passage should come only after the fullest degree of public discussion and consultation on the issues involved. But as I mentioned, there was extensive prior discussion of these issues before the accord was reached. It seems to me there has been a pretty high level and high degree of public discussion in this and the other legislative forums that have been provided since it was passed. Indeed, it is by no means clear to me that this accord will eventually secure the necessary consent.

The second critique of parliamentary government is one, it seems to me, which legislators like yourselves are going to have to grapple with much more in many aspects of politics in this country, and that is the criticism that, in effect, parliamentary government and executive federalism are in some crucial respects not fully representative. The fact that governments at the first ministers' conference must all be elected and re-elected, that they are responsible to their legislatures and to their electorates and so on is held by this group of critics to be an inadequate means of ensuring that all views and all interests are represented and taken into account.

It is in particular believed that minority groups or groups which are systematically underrepresented in legislatures and cabinets, such as women, will in fact, if they are not present, simply be left out and not taken account of at the table. When we have governments and legislatures whose memberships are not a mirror of the



population, and governments and legislatures which have their own interests to protect, this criticism is really saying: "We cannot trust those governments, however democratically elected they are, to represent and speak for the people on constitutional matters. To be represented, one must be present." That is a very fundamental challenge, I think. It is not only on this issue that it is being raised.

In the constitutional discussions, the anger of women's groups, especially because of their perceived and I think accurate perception of being betrayed in the November 1981 conference, adds a huge degree of weight to that criticism which has been articulated, especially by women. It gives a lot of weight to the complaint of northerners that their future, if it is not determined is at least influenced by what was done at the accord and that they were not present at the table.

For these critics, the model of democracy that is being argued is that we need, perhaps in general but certainly in the constitutional process, a much more participatory one than we have been accustomed to in Canada, one in which citizens as a whole should have more say in such decisions, perhaps by a referendum, and in which specific provisions should be made to ensure that important groups are directly present in the decision-making process, as the aboriginal peoples were present at those aboriginal discussions.

The critique is not so much that the Meech Lake process violates our existing standards of democratic decision-making, because I do not think it does. The critique is that it violates our newly emerging standards of democratic decision-making, standards which see our present system as really much too elitist.

I am very sympathetic to many of those sets of concerns and I do think they raise some very deep philosophical issues for how we operate our democracy in such a plural and diverse society as ours. I think in this case that it is a very difficult thing simultaneously to bring about such a delicate, difficult constitutional accommodation as the Meech Lake accord and suddenly to say, "We are going to require that the process meet a new and controversial, little understood set of democratic norms."

It seems to me that executive federalism and representative, parliamentary government may be flawed and are flawed in important respects, but it is hard now to imagine how one would create an alternative process which would command broad assent and which could bring

together and make the kind of accommodation which is essential here. It seems to me we should not reject the accord on these grounds, but we should in the future seek to respond in as many ways as we can to some of those new concerns. I think that rather than reject the Meech Lake outcome on this ground, we should turn our attention to the process in the future.

Here in fact one or two elements in the accord are promising. The provision for annual first ministers' conferences on the Constitution opens up much greater possibilities for extensive citizen consultation and discussion prior to the conference itself. The more clearly we know the agenda in advance, the more precise and focused those public discussions and the research and deliberations can be, and the more governments can use legislative committees like this prior to the process rather than after it. I certainly hope that this committee will make a number of recommendations as to how Ontario will gear itself up democratically to carry out these constitutional discussions prior to each of the future rounds. That would be a very important thing for this committee to do.

Those are generally my views on the process. Just to conclude more briefly on the substance, I suppose it is true that one's attitudes about process depend entirely on one's attitude about content and vice versa, so my worries about the process might be a lot greater if I were more worried about the substance of the accord. There are many respects in which the conception of federalism and of Canada embodied in the accord does coincide broadly with my own conception. As I have said, I have long thought it essential to provide some recognition of Quebec as a distinct society. It seems to me that is not only a sociological but also a legal reality in this country.

I strongly endorse the spending power provisions in the document, partly because they set up exactly the right dynamic for federalism, as I understand it. That is to say, it legitimizes federal intervention for major national purposes into areas of provincial jurisdiction for the very first time, or gives it constitutional weight for the very first time, and as well establishes the right balance between national objectives and national concerns in provincial variations. I am actually a great fan of section 106A.

I agree very much with a provincial role in appointment of senators and in particular of Supreme Court judges. It seems to me that those bodies, especially the Supreme Court which is sort of the umpire of federalism, should not be a

creature of any one of the two orders of government. This may not be the best way of securing both level's involvement in Supreme Court appointments, but it is, I think, a reasonable one.

As I said, I do not want to go into a point-by-point evaluation of the accord, although I would be glad to do that later if members wished. I would like to end up with a few general observations.

First of all, I do not believe that the accord is a radical transformation in Canadian federalism or Canadian democracy. I do not see it as a huge change. It does not confer on Quebec significant new powers, and certainly not ones which suggest it is a first step down some slippery slope to independence. I do not think it does denude the federal government of its ability to exercise policy and political leadership in this country. It does not set aside the Charter of Rights.

It seems to me that much of the criticism really is of the perceived kind of tilt, and I admit there is a tilt, towards a more provincialist conception. It is based less on the text of the accord than it is on the larger visions people hold. I think much of the criticism overstates the impact of the accord and much of it fails to recognize that many of the elements in the accord such as opting out, for example, have been long-established parts of our political tradition. In that sense, there is very little that is new here.

Much of the criticism seems to overstate the existing authority of the federal government, as if the federal government at present had the right to dictate to provinces what they would do in areas of provincial responsibility. It does not under the existing rules, or a province does not need to participate if the federal government sets up a program.

The federal government does not deliver shared-cost programs. Provinces deliver shared-cost programs. We have not had a tradition in which the federal government, even where there are shared-cost programs, sets out highly detailed conditions and restrictions on the way in which the provincial government spends the money. Our shared-cost programs have always historically, for good political reasons, given all sorts of room for provincial variation in how those programs will be conducted, quite unlike the American system where its grant and aid programs are just absolutely detailed in setting out every aspect of how a joint activity is done.

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Much of the criticism is not so much a critique of Meech Lake itself, but really is a criticism of

the evolution of Canadian federalism since the 1960s, rather than of this document. Certainly, much of the criticism denies that this is a limited Quebec round and seeks to say, "Let us put a whole lot of new and additional items on the agenda which we think are very important."

As I think about the extent to which Meech Lake reinforces tradition rather than opens up new change, I see Meech Lake more as drawing a line under the past. I see Meech Lake almost as the end of an era rather than a reshaping of our future. That is especially true when you read it in conjunction with the 1982 settlement. By giving us an amending formula, and especially by giving us the charter and constitutional recognition of multiculturalism and other newly emerging dynamic elements of Canadian life, 1982 was a great nationalizing document—I think it was tremendously important in that respect—and it did give new prominence and recognition to aspects of Canadian identity and Canadian values other than our federalism side of our life, and that was tremendously important.

But it had this fatal flaw of excluding Quebec and somehow it did not really respond to that large number of proposals which, as I mentioned, had been debated over many years by provinces in the previous rounds of discussion to provide some redefinition of the federal system. What Meech Lake does is not to set aside 1982 but to pick up on those things which were left out and to reaffirm our federal character. Meech Lake is a solution to a set of problems that had dominated our thinking for a very long time and exorcises some pretty deep wounds, it seems to me.

One response to that is to say that in doing this and reaffirming our federalism, Meech Lake is further institutionalizing and entrenching the primacy of regional and linguistic divisions within our political system, is reaffirming our tendency always to be preoccupied with federal-provincial relations, regional conflicts and so on and so forth. They would also argue that in so reinforcing the federal character of the country, we are perhaps blunting the ability of Canadian political institutions to respond to new identities, new concerns and newly mobilized groups in the future.

Here I think there is a parallel between the procedural criticism, which says we need to reorient our democracy in a more participatory way, and these criticisms which really say we need to reorient our political system from its historic concern with federalism to this new concern with gender, multiculturalism and so on,



those nonfederal aspects of our politics. I think that is a very important statement.

I think it can be replied, however, to those views, that in fact we would not effectively be able to respond to these new agendas so long as that unfinished agenda hung over our heads. Now with Quebec fully in the fold, with the federal spending power clarified and so on, with that set of issues in a sense out of the way, we are more free to respond to these new dimensions than we might have been before. Many aspects of Meech Lake, as mentioned earlier this afternoon—for example, a provincial role in Supreme Court appointments—point to ways in which a lot of new groups can exploit those varied lacunae that the federal system creates.

I think we will learn, as we have learned in the past, that the responsiveness of our system to new issues and new groups historically is not and has not been achieved in Canada by getting rid of federalism, although many people have argued right since the 1930s that federalism is somehow obsolete and we should get rid of it and that a really modern country is a country with class politics, not with regional politics and so on. It has had this tremendous staying power, so arguments that we should just set federalism aside are wrong. What we should instead realize is that working in and through the institutions of federalism, exploiting the multiple opportunities for participation and so on that it creates, is where we will find responsiveness to these new concerns.

It is also important in a sense to realize, when we look at the responsiveness of our political system to minorities, that the best guarantee of the justice with which we will treat future minorities is how we have treated minorities in the past. In that sense, it seems to me the meeting of our obligation to Quebec should send a positive signal to other minority groups, rather than a negative one.

Finally, I would just like to conclude with a slightly embarrassed defence of the compromise, ambiguity and contradiction we find in this document. The critics are certainly right to point out that Meech Lake leaves much unresolved, that it is shot through with internal tensions and that some crucial terms are left pretty vague. In a sense, it is unsatisfactory to the constitutional purist whose ideal is precision, clarity, a single vision of the country and so on.

It is true that these contradictions and ambiguities mean that it is very difficult to predict the long-run effects of the Meech Lake accord. I would say that the Meech Lake accord is open

enough that the future of federalism is really going to be determined much more by economic and social changes, by things like whether we have free trade and by the mobilization of citizens groups than it is by what is said in that document.

We have had historically a lot of constitutional flexibility in this country. Despite the slightly increased rigidity in the amending formula, I do not think we have lost that.

I think that all these ambiguities reflect, not poor draftsmanship or late nights, but rather the realities of constitution-making in Canada and of the country itself. We find just as many competing visions embedded in the British North America Act itself. You can haul out of that a centralized vision of the country. You can haul out of that a compact theory of federalism. Ditto in 1982. Look at what we did in 1982. We sent all sorts of contradictory messages. We invented a charter with massive numbers of brand new concepts which had never been nor had any experience in Canadian jurisprudence and so on and so forth.

Meech Lake is just in the pattern of Canadian constitutional documents when we point to its internal tensions. That is for good reason. I do not think there is a single vision of the country which can command unanimous consent, no single blueprint we can all agree on. As individuals and as a country, we are this complex mixture of interests and identities, Ontarians and Canadians, men and women, defenders of individual rights but also preservers of community. We are centralists on one day and decentralists the next. We have learned that the country really cannot survive if one group's model of politics is imposed on the rest.

It seems to me that we must make modest demands on our Constitution. We must see it as being, at any given time, a somewhat awkward balance which is politically acceptable at that time. We must see it therefore as a continuous matter of unfinished business and not require that each episode of constitution-making, like this one we are just going through, address all the possible issues.

I guess my sense is that Meech Lake is not a definitive reorientation, nor do I see it as foreclosing alternatives in the future. I see it as in a sense reaffirming some very traditional aspects of Canadian politics, but still leaving us free for the political process to work as it should; and that should be the real source of political change.

**Mr. Chairman:** Thank you very much. You have touched on a number of areas that certainly

have been compelling in the various presentations that have been made to us. I wonder if I might just start off with an observation and a question. One of the things that has probably struck all of us, and I suspect struck members of the Senate-House of Commons joint committee, is that I think you are quite right that technically you go back, that you look at the 1982 document and the various procedures that were followed.

There were different meetings. You can find statements by various leaders prior to Meech Lake which show some sort of development towards something.

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It seems to me there are two factors that have made it very difficult both for the joint committee and for ourselves. My colleague Mr. Breaugh has touched on this, and I think it is very true. There are two things. One, that however valid the process was until the agreement was signed, the fact that it was signed and then brought to the various legislative bodies, however correct, sent out a message to many, particularly those who see the charter as having done something tremendously significant, that there must be something wrong back there, that something funny happened. The late-night meetings sort of add to it, regardless of whether they were half asleep most of the—

**Dr. Simeon:** That is also a long tradition in Canadian politics, of course. There were the kitchen meetings—

**Mr. Chairman:** That is right. With all that together, then, I think it has been—not surprising, but I have been struck by the continuity of it, that people really believe in the charter. That is tremendously important to them and, right or wrong, many of the groups which come before us believe, perceive, that somehow Meech Lake has taken something away from them. The fact that we are all being told, “Don’t change a word or the world will collapse,” all tends to heighten that sense that something awful is about to happen.

As we have tried to work our way through it, and in particular to look at it and try to ignore some of these other things, I have often wondered if, for example, the first ministers had come out of that meeting and said: “We think we have here something that is really forward-looking and positive. We’re going to meet again in six months, but we really believe in this document and each one of us is going to lobby very hard within our own jurisdiction for it,” I suspect that as a committee, as we then looked at that accord and looked at the various problems, we would still have had in the back of our minds:

“OK, we want to look at this very carefully because we know how difficult it is to bring about agreement. Clearly, all the first ministers feel this is something very worthy of support.”

Of course, the problem is that we have had superimposed a whole series of other kinds of discussions, which is to rubber-stamp. The Liberal members or the Conservative members, depending upon the legislature, will all scurry around because they want to become parliamentary assistants or be sent hither and thither. That is really unfortunate because all of that has really taken away from the essence of the accord and looking at that accord.

If there is a lesson that I hope a lot of us have learned from this, it is that no matter what kind of plausible legal, technical argument one wants to put forward, we really cannot again be put in this position of dealing with an agreement whereby it has been signed and one, in effect, has been told, “You can talk about it but you’re not supposed to do anything about it.”

The reason I underline that is that it does terrible damage to the credibility of our political system. We have had in the last four years three issues, one in this province and two broadly: provincially, the funding of the separate school system; then free trade and then Meech Lake. I am not arguing the rights or the wrongs of them. We have had the situation in two cases where there is agreement that these are good things and we all have to go forward with them, which then makes it difficult for anybody in any sort of legitimate way to try to oppose. In the case of free trade, I suppose, it is simply stated, “We don’t need unanimity on whether we should have free trade.”

One of the results of those three—and again I stress that I am not arguing here the substance of whether they are good or bad—is that those who, for whatever reason, did not necessarily agree with one or all of those initiatives felt cut off. They had no place to go. They had no place, in a sense, to find some legitimate expression for their opposition.

What I have felt from a number of the groups and individuals before us is that kind of frustration, that here we are and here I am talking to you and you may be a perfectly reasonable group of people sitting around in this committee, but, damn it all, I have no say in this. The charter and various other developments made me feel that I was going to have a say. I think that is a very serious problem that we, as legislators, have to face in making clear that our system is credible and legitimate and that there is a role here for



people. We have to find out how we can go about that, whether it means getting into the question of referenda, as the gentleman earlier this afternoon was discussing, or simply expanding and developing our parliamentary process. It is better to take that all into account.

That is a long preamble at the end of the day, but it is one that I feel very strongly about. You look at the process, and I think quite rightly you said, "Look, maybe Meech Lake has ended a certain approach." We will have, presumably, the 10 legislatures and the federal Parliament dealing with this. Have you given some thought to a process on how you would see this all starting to work so that we would have a full and frank discussion before signatures were made?

**Dr. Simeon:** I agree with just about everything you have said which is why I have been doing a fair bit of—I promised somebody before I came up here I would not use the word—agonizing about it. It seems to me that part of it is that we really are having our political system challenged—I mean that positively—to behave in a very different way, in a very politicized and mobilized and diverse society. It seems to me that we need to do a great deal of experimenting. As you mentioned, it is not only on this issue that we find complaints that a process is illegitimate. There is the Catholic schools issue and abortion, and now some groups are going to call into question the legitimacy of the Supreme Court as a body to determine these. So I think we have a long-term task in front of us to try to devise more sensitive and more participatory kinds of processes.

The other problem with that is, too, when you have a divided society, there is a real tension between hearing everybody and deciding; because where there is division, a decision eventually is going to say no to some people's preferences and yes to others.

That is partly why, of course, we have had a process like this; and again, if you just think back to 1980 and 1981, we had a government that was prepared to go right outside the country to find a way of amending the Constitution on the grounds that it was impossible to find any mechanism for getting consent in this country. Now, it was not able to do that in the end but that is what it tried to do.

So, I think it is a matter of hearing and representing and also a matter of deciding. How we do those things together I think is very difficult.

I do think that, under Meech Lake, many of the directions in which we should go can be done at

the provincial level: how the province gears up, as I mentioned, for constitutional conferences, how the province goes about nominating justices for the Supreme Court, how the province goes about nominating Senators and so on.

All of those are ways in which, now, the province has an opportunity to experiment with new kinds of techniques and new devices. It may be, conceivably, as has been suggested out west, that we elect our nominees to the Senate. That is a possibility. Certainly holding hearings is a possibility, as is establishing rules at the provincial level about what the partisan mix would be. We could decide, for example, that Ontario's nominees will be proportional to the party representation in the Legislature rather than having the government appoint only its supporters. So I think there are lots and lots of possibilities that we can engage in here.

**1730**

I also agree with you that one of the real dilemmas that we have to deal with in this country is how we relate those areas where we have to have federal-provincial agreement to the whole process of accountability. In one sense, the governments are accountable to each other not to break an agreement that they have made, but they are also accountable to their legislatures. That is exactly the dilemma we have with this being an unamendable resolution.

It seems to me that there are a few areas where that is just an inevitable problem, those areas where there must be intergovernmental agreement, as in constitutional amendment. In other areas, it seems to me that while Meech Lake very much undermines that the only way we can operate this federal system is through a lot of intergovernmental co-ordination, communication, co-operation and so on, I think we should really resist turning first ministers' conferences in general into legislatures.

One reason for that is that you buy collective agreement among all the provinces at the cost of the individual provinces' ability to play through their own political processes. While I am supportive of co-operative federalism, I see that as wanting to restrict that as much as possible to consultation, discussion and so forth rather than formal deals or formal accords, which have then to be accepted as is.

Another possibility that I think might be considered in areas where intergovernmental agreement is absolutely essential is to think about whether the first ministers' conference itself should conduct a consultative process or bring other parties into its discussions. It would not be

inconceivable that the first ministers would appoint a task force, a commission or some mechanism for holding hearings and that sort of thing. I do not think I would advocate that, but that would be another way of getting popular participation right into the process if it were felt desirable.

I certainly would have liked a longer period, in a sense, in between Meech Lake and Langevin. It is interesting that the Quebec government did hold public hearings in that period, very good ones and very well attended ones. It was a matter of considerable regret to me that more governments did not even take advantage of that few weeks to do some more consultation.

I agree with you. I think that in a sense the fear that maybe something has been taken away from us here or that we have not been able fully to participate has diminished by quite a bit the sort of popular support here. I guess my bottom line would be that it is not enough to say no to this accord. But that is enough to say, as you said, that we should try to do it better in the future.

**Mr. Allen:** One sometimes feels after a fairly comprehensive review of the kind that we have had, which I think was marked by a considerable note of brilliance, that we ought to just go home and write our report because it sort of pulls everything together so well.

**Dr. Simeon:** I'm glad I do not have to.

**Mr. Allen:** I really appreciate your coming this afternoon to reflect and to gather together some of the strands of discussion, the criticism and the support that does exist for the accord.

I thought in particular that your concept of Meech Lake sitting really midway between two eras of social, political and constitutional concerns and somehow being caught somewhat in the byplay, the whiplash, the cross-currents or whatever images you want to use there, was a very helpful one, because I think it helps us sort out what we are completing, what we are beginning, how the two are interacting and how we might rationally address that particular issue.

I would like to bring you up against a fairly precise question, none the less. You were here while the Native Council of Canada was making its presentation and urging that in all probability their concerns, both in terms of getting on the agenda and even more in terms of reaching out for propositions of self-government, would in the nature of things, for a number of reasons, come under the unanimity rule in the amending formula. I wonder if you could reflect on that for us for a minute because I think some of us would be very disturbed, to put it mildly, if we thought

there was a single premier out there who could somehow at the end of the day finally put a stop to ambitions of reasonable proposals on native self-government.

**Dr. Simeon:** Yes; well I had not thought about that particular issue and I immediately rushed to the section on the future constitutional discussion and, I suppose, maybe this is another ambiguity in the phrase that was used and which was mentioned in the discussion, "and such other matters as are agreed upon," would constitute the agenda. That certainly does not sound like a formal rule of unanimity, but it is vague.

I think the tradition in federal-provincial conferences, maybe not strong enough to be a convention, but I think the tradition is that those conferences have been pretty permissive: When a government has said, "I want to talk about X," I think it is very seldom that it has been ruled out of order by saying, "No, that is not on our agenda. You are not allowed to discuss it." I would think if the federal government or some significant number of provinces were insistent that issue or another issue be put on the table, it would be somewhat unlikely that one or two or a few could veto it.

The other thing I think should be mentioned in terms of the possibilities of innovation by provinces in this area of constitutional amendment is that even though the accord sets up an annual constitutional conference, there are still other ways of getting constitutional debates going in the sense that under the 1982 amending formula, which has not been changed in this respect, any legislature can pass any resolution suggesting any kind of constitutional amendment that it wants.

As it turned out, the very first proposal under the 1982 formula was British Columbia passing a resolution saying that property rights should be put into the charter. Admittedly, that did not go anywhere in another legislature, but it suggests another way in which we can make these things happen. Where there is strong demand, where one province is perhaps willing to take the lead and then groups or governments or political parties in other provinces can take it up, you could go a long way down the road towards building consent for new constitutional amendments without it ever necessarily being on the agenda of the first ministers' conference. I think we should recognize there are different routes that could be followed here, but I am afraid I cannot give you a more definitive answer on the question of whether, say, if two provinces are



saying, "We do not want to discuss aboriginal peoples," it would keep it off the table.

**Mr. Allen:** What about aboriginal self-government and the impact on class 24 of section 91 which gives native affairs to the federal government. Do you see in that sense the movement towards aboriginal self-government as being a federal matter and therefore under the unanimity principle?

**Dr. Simeon:** I would say this about the north as well; the federal government alone can go a long way down that road. It is a little easier to say this with respect to the northern territories. Despite the unanimity rule for making them provinces, the federal government could make them de facto provinces in terms of the amount of autonomy it gave and make it increasingly difficult for other provinces to resist making that a formal reality.

Native or aboriginal self-government is different in the sense that I think any proposal that has been put forward for aboriginal self-government involves a transfer of jurisdiction from the provinces to those aboriginal governments as well as from the federal government. In that sense, I do not think, even though the Constitution gives the federal government responsibility for native peoples, that you could bring about native self-government without some sort of provincial consent.

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**Miss Roberts:** I do not know if this should be the last question but I appreciated your comments with respect to spending so much time on the process. My concern, just picking up from what you were speaking to Mr. Allen about, is if the aboriginal people feel so much blocked out, if they feel that their round was missed, how important is it for us to get into the Constitution processes?

I look at the Constitution, the 1982 round or the 1987 round, the Constitution in 1867. I look at the processes that are there and I do not know if that is the right place for them to be.

**Dr. Simeon:** I could not agree more. I think we have constitutionalized or we have made the constitutional forum too important a forum in this country. I do not think there is any doubt about that at all and so what happens, and this is again what has happened in the Meech Lake discussion, since the Constitution is the game going on in town, everybody has to get a play in the game and if they are not there, then they feel particularly upset.

It is remarkable to realize we have had in 1982 and 1987 a massive sort of period of constitutional activity. But historically, the way we have adapted and changed our federal system to new concerns has not been through constitutional changes. We have had remarkably few and certainly not the sort which swept across the whole area of amending formula and so on. Before now we had a few changes for unemployment insurance and for old age pensions, and so on and so forth. Basically what we have done historically is invent a whole lot of things like shared cost programs, which have been the device. I do not know how you can put the constitutional genie in the bottle, but I personally have a preference for, in a sense, a less high stakes kind of politics. The problem with constitutional politics and constitutional issues, is that they are very high stakes in the sense that they deal with important symbolic values, and in the sense that once done they are hard to change, and therefore to lose is much more difficult and so on.

I would love to find a way that we would put the constitution aside and concentrate more on informal agreements and legislation and so on than we have got into. The big plus of the annual first ministers' conference is this opportunity for citizen involvement; but the big negative is that it sort of tends to tell us that as new issues arise they are going to be debated in terms of the constitution, at least to some degree.

**Miss Roberts:** That seems to be a problem, if you debate it always in terms of the Constitution, when we all agree that we now have three documents that even the Supreme Court is not sure how they are going to fit together. So that each year we are going to have this rendering of the positions of various parties or various provinces at a first ministers' conference that might not be that helpful. Although I understand your reason for supporting first ministers' conferences, certainly the process outlined in the three documents we have is a very difficult one and is something that maybe is not helpful to our country.

**Dr. Simeon:** Yes; well the first ministers' conference has evolved, though, really in a sense out of necessity. I mean it has to do in a sense with some of the difficulties of the original Constitution, and in particular that that Constitution had to adapt to all the new functions of the welfare state and government intervention in the economy and so on, so that we moved dramatically away from the idea of here was section 91 and this is what the feds do and here is section 92

and here is what the provinces do, and they each go and do it on their own and so on.

It was the growth of the modern states which led to this incredible interpenetration of the two orders of government. While lots of people over the years have said as part of a constitutional exercise, "Can we not do—the Ontario word was disentanglement—can we not go back to parceling out the functions?" Those just never got anywhere. It just turns out to be incredibly difficult to do, so that intergovernmental relations has become just an absolutely essential process if our system is going to work, because we cannot reshape the powers and because we have moved into a system. The US has that same degree of integrated penetration, but it has a much more dominant federal government. Politically, we have not emerged, moved to a situation in which the federal government has that kind of political dominance which would allow it to dictate to the provinces.

Again, I think that has changed historically. We have come out of the period, of course—and what we remember is what is freshest in our minds—the 1970s and the incredible assertion of provincial power during that period and the incredible intensity of regional conflicts and the incredible sense that the reason the provinces had to be strong was because we had a federal government which did not adequately represent the whole country. That was one of the very important forces driving it.

If we look before that to the 1940s and 1950s, we had the same decentralized, federal system, the same division in powers and so on; but at that time the issues that faced the country were the

issues of building the welfare state and so on; there were not strong regional divisions on those kinds of issues, like there were on energy. The federal government did have the major financial resources. So it was a period where we had all the complexities of federalism but lots of federal leadership and lots of national consensus. Then we were able to operate under federalism; it still made things a bit more complicated, but we were still able to do it.

**Mr. Chairman:** Thank you very much. I am intrigued, your last comment also raises the issue of political will, regardless of constitutions. I suppose C. D. Howe would have been the first to say that there are lots of things you can do, no matter what the Constitution says.

Thank you very much for joining us this afternoon. We really appreciate the thought in your paper, which I think has been extremely helpful, not simply at the end of a long day with a variety of presentations but this is moving towards the end of our fifth week. I think you have put some things in perspective that have been most helpful. Thank you again for coming today.

**Dr. Simeon:** Thank you for having me. I enjoyed it.

**Mr. Chairman:** Two quick announcements: A reminder that we meet here at 9:30 tomorrow morning. Breakfast is at eight o'clock in the board room, which is the little room across the hall, where we will go over some of the organizational things we have to deal with.

The committee adjourned at 5:48 p.m.



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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Offer, Steven (Mississauga North L)

**Substitutions:**

McGuinty, Dalton J. (Ottawa South L) for Mr. Elliot

Villeneuve, Noble (Stormont, Dundas and Glengarry PC) for Mr. Eves

**Also taking part:**

Daigeler, Hans (Nepean L)

**Clerk:** Deller, Deborah**Staff:**

Bedford, David, Research Officer, Legislative Research Service

**Witnesses:****Individual Presentations:**

Roy, Albert J.

Léger, Huguette, coordonnatrice provinciale, Union culturelle des Franco-Ontariennes

Peladeau, Claire, membre, Union culturelle des Franco-Ontariennes

Martel, Thérèse, vice-présidente, Action Education Femmes - Ontario

Riese, Monique

**Individual Presentation:**

Geraets, Dr. Theodore F., Professor of Philosophy, University of Ottawa

**From the Township of South Crosby:**

Warren, Donald M., Deputy Reeve

**From the Public Interest Advocacy Centre:**

Bell, Glen W., Associate General Counsel

**From the Native Council of Canada:**

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McCormick, Christopher, Vice-President

Groves, Robert, Special Adviser

**Individual Presentation:**

Simeon, Dr. Richard, Director, School of Public Administration, Queen's University











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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Wednesday, March 23, 1988



Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, March 23, 1988

The committee met at 9:37 a.m. in Algonquin Salon A, Delta Ottawa Hotel.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin our morning session, I would like to call our first witness, John Holtby. Please come forward to the table.

We would like especially to welcome you, Mr. Holtby, as you certainly are no stranger to Ontario legislative committees or the Ontario Legislature, having served for a number of years, some 12, at the table of the Ontario Legislature, and of course also with the federal Parliament.

I note with interest that you are presently completing the writing of the sixth edition of Beauchesne's Parliamentary Rules and Forms, which I think all of us who labour in legislatures will find of interest. I gather it is hoped that will be put to bed within a month or so.

**Mr. Holtby:** About two weeks.

**Mr. Chairman:** That is great. It is a pleasure to welcome you back before an Ontario legislative body. I think I mentioned to you that we have had a chance to review some of the comments you made to the special joint committee on the Constitution of Canada. Perhaps you could begin with some opening remarks and then we will plunge in with questions.

JOHN HOLTBY

**Mr. Holtby:** Thank you, Mr. Chairman. That is very kind of you.

When your clerk called yesterday to extend your invitation to speak this morning, I was very flattered and pleased to have a chance to see some old friends again, but I cannot honestly say that I am keen to discuss the Constitution at 9:30 in the morning, and I do not know how you people are doing it.

I was rooting through some stuff last night and came across something from someone who I suspect is known to most of you; that is, our old friend Sir Humphrey Appleby. In Humphrey's diary, he said this on one of his dates: "In government, many people have the power to stop things happening, but almost nobody has the power to make things happen. The system has the engine of a lawnmower and the brakes of a Rolls

Royce." As elected people, even though some of you are unfamiliar to me, you may have some sympathy with the wisdom of that.

I understand you are interested in the proposal that I made last August 6 at the invitation of the special joint committee of the Senate and the House of Commons which examined the constitutional entente that is now before you. Since, as your chairman has said, you have had access to the transcript of that meeting and the report of the committee—and I trust, as well, Peter Hogg's book, in which the issue is again raised—I will not waste the time of the committee by repeating what is already on the public record.

Instead, I invite you to turn your minds to the question of codfish and the regulation of the scallops fishery. I would like to know, Mr. Chairman, how much you know about the migration of flounder.

**Mr. Chairman:** I have a feeling you are going to tell me a great deal.

**Mr. Holtby:** That is the next constitutional issue that is on the horizon for you. While we are indulging in this flight of fancy, what should be done with the soles and urchins now in the Senate? You are going to have to have an opinion on their political life or death or reform before you face the next provincial election.

I am talking about process and the place of members of Parliament and assemblies in constitutional change. Meech Lake is not the end of the process, nor is it the beginning. It is a continuation of an updating of the country's fundamental living arrangements, and this process is going to be with us for some time to come.

Where do you fit in this? In the 1981 amendments, you counted for nothing. This is in spite of the fact that the Charter of Rights and Freedoms has had great importance to your political and parliamentary life. I remember hearing members of the British House of Commons lament in that foreign House the absence of a direct sanction of the 1981 changes by the provincial legislatures. There was not much of a squeak from those houses themselves. They were, by and large, content to leave the matter up to the first ministers, the Senate, the House of Commons and the diplo-bureaucrats.

When the Constitution was amended again in 1983 regarding the aboriginal peoples of Canada,

you were involved only to the extent of a brief debate in your House and unrelated and isolated debates in each of the other provincial capitals. There was little community consideration or involvement, and the fruit of that amendment has been small indeed.

Now you appear to be looking for a role, perhaps a bit late in the day, but here you are, standing on the platform, looking down the tracks as the train disappears around the bend. I hope you are getting ready to catch the next one. It is coming sooner than you think, and Meech Lake gives you a unique opportunity to play a positive role. My guess is that most of you are offended and hurt by the circumstances in which you find yourselves, and if you are anything like members of other houses, you are looking for a way to see that this does not happen again.

Let me flog this horse just a little longer. The government of Canada has announced that it will be bringing forward proposals for Senate reform. Are you content to let this question be defined solely by Ottawa? I doubt very much that your colleagues in Alberta are. Are you then prepared to be placed back in the boat in which you now find yourselves? To return to the fish, are you content that you know enough about the subject to legislate proper constitutional arrangements, not just for the people in Shining Tree, Ontario, but as well for the people of North Rustico, Prince Edward Island, or Tofino, British Columbia, or Yellowknife?

Your duty now is to legislate constitutional matters for all of Canada in fields previously not part of the realm of provincial jurisdiction. Are you to espouse provincial status for your neighbours in the Arctic or are you in favour of Nunavet?

My proposal for a national joint committee on constitutional amendments would bring members of the Senate and the House of Commons together with members of the assemblies of the provinces and the territories to hold hearings, to discuss, to educate the community—in short, to carry on the great public debate that is the *raison d'être* of Parliament.

This is the necessary prelude to decisions being taken by party leaders and first ministers. It would involve the wide spectrum of the Canadian body politic, members from both sides of each House in a regular national consultative process, I repeat, before the first ministers make their agreements. The Constitution is the property of the community, but past arrangements, unfortunately, lead many to believe that it has become a private preserve.

You have a few cards to play. I doubt that anyone realistically believes that you are going to tear open the present proposals. You could, however, recommend changes in the process for future amendments. Moreover, you could play a part now in getting that process moving.

This committee could convene a meeting of its fellows from other jurisdictions—not to talk about Meech Lake, that would be totally counterproductive. Use the opportunity to start the interpolitical discussions on Senate reform, on fisheries, on the unhappy position in which the north finds itself, on native issues, on those issues which need addressing because of the concerns raised during your present hearings.

What you have, in fact, been hearing is not so much the deficiencies of Meech Lake as the beginning of the agenda for future discussions. I have suggested a vehicle. If there is a better one, fine and dandy; but I do think that your committee can initiate that process during its present existence. I believe that if you do not, you return all your political currency to the first ministers and the diplo-bureaucracy when you present your report. You will, unfortunately, demonstrate to the public that the public political process is capable only of reaction to the fait accompli.

If you want me to summarize the framework of the national joint committee, I am pleased to do so. I do not want to cut into the committee's time. I realize what the constraints are.

**Mr. Chairman:** We have the time for questions. Perhaps for the record and the Hansard, you would just set that out.

**Mr. Holtby:** Basically, what I have suggested is that we need a new creature in this country, a new parliamentary mechanism to allow the parliamentarians of the country to focus in a collective way on constitutional issues and the need for constitutional amendments and their direction on a regular basis, before the first ministers make their agreements.

My initial suggestion, and I am certainly flexible on numbers, is that two members from each provincial and territorial House, one from each side of the House—I realize that creates a difficulty in this House, but you can sort that out—along with, say, four members of the House of Commons and two members of the Senate, meet together as a national joint committee on constitutional amendments to hold hearings, as I say, to carry on the public debate. Your duty is to carry on the public debate. It is not to run the country, not to run the province; you carry on the great public debate. That is what you should be



doing before the first ministers make their agreements.

I do not think there is anybody who is happy with the present arrangement. I do not think the first ministers are particularly happy with it. I do not think the senior bureaucrats are happy with it. I know they are not. They are embarrassed that they had to do it. There were no mechanisms. Why? Because parliamentarians did not put the mechanisms into place.

That is my suggestion, in brief.

**Mr. Chairman:** Thank you very much for setting out both the general views and the specifics of the proposal. We will turn right away to questions.

0950

**Mr. Breagh:** John has been with some of us for some time so we kind of know the common ground here. I think what you have identified is the thing that keeps coming back to haunt us and that is that the process was, at best—I think it is not unfair to say that it was legal and politically correct and all of that, but it does not fit into today's society. It is both intolerable and inexplicable to the public at large as to how they came to this agreement, and I think most of us have come to the same conclusion you have, that a new mechanism must be found. I read with interest the paper we got yesterday about the national joint committee concept. It is one that I would certainly share in principle.

I take it you are not wedded in any way to the mechanics of how it is set up or how many people are on it or when it would meet or things of that nature. You are basically making the argument that some group of parliamentarians must be struck whose job it is to sort and work the process through in a public way. Is that the gist of what you suggest?

**Mr. Holtby:** Yes. I think there are certain constraints that operate on any body such as this. Numbers are, within reason, not critical; there is a size limit that reaches a stage of nonproductivity. I think it should, at some point, be given some statutory roots somewhere because you people keep disappearing, unfortunately. I realize that all of you come in for four years and you think you are going to be there for 40, but you do keep having elections. I think the creature needs some legislative root system somewhere, whether that be through the Parliament of Canada or even through a provincial House.

**Mr. Breagh:** As I read the proposal, the basic premise is that a committee would be struck

of people representing the provincial assemblies and the federal Parliament and Senate.

**Mr. Holtby:** And the territories. If I may interrupt, I do want to emphasize this: the territories. There is a significant reason the territories were excluded from Meech Lake. There is a real constitutional problem there for the government of Canada. The crown in right of Canada still possesses that, and the territorial assemblies have certain rights and responsibilities but there is a hangup there.

There is not a hangup for parliamentarians. You people have been meeting with territorial parliamentarians for as long as I can remember. I remember when the first territorial assembly appeared at a parliamentary meeting; it would be in the early 1970s, and I think they were probably there before then. It is not unusual, and because you do not have the power residing in this organism to be a threat to the crown in right of Canada, you have an open door to involve the territories in the process without doing any irreparable harm along the way and they will not be forgotten again if you involve them there.

I am sorry to interrupt you.

**Mr. Breagh:** What I was a little bit concerned about with your proposal is, are you excluding the concept that there would be legislative committees in each of the assemblies and the territories?

**Mr. Holtby:** No. They have to be there.

**Mr. Breagh:** When I looked at that proposal, at first blush the one thing that struck me is that this would be, frankly, one hell of a job for anyone to take on, if you were some kind of national touring committee. You would probably have to be willing to say: "I don't want to have anything to do with Oshawa or the Legislative Assembly of Ontario any more. I am on the road for the foreseeable future." No one in his right mind who ever wants to be re-elected would be very happy with that task, but as long as we could work that out in conjunction with some kind of legislative committee format—

**Mr. Holtby:** There are some provinces which do not have very many committees and will not have very many committees, and the national joint committee proposal gives them, by virtue of their membership in it, access to the types of hearings and expert assistance that you have been receiving.

A key component in the proposal has to be the ability to publish papers, to gather information, to disseminate it and to be a resource centre.

Quite frankly, I made a prediction when this process started that the joint committee of the House of Commons was going to hear witnesses, the Quebec National Assembly was going to hear the same witnesses, you were going to hear the same witnesses. It is one experience for you, but it is 10-plus experiences for these individuals, and there is a limit to the resources. The country simply cannot afford, intellectually or in terms of time, to keep putting on this thing again.

So a central organism initially, but not to preclude the ability of any House to structure its own committees to look at proposals. I think you have to. I think the assembly in Alberta would place a different emphasis on Senate change than perhaps would either this committee or a national joint committee or a joint committee of the Parliament of Canada. This is just another link in spreading the work and giving the public the ability to come somewhere.

The public does not know what button to push now when it comes to the Constitution. We do not know who does it. Do we line up in front of every provincial Premier? Do we line up over at the Langevin Block? Where do you go when you want to make your views known? This is not a proposal for one-stop shopping, but perhaps a little closer to some place where people can go to make their views known.

**Mr. Breaugh:** One final little point that maybe you can help us with. Part of what we have experienced is that people—not all, but many of the groups that have appeared before us—are not quite sure what is going to happen. Do we write a report and then it dies, as the federal report appears to have died? There is no connection between what we might do in terms of getting input at a public hearing and where it goes from there.

I had some little concern in reading through the proposal for a national joint committee that it was not clear what that committee would do, what its relationship was with the process, whether it could set an agenda for a first ministers' conference or set public priorities and then the first ministers would have to deal with that in some way. Have you thought through how that process might be connected?

**Mr. Holtby:** The national joint committee obviously has to have an awareness of what is happening on the agenda for the first ministers. There is no point in this body going off and discussing fish if the issue they are going to talk about this summer is Senate reform. So there has to be a symbiotic relationship, but that is part of

the political process. We all know what that agenda is going to look like.

Initially, you are going to be flooded, and there will have to be a consultative process to narrow topics so that you can focus. You can focus, as a prelude, to meetings of the attorneys general and meetings of the first ministers. You have to be the first step. Not to run the show: to hear, to educate, to influence. Have I answered your concern?

**Mr. Breaugh:** OK.

**Mr. Offer:** I would like to thank you very much for your presentation. I think you have well characterized the whole difficulty surrounding the lack of process and the obligation with respect to carrying on this national debate in whatever way is beneficial to the public at large.

The comment I have is all predicated on prior to the first ministers' conference, so just obviously keep that in mind. With regard to your suggestions about the single committee, the question I would like to pose, and I think it was already dealt with in some way by Mr. Breaugh, is the whole sense—and I will talk from an Ontario perspective—that there is an obligation and responsibility, in my opinion, by the people at large, groups and individuals, for a provincial Legislature carrying to these types of hearings. Again, I predicate it prior to our first ministers' conference.

## 1000

My question is, how does your proposal with respect to the single committee align itself with respect to the legislative committees? You indicated earlier you see that there should be—and obviously it is within the discretion of the province to have them—these provincial committees hearing these important issues, but you have also, in your proposal, indicated that there ought to be this single committee, a national type of committee. What is the relationship between the provincial committee and the national committee and what type of signals do you sense we are sending out to the public at large with respect to making submissions and to which committee? Is one committee going to feed into the other committee?

I think it is important in dealing with constitutional reform that once a process has been devised, whatever constitutional reform one is talking about, we do have a committee that puts a provincial perspective on the particular reform. I am just trying to get an idea. Could you comment on how you see the provincial committee feeding into the national committee or not feeding into the national committee?



**Mr. Holtby:** I would like to stay away from the term "feed," Mr. Offer, simply because you run the risk of having every province attempting to feed the baby, as well as the other houses. I do not think that would be terribly productive. I think there are certain issues. Let us take it outside of Ontario to Newfoundland. Newfoundland could very well establish a committee on the constitutional aspects of the fisheries. Nova Scotia could equally set up a similar committee and they will come in, I suspect, with totally contrary opinions.

That is obviously the fight that is on the horizon. It will not be terribly useful to use the national joint committee as some sort of referee in that battle. It is not an executive committee. It is a vehicle where one tries to find common ground, if it is there, to attempt to do a little public and perhaps a little private brokering, but I do not think you can expect it to do much more than that. That is not to say the members of the Newfoundland House of Assembly ought to feel in any way constrained in their own committee from going off and doing what they bloody well please and espousing the views that they please.

Do not think that a national joint committee is going to solve all the problems. It will not. It is a public vehicle for public discussion, perhaps a little problem-solving and perhaps a little more national understanding of the different perspectives of the issues. I do not think you have talked about fisheries. I mean, I watched you. You thought I had lost my marbles when I started talking about flounders and what not, and you are quite right, but that is peripheral.

You have to deal with issues that you are totally unfamiliar with. You, as parliamentarians, need a vehicle so that you are not beholden to the government of Canada to tell you what is in the best interests of the fishery, or to the province of Newfoundland to tell you what is in the best interests of the fishery. You have to have a vehicle where you can sit down and it would be totally counterproductive to have 12 parliamentary committees travelling this country to talk about flounders and scallops and the Constitution. You have to come together in a vehicle.

**Mr. Offer:** I understand that. My query is with respect to the people who want, who see a need, to come before a legislative committee; who have, in fact, come before this legislative committee. Would the fact there would be a national committee in any way detract from the provincial committees? People would say, "I am just going to go to this national committee. I am going to say my piece because there is provincial

representation and that is where I really should be selling my case."

**Mr. Holtby:** I just do not know of a lobbyist who would make the choice and say, "I am going to knock on that door instead of that door." I think they will knock on both doors. We have a brand-new industry springing up in the country. It is marvellous to see how all the unemployment is being solved by the Constitution. You cannot get office space in this town now for public interest groups that want to knock on the door and tell you about Meech Lake and the Constitution.

They are going to be there. Where the real people are going to be, I do not know. I guess you know that because you go out and you knock on their doors and you talk to them in your community. That is the essential element that you always bring to a question.

**Mr. Allen:** I do not have to reiterate that process from the first day of this committee has been a major preoccupation, so it is very helpful when people with the experience of Mr. Holtby come forward and make some specific, concrete proposals for us.

I guess the first reaction about getting involved in flounders and fisheries questions, apart from the fact that of course the nation has been involved in that from the beginning—every school kid learns about the treaty of Washington, or should, as a sort of first example in the national debate over that question—is that it raises some very interesting matters for us, both in legislative committees and in travelling joint committees such as you propose.

I suspect that in Ontario a standing committee on the Constitution that was struck to deal with that question—and obviously, we may well have to do that—is going to have people coming mostly to tell us why that should not be on the agenda and why the nickel industry ought to be on the agenda and why some of the problems of labour with respect to certain recent court judgements under the charter ought to be on the agenda or why we ought not to be dealing with this, that and another concern.

Most of our time is going to be taken up fielding people who think they should be there rather than the issue at hand, since it really has so little to do with the main thrust of Ontario politics. I would like you initially to respond to that, how we cope with that at either level, the legislative committee or the national joint committee.

The second question I want to put to you has to do with either an alternative or an addition. I would hope an alternative, because I think this

whole process can get too weighed down with structures, as you have already indicated. None the less, many of them are going to be there, and people are going to have to do their big trip.

One of the interesting things has been that people, on the one hand, have told us they want the process more democratized and, therefore, have more places to say their piece. At the same time, they have said they cannot afford sending groups lobbying around to all the places they want in the democratic process to say their piece. So there is a real contradiction in the public mind about that as well.

What would your response be to focusing this enterprise rather, first of all, on legislative committees and provincial hearings and then, when first ministers' meetings are in the offing with respect to any given issue, that there at least be a national legislative convention on the Constitution, which would run for a week, in which this sort of networking and interchange would take place between the legislative committees?

**1010**

I can see initially that the House of Commons might say, "That is our business." I think the logical response to that is: "After all, there are 91 and 92 in the Constitution. We do have our separate jurisdictions. You are not familiar with ours and we are not all that familiar with yours."

Perhaps this kind of encounter situation, attempting to build consensus and formulate some common propositions with regard to the emerging issue could therefore be a useful thing to do. You may well have thought about that as an alternative and may have rejected it. I wonder what your thoughts are on it.

**Mr. Holtby:** There are several questions, Mr. Allen. If I neglect to respond to them, please remind me. On the first question, about just the sheer volume of representation that can come, I think any committee, whether it be this one or any other one, simply has to put in place internal procedures to discipline itself and its time so that it is getting information it feels it needs to have and not allowing its agenda to become the property of external forces. You simply cannot afford that; the community cannot afford it.

Certainly, every person who wants to appear in front of a parliamentary committee does not get to do that. They certainly have the ability to file information and have that information read, but they do not have the right to a block of time or to set the agenda of the committee. The committee has to do that.

In a matter related to your second question, I suspect that at some point you have considered the propriety of this committee's going outside Ontario. I cannot think you would be comfortable with the notion, particularly, of a Toronto-based Ontario committee trotting into some of these other provinces. You are not going to be welcome. You need some sort of ability to talk to your fellows and you need a way to know your fellow parliamentarians in other provinces. There are very few vehicles to allow you to do that so you can be sensitive to something other than the feeling on the main street of your local community, to have a sense of the country.

If I can digress for a moment, one of my crazier proposals was to move the Parliament of Canada around the country every so often. Because you do not travel from place to place. You get an aircraft and you go somewhere, but you do not go to that place you go to that issue; you go to a room and you confront an issue. You do not get to know the people there very often. This House used to go on a great northern expedition. Once in the Legislature they fly you all over the north. The now Treasurer (Mr. R. F. Nixon) was always a great proponent of it, and I think you should tap him for some funds to do it again. It was always very helpful to sensitize members to your own jurisdiction, and you ought to be sensitized to your own country.

There are members of the House of Commons who, when they came here for the first time, had never been out of their own province, and yet they are asked to be parliamentarians for the whole country. You need a vehicle to understand what is griping the Albertans and why some British Columbians think everybody on the other side of the mountains is out to get them.

Have I missed a point, Mr. Allen?

**Mr. Allen:** I would like to quite specifically focus on an annual or periodic gathering of representatives of the legislative committees and the House of Commons and Senate committees in formal session around the emerging issue of debate.

**Mr. Holtby:** Oh, yes, I think you mentioned a week. I think you would have trouble with a meeting a week a year in getting any sort of human chemistry going. I think you perhaps have to have shorter meetings more regularly through the year, with adequate staff preparation and regular communication with your fellows.

If you are on the national executive of your party, you have regular contact with those people. That is the type of relationship that has to exist. You also have to have an ability to



interrelate with members of the Parliament of Canada. Miss Jewett alludes to that fact in the transcript of the meeting that I had of the joint committee. Just the straight value of sitting down with your counterparts can be very productive.

**Mr. Harris:** I will be very brief. I thank you, John, for the presentation, and I understand what you are saying. I am going to ask you something on the overall picture, though.

A lot of the proposals that we have talked about and discussed, and yours, are all geared to making the first ministers' process of constitution-building better. Is that the best way to be revising our Constitution, through first ministers' conferences? I realize that is not the subject of debate.

**Mr. Holtby:** It is the process that is there.

**Mr. Harris:** Yes, but none of us likes the process that is there. It is a short-term process that evolved leading up to 1981 and 1982. I guess it was back as far as the 1970s when they talked about it. It seemed to be the only mechanism we had. You are suggesting other mechanisms for public input for parliamentarians and the public to start to be more involved in the process, but everybody is still saying, "This will make the first ministers' conference method of constitutional change better." I guess I am not so sure we should not be asking ourselves, "Should these guys be the guys who are doing this?"

I understand there are pluses and minuses, but some of the things that concern me are the very high profile that they take into that process, the politics that they have to represent in their province, particularly if it is a year before an election, or country if it is a year before an election, and that if we want to try to depoliticize our Constitution to a certain extent maybe we should get these guys the hell out of there.

**Mr. Holtby:** A Speaker once said, "Order, this is degenerating into a partisan debate." I do not know how you can get politics out of politics or partisanship out of politics, Mr. Harris. I suppose we could turn it over to the bishops or something, but I think they would be equally political in the process.

I hear what you are saying. The stakes are very high, the expectations are very high, and it seems to me that one of the aspects of this proposal is that you begin at a lower level of expectation when you people are discussing things. Nobody expects you people to come out with a constitutional amendment. It is not your job, it is not the expectation.

1020

If the first ministers can do it, fine. When I first raised this, in an article in *The Globe and Mail*, I had no expectation that there would any sort of success at Meech Lake. The first ministers' meeting on native issues had collapsed, and I thought, my God, we are going to be stuck. The interesting thing about Meech Lake, which I think is sometimes missed, is that it was in fact 11 elected politicians in the room making the agreement. They left the officials behind; and even when they went to the Langevin block, they got them a box of doughnuts and left them outside. Politicians are the deal makers. You are the wheeler-dealers, the brokers. You are doing it every day. You can see where the consensus possibilities are. You can see what the stakes are.

I think politics and politicians are engaged in an honourable process. It is the public debate, the public brokerage. I certainly would not want Constitution-making turned over to the bureaucracy, and that is the danger now. What have you got? You have this marvellous explosion of something called intergovernmental affairs. We now have a provincial diplomatic corps in every province. Sorry, Mr. Chairman, I am getting a bit on your turf. But they are intruding. What happens is that the counterpart in this town for the government of Canada becomes a very weighty organism indeed, very powerful. "What about that proposal?" "Oh well, we are not particularly keen on that. No, that would devalue the ability of the crown in right of Canada to do certain things." That gets shunted off, and they are very good about this.

There is a reluctance to allow political people to get involved, for a number of reasons. It is their turf, their job. You can outline any number of reasons for it. Give me a roomful of politicians and I think something can happen. I have seen it happen too many times. I have seen committees of elected people agree on policy initiatives, on directions. Look to the record of some of the committees of your own House in getting things done: the select committee on company law and the select committee on Ontario Hydro affairs. Let the politicians get involved.

I suspect you have put your question to arouse me, Mr. Harris; you knew where my sensitivities were. But give me the politicians when you are making deals, thank you very much. That is what you are used to doing, that is what your expertise is. And that is what you are elected for; you have an electoral base. If we do not like what you are doing, we know what to do with you. But who do you touch when you are dealing with the diplo-bureaucrats?

**Mr. Chairman:** Thank you very much, Mr. Holtby, for joining us this morning, and not only for presenting the idea of a national joint committee and your answers to our questions, but I also think you have stimulated a lot of thought on that whole process. We are indebted to you for joining with us this morning.

**Mr. Holtby:** May I say one thing in closing, Mr. Chairman? I hope that you will take a close look at your order of reference because if you are going to be in existence for some months to come you can hold hearings until the cows come home, you will get lots of evidence and there will be lots of people to talk to, but give some thought to using your order of reference to convene a meeting of your colleagues from across the country to talk about these things, to talk about their place, because a number of the provinces really have no place to go. You are sitting pretty. You are a largish House, you have resources. A number of your colleagues perhaps find themselves in a different position. I think that a provincial House is a little more flexible and better able to do things than the Parliament of Canada is.

Thank you very much, Mr. Chairman. It has been a great pleasure to see some of you again and to meet others of you for the first time.

**Mr. Chairman:** Thank you very much.

I now call upon the representatives of the Quebec Association of Protestant School Boards, the Reverend Doctor John Simms, president; Colin Irving, counsel; and David Wadsworth, executive director.

We want to thank you, gentlemen, for joining us this morning. The clerk is circulating material. We received copies of the material, and we have before us your brief, as well as the presentation to the committee of the whole of the Senate of Canada.

I have introduced three people and see two.

**Dr. Simms:** Mr. Wadsworth is not here.

**Mr. Chairman:** Fine, we are going to have just two at the table. If I might then, I will just simply turn the microphone over to you, Reverend Simms. Please proceed and we will follow up with questions.

#### QUEBEC ASSOCIATION OF PROTESTANT SCHOOL BOARDS

**Dr. Simms:** Thank you very much, Mr. Chairman and members, for receiving us.

As indicated, I am John Simms. My regular work is with the handicapped, day by day with the blind, specifically in Quebec and in Ottawa in Ontario. I am president of the Quebec Associa-

tion of Protestant School Boards as a citizen and as a parent. With me is Colin Irving, our legal counsel, who has practised mostly constitutional law before the Supreme Court for over 10 years, representing many of the provinces in Canada.

The Quebec Association of Protestant School Boards represents 29 school boards in Quebec, with a population of 80,000 students. We represent boards that are pre-Confederation, that go back 160 years or more in Quebec. Up until very recently, we raised our own taxes, built our own schools, paid for our own programs and literally gave some of the finest education to be found in Canada.

It was only in 1964 that the Ministry of Education was formed in Quebec, and it was only since that time that Quebec has gotten in to supporting us financially. The financing actually is mostly state-controlled now, since Mr. Parizeau put through a law when he was Minister of Finance for the Péquiste government in Quebec in 1959. Very frequently, Mr. Bourassa and others say, "Look how well we are treating these people." Well, most of what we have done down to the 1980s we have paid for ourselves.

We did take Bill 57 to the Supreme Court for the right to still collect our own taxes. We have not collected taxes, mainly out of deference to the municipal and provincial governments not wanting to mix things up. But the fact of the matter is that we could raise greater taxes than we do. It is up to six per cent at the present time.

We represent a large sector of the population in Quebec that has been there for a couple of centuries. Until Bill 101, there were as many English-speaking people in Quebec as there are French-speaking people in Canada outside Quebec. Although we have lost since Bill 101, we still have somewhere between 200,000 and 300,000 people. We still have a larger English-speaking population than more than six provinces in Canada.

I call your attention to the figures given by Mr. Fortier, the commissioner of official languages, in his annual report. He indicates that the English student population declined from 249,000 in 1971 to 117,000 in 1985. That is a decline of 53 per cent, so you can see the effect that Bill 101 has had on us.

#### 1030

Looking at our own statistics presented in the brief, we had 120,000 students, a number which had remained fairly constant at the time of Bill 101. It declined in 10 years by just about 50 per cent, to our 60,000.



During the 1970s, before Bill 101, when I was chairman of the Protestant School Board of Greater Montreal, we had 64,000 students. Within less than 10 years, our student population had dropped to 32,000; again, just 50 per cent of what we had had.

Let me say that in our schools we are not anti-French-speaking. We began bilingual education back in the late 1960s, and before Bill 101 was passed some 48 per cent of our students were involved in bilingual education. That means they went into French classes in kindergarten, grade 1, grade 2. It was only in grades 3, 4 and 5 that they began to get a small percentage of English. Again, in grade 7, they would get a full year of French and then 35 or so per cent, perhaps even 45 per cent, French throughout their high school.

The population of the PSBGM right now is typical. There are 32,000 pupils; about 12,000 are in French schools. Most of these are not really French in background—they are Greek, they are from the Caribbean and so on—but they are there because of Bill 101.

Another 10,000 are in bilingual education and these students come out fluently bilingual. The rest are in what we call the English stream but with a large portion of French.

I keep mentioning Bill 101 because I want you to realize, if you have not realized it already, that nowhere else in Canada are restrictions placed on the linguistic minority so severely as they are in Quebec.

Stepping outside of education just to the language of signs, which is a big issue in Quebec right now, where else in Canada could you say that only the predominant language, say English in Ontario, could be used on signs? Where else could you say that businesses would have to speak English if they had more than 50 employees? Mr. Bourassa is now suggesting that maybe we ought to drop that to any business which has 10 or more than 10 employees; they would have to speak French to all their customers.

We have had new restrictions on our English films.

We have had one of our towns, Rosemere, a very predominantly English town over many, many years, now declared French because of an influx of French-speaking people into it, because it went over the 50 per cent mark of French residents there.

Without giving you any further examples, because time is short—but we can come back to it if you like—we have had many restrictions placed upon us by Bill 101; very severe restrictions,

restrictions more severe than anywhere else in Canada at any time in our history.

Moving on to constitutional matters encompassing Canada: our vision of Canada is a bilingual country. We basically support Bill C-72. Our legal counsel have been involved in cases with regard to francophones in Ontario and elsewhere, and we have given them our help and support.

Now we come to the Meech Lake accord, which we think is flawed, fatally flawed, largely because the language is so fudged, is so incomprehensible, is so unclear. So unclear that not only do you have Senator Lowell Murray saying that it gives a new status to English in Quebec and others like Mr. Bourassa saying that the "distinct society" gives them full authority over their culture and language and Bill 101 and all the laws that they need to encourage their language and culture, but even in Quebec we also have others like Jacques-Yvan Morin, a former minister in the Parti québécois government, now a professor of constitutional law at the University of Montreal law school, saying that the "distinct society" means that Quebec is a bilingual society, as it has been for 200 years, and it gives predominance and a new place and a new status to the anglophones.

What I am saying to you is, the kind of social pace that Mr. Bourassa wants is not going to be there if suddenly, when the "distinct society" is in place and approved—I hope not, but if it is—if it gives English a new status in Quebec it will cause certain frustrations.

Mr. Murray says that it is a seamless web and you cannot play with it. What is going to happen when they find that the emperor has no clothes, that it is not what it was thought to mean at all?

I would question our last speaker. I think it is unbelievable that a group of 11 could sit down in a room, alone, with time restrictions, and come up with an accord that cannot be touched. I have sat through provincial negotiations with unions and we have come up with an accord, an entente, in the middle of the night and then we have turned the text over to experts to write and rewrite until it was complete, perhaps taking months. For them to write this and say that it cannot be touched, and then to find such various interpretations across the country, is strictly unbelievable in my mind.

I would like to turn this over to Mr. Irving to speak more fully on his ideas regarding Meech Lake, but let me say that the character of a nation is unmistakably influenced by its love of freedom, by the manner in which it treats its minorities and by the vigilance with which it

rejects discrimination, racism and other forms of prejudice. The kind of Canada that we envisage has a strong place for the Canadian mosaic, has a strong place for its minorities and treats them with respect and decency.

**Mr. Irving:** In view of the shortage of time, I will try to be very brief so as to leave time for questions. Dr. Simms has pretty well covered the ground.

Without attempting to read our brief, may I say, first, we are very concerned about the process by which Meech Lake was reached? I think you have heard that from quite a number of people. I need not dwell on it, but there was no one there to speak for any minority. There was no one there to speak for the English in Quebec. There was no one there to speak for the rights of women, which may be seriously affected under the charter. No minorities were represented, and I was listening to the previous speaker. No one in Quebec elected Mr. Vander Zalm or Mr. Peterson or anyone else to compromise the rights of the English minority in Quebec. I do not think anybody elected Mr. Bourassa to trade off, perhaps, the rights of the French minority in Ontario. The process is seriously flawed.

The outcome is what one might expect. There is a very serious risk that minority rights have been compromised. We speak from the point of view of Quebec, where we come from, but it is not just the rights of the English minority which are at risk here. If there is a seamless web anywhere, it is the rights of minorities across the country.

No charter, no law can adequately protect minorities if people do not want to protect them. If, as Mr. Bourassa feels, Meech Lake has given Quebec carte blanche in all areas to do with language and the French language and culture, and if it affirms—the language would seem to be an affirmation of Bill 101 itself and the approach taken in Bill 101. If that is true, then I suggest people in other parts of the country who have serious concerns about minority rights in their part of Canada would have to ask whether fair and equal treatment for minorities anywhere in Canada is going to survive in the face of further steps such as those Dr. Simms has described to suppress English in Quebec.

I would suggest that, reading Bill 101, you cannot escape the conclusion that one of the ways in which Quebec has addressed what I do not deny is a genuine problem is to suppress the rights of the English in Quebec. If that is going to continue, if that is what Meech Lake was intended to mean, then it is going to have a major

impact on minority rights everywhere in the country and I would suggest, most respectfully, that it is the duty of the other legislatures and the committees of those legislatures, in looking at it, to ask themselves, “Did we really intend that?”

#### 1040

What was intended? The question comes down to a very simple one. Does the right now given to Quebec, now “affirmed” to use the language of the accord, override the charter? Mr. Bourassa clearly says that it does. On the other side, we hear only fudged answers: “Maybe it does; maybe it does not; probably not. Anyway, if we had insisted on a clause saying that the charter remains supreme, Quebec would never have signed.”

Surely the time to address that question is before the accord is put in place. If we have reached a stage in this country where we are not allowed to ask questions like that, where we have to say, “That is too delicate; we are not going to deal with it; we are going to leave it to the court,” then we have reached a very sorry pass in this country. The court cannot solve these problems. The Supreme Court, Lord knows, has enough to do.

Suppose we simply say, “Here is the language. We agree on the language; we do not know what it means.” You have only to read the public statements to see that there is no agreement on the real meaning. Then we say we will leave that to the Supreme Court of Canada. Nine judges are going to decide it, perhaps by a majority of five to four.

There can only be one outcome and it is a bad outcome. Either the court will conclude that Mr. Bourassa is correct, in which case a great disservice to minority rights has been done; or it will conclude he is not correct and then we are going to have an even worse problem in Quebec, to which Dr. Simms has already alluded. The chorus of comment has started already in Quebec. The feeling will be: “We have been betrayed again. We have been sold a bill of goods. It turned out that we got nothing,” as we mentioned at the end of our brief; as, for example, in the case of appointments to the Supreme Court of Canada, which is just a slip, obviously, by Quebec.

That is the situation. I will not go through the brief again. I would just like to say one other thing. It is often said that if the French minorities outside Quebec only had the same rights as the English in Quebec, they would be lucky and they would be very happy. That gets repeated so often



that everybody believes it. I suggest it does not bear any analysis.

Ask yourselves whether the French minority in Ontario would be content with rules such as those Dr. Simms described, where it was an offense for which you could go to prison to put a sign on public view in French in Ontario, or where you must get a certificate from a bureaucrat which says that your child is eligible to be educated in French, which can be withdrawn by that same bureaucrat, or where you are told how many films you can see. There are those and many others. I do not think those kinds of restrictions would be acceptable at all to the French minorities outside Quebec. Ontario does exactly the opposite. It would be utterly unacceptable, and they are unacceptable to us.

To the extent that this accord was intended to "affirm" that—if you read the language, that may just be what it was—we find it completely unacceptable and the wrong direction for this country, a serious betrayal of what has been built up here since Confederation. There is much more in the brief. I know time is limited so I will not go any further.

**Mr. Chairman:** Thank you very much. As you note, we have copies of both your documents. We will move right into questions.

**Mr. Allen:** One of our problems in this committee is that we have not had many direct representations from the province of Quebec, which of course is the focus of the Quebec round of the Constitution-making, and that seems a little bit ironical for us; but such are the constraints of a provincial committee. We are really pleased you have come, presented your briefs and made yourself available to us.

I am having a little trouble, and perhaps this is an irresolvable problem—I do not know; sometimes things are like that. If on the one hand, "distinct society" would imply greater restrictions on the English minority in Quebec, and that creates a major problem; if on the other hand, it could be viewed as expanding and giving a promoting role to government with respect to the English minority in Quebec, and that creates a major problem; if we are not really permitted, if I can use that word, to get into the language of "distinct society," "special status," "foyer principal," or all those terms that have been run around in this whole debate, how do we respond to what have, I think, been accurately characterized as the minimum terms of the Quebec government, which any Quebec government in recent history has been prepared to put to the rest of the country, for the resolution of the relation-

ship of Quebec to the larger federation? That is my first question.

**Mr. Irving:** If your first premise is correct, you cannot. The only way the issue can be resolved is to have the freedom and the ability to go to the language and say: "What does it mean? What are these minimum demands?" I do not know what they are. It is always said Quebec had certain minimum demands and the preamble to Meech Lake says agreements were made to satisfy those demands. Even Quebec is not saying with any clarity that it insists absolutely that the charter must be subordinated to all its rights with respect to language. I think at this point it is simply a matter of this committee and others saying, "Do we know what this means?" I suggest the answer has to be no, we do not.

Do we know what in reality Quebec is insisting on? Perhaps what they are insisting on is freedom to act without reference to the charter. If that is true, then all right, the question can be asked, "Is the rest of Canada prepared to accept that?" If they are prepared to accept it, they will accept it. It is the first part of your question. Everybody has been saying to us all: "It is a seamless web. You cannot go back into it. You cannot open it up. You cannot ask questions. If you ask questions, it is no use to ask questions because that is the language." It is there the fatal flaw is. You have to ask that question or you cannot get to your question. You have to say, "We will not ratify it unless we know what it means."

**Dr. Simms:** One thing you should keep in mind is that we had a referendum in 1980 and the people of Quebec affirmed federalism. They affirmed their place in Canada by a resounding vote. I think the majority of the people of Quebec consider themselves as good Canadians. With all due respect to politicians, I think it is the politicians who are causing the problems. I think there could have been more negotiations than took place.

**Mr. Allen:** I accept the judgement of the referendum. I do know it was made by a good many Quebecers on certain understandings with respect to changes that would take place vis-à-vis Quebec and the rest of the country. Those did not happen in 1982 and they have not happened since. That was the dilemma I was really trying to pose to you once more. If we cannot get into all the language that surrounded that, and if either way we go on any of those terms is going to mean more trouble anyway, then where do we come down in terms of positive proposals, either to put to the first ministers, whether or not they will open it up, or at some future meetings that might

have to take place to clarify still further some of these points?

**1050**

I know what you are talking about. I was visiting a family in Rosemere just a weekend ago and I know what they told me. They said that on the one hand, yes, on language questions they felt significantly aggrieved. On every other aspect of their life, they felt they lived in probably the freest and most civil libertarian and accommodating society in Canada. I had to take those two and try to square them and see where I came out.

If one tries to compare the linguistic situation of the minority groups, if you compare the French outside Quebec and the anglophones inside Quebec, it would certainly be true, on the one hand, that there are fewer legal restraints on language in Ontario. But there is, of course, for the French community, massive sociological restraint that is very difficult to overcome, as you know. Whether the restraint is characterized by a piece of paper on the one hand, or the mere fact of numbers and so on on the other hand, the restraint is there.

The French minority would love to have a couple of French-speaking universities in Ontario. They would love to have the institutional structure the anglophone minority has in schools in Quebec. They would love to have the protections that range through Quebec's Charter of Human Rights and Freedoms, which is more extensive than that of Ontario.

One can sort of go both ways on that question. But is there a way, and I think this is the essential question raised by your point, that the French language, as a minority language in North America and Canada, can be protected in law and legal ways that are real and which therefore do not issue in the bureaucracy and do not issue in a piece of paper?

**Dr. Simms:** It has been my impression that things have been improving in Ontario and that legally the way has been opened up to overcome a lot of the difficulties of francophones.

**Mr. Allen:** That is true.

**Dr. Simms:** In Quebec, I would submit, it is going the other way. We come from a very large background of anglophones in Quebec, a very long history where we built our own institutions. We were big enough to do it. We had a whole society, really. We had cities like Sherbrooke, which the National Geographic did a story on a few years back, which were basically anglophone in the past.

The French culture in Quebec has blossomed, and before Bill 101 was doing very well, thank you. It did not need all the restrictions of Bill 101.

What is our vision of Canada? Is it a bilingual country? I would submit that the preservation of French has a better chance with a bilingual Canada than it does with a unilingual Quebec which does not seem to care about the francophones in the rest of Canada.

**Mr. Allen:** I guess my only question, then, is whether one has to go totally either route. Obviously, we will get a sort of bilingualism in the rest of the country; that is happening. What is happening in Quebec is a modified unilingualism, if I can call it that, something that gives some additional reinforcement to the principal language of the province and which therefore has some implications for other language groups. Therefore, you may never get better than small-type English below large-type French. I wonder if that is an impossible future, as distinct from the totally unilingual option or the totally bilingual nation option.

**Mr. Irving:** No, it is not totally impossible. To come back to your original question, there are a lot of things which have been done and a lot of things which can be done to protect the French language. The difficulty that French faces is a worldwide difficulty. First of all, it has precious little to do with the English in Quebec; and very little, in fact, to do with Canada.

I just came back from doing some work in Paris. The Metro is filled with ads from Berlitz. There is a Union Jack in the corner and a big sign in English saying: "There is no job for you. You do not speak the language," which would put you in jail if you put it up in Quebec.

English has become a universal second language and we live right next to the United States. Yes, French is very much threatened and people in France will tell you that too; they cannot publish a technical paper unless they publish it in English and so on.

There is quite a difference with positive steps, reinforcing the learning process of French itself, requiring the minority—we are required and nobody objects to it—to learn the language. The English community in Quebec is the most bilingual community in Canada now, by a long way. It is far more bilingual than the French community.

You can, without trampling on anyone's rights, reinforce the reality, which is that Quebec is a majority French-speaking province. None of us who chooses to live there would ever question



that, nor would any of us question that for our living there French is essential. We work in French half the time and we speak French.

All of those things are possibilities. But the vision the government has now and the fear we have of Meech Lake is that the particular language of affirmation of the role to promote the distinct identity—which is the very term used in the preamble to Bill 101, “the distinct identity of Quebec”—we see that and a number of these measures which have been taken as an effort to eliminate English in Quebec, to make Quebec a unilingual province.

The people who come to the courts to defend these measures when they are challenged—there are only two of them and it is always the same two; one is from Ontario by the way—will always say, “You cannot mix English with French or the French will disappear.” Mr. Castonguay, who comes from Ottawa, who has testified for days on end—he is the spokesman for the government on this issue—will say: “If you have one Anglais in a group of 20 francophones, they will all end up speaking English. You cannot mix them.”

It is that approach that we say is absolutely unjustifiable. It is not proved, to begin with. It is simply contrary to everything we believe the Constitution is intended to protect, and it does not advance the cause anyway. It is when you come to suppression rather than positive steps that we say, “Just a minute;” and it is that which concerns us about Meech Lake.

A lot can be done and a lot is being done at the federal level. What is happening in Ontario is a reinforcement of French right across the country. Ontario has changed out of all recognition in the last 15 or 20 years. All of these things can reinforce it. Unfortunately, nothing can change the fact that, worldwide, international business and so on is largely now conducted in English. It is not acceptable to say that the minorities in this country are going to pay the price of that. We do not contribute to that problem. We are not the cause of the problem.

**Mr. Allen:** Thank you very much. I wanted to get the general questions out before we got into some of the more detailed ones that I am sure are going to arise.

**Mr. Chairman:** I have Mr. Morin and Mr. Cordiano. I am just conscious of the time.

**Mr. Morin:** You have spoken mainly of Bill 101. If the accord was to be accepted as it is now, do you think it might force Mr. Bourassa either to soften the blow of Bill 101 or even perhaps to remove it completely?

**Dr. Simms:** The tendency has been to make Bill 101 more extreme, as I indicated. I think he has indicated in speeches before the National Assembly and in interviews with *Le Devoir* and so on that his intention is to use Meech Lake to reinforce Bill 101 and to make it more restrictive. He has said, for example, that he has already made up his own mind on public signs, no matter what the Supreme Court decision is. Many people are saying now—his own minister wants out of the job, and I think it is because of the difficulties of the situation—that if the Supreme Court were to decide it was illegal to confine signs to French, he could invoke the “notwithstanding” clause even at the present time.

1100

**Mr. Morin:** Section 33.

**Dr. Simms:** Yes, exactly. All I am saying is that those are examples of the fact that there is this desire to become more and more extreme in restrictions.

**Mr. Morin:** I was not at the deliberations during the entente. I wish I could have been there to listen, because there was a lot of trading, obviously. I am sure that other members, other premiers, must have said: “Look, M. Bourassa, Bill 101 is too strong; you have to get rid of it. If you don’t, we won’t sign.” Do you think that was in the scenario?

**Mr. Irving:** No. I am sure it was not, in fact, from people who were not in the room but were advisers and what not—not in the least.

It is since Meech Lake was signed, in fact, that the Minister of Education has said, for example, that the section of the charter which allows a family from Toronto which has a child in school in English to come to Quebec and continue in English is unacceptable to Quebec. That is part of the charter. Senator Murray says Quebec embraced the charter. That is one of the key parts of the educational guarantee: that families which move to Quebec will not be forced to send their children to a French school. Since Meech Lake was signed, we have the Minister of Education saying that is unacceptable to Quebec and will be removed from the Constitution.

That is the next round. That is not a moving away from Bill 101. It is the present government that has made it an offence to tolerate a child receiving instruction in English. He does not qualify. It is an offence. I do not see a moving away from it. I am surprised there is none, but I do not see it. *Au contraire*.

**Mr. Cordiano:** Time and again we have heard from various witnesses who have come before

this committee suggesting that we have to deal with the words that are used and that, in fact, this is all that is going to count, particularly from those who have legal backgrounds and legal expertise. That is fairly obvious. I would like to do that with you for a moment, just for the purpose of trying to point out whether my analysis of what this section means is the same thing that it means for you, if you have looked at this, and obviously you have looked at this from a number of perspectives.

Having discussions with a number of people who have come before our committee, you look at section 2, the "distinct society" clause, clause 2(1)(b), where we recognize Quebec as a "distinct society" and the role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec. It has been said and suggested many times that what constitutes part of Quebec's distinctness is the fact that you have an anglophone minority. Would you agree that is something that has been a historical fact and not disputable?

**Dr. Simms:** It is a historical fact. Jean Morin says 200 years.

**Mr. Cordiano:** Indeed, what the legal experts are saying is that the role of the Legislature and government of Quebec would have to be to promote the distinct character, the distinct identity of Quebec. It would also include that very fact.

**Mr. Irving:** There is where there is very sharp disagreement. You will notice, for example, that in clause 2(1)(b), which you quoted, it says, "that Quebec constitutes...a distinct society." That is the interpretation section, subsection 2(1), "The Constitution...shall be interpreted in a manner consistent with..."

When you come to 2(3), it is not an interpretation section any more. They do not talk about "distinct society," they say, "promote the distinct identity of Quebec referred to in paragraph (1)(b)."

"Distinct identity" happens to be the language of Bill 101 and you notice the subtle difference. The Quebec view is that the distinct identity of Quebec is its French identity, although it has an English minority, as they would not deny. But the distinct identity of Quebec is its distinct language, which is French. So all that is to be preserved and promoted, as persons who take that view would see it, is the French character of Quebec.

**Mr. Cordiano:** What seems to be disturbing you is that one word, "identity," because, later on in that sentence, it says clearly—

**Mr. Irving:** Yes, "referred to in paragraph (1)(b)."

**Mr. Cordiano:** Yes, paragraph (1)(b). What is the distinct identity of Quebec referred to in paragraph (1)(b)? Now, we are going to have legal disputes, but it is not as clear as you indicate. There is indeed an argument to be made that what constitutes Quebec's "distinct society" is also what I am pointing out, the minority English anglophone fact of Quebec.

**Mr. Irving:** If you read our brief, you will see we say just that. There is very much a debate to be had. But what does it mean? How can anyone say that Mr. A and Mr. B have agreed on something when all they have agreed on is the language and they have entirely different interpretations of what the language means. What they are really saying is: "What we have agreed is to put in this language and that language. In the end will be interpreted by someone else, the Supreme Court of Canada will make the agreement for us." That is not what the court is there for.

**Mr. Cordiano:** But it points to one thing that we, as legislators dealing with this question—at least, I will speak for myself—have some great difficulty with and that is the fact that when you are drafting a Constitution there are a lot of ambiguous terms that are used. If you look at the Charter of Rights and Freedoms, there are a number of terms on which, if we do not agree, we define by a number of years of practise. That is, these terms are so vague they could be interpreted in any number of ways. If there is no convention, if there is no tradition, then certainly these things are difficult to predetermine and I can see where that difficulty stems from.

But the fact is this is new territory that we are dealing with in terms of drafting a Constitution. Some of this has no convention, but most of it does, as most experts before this committee have told us. Most of the things that we are dealing with in the Constitution had been practised over the years before the Meech Lake accord but had not been constitutionalized and we are now doing that.

**Mr. Irving:** If that is what we are doing. I mean, to say "to affirm" has a sort of retrospective ring to it.

**Mr. Cordiano:** Yes.

**Mr. Irving:** But the French version does not have it at all, it says something quite different. But sticking with the English, you are affirming something which then presumably has already existed, which is the role of the Quebec government to preserve and promote its distinct



identity. Somebody is going to say, "All that can mean is that what Quebec has done in the past to promote its distinct identity is affirmed and therefore Bill 101 is affirmed." That was the argument of Quebec; I am not saying that is correct.

It is true that the Constitution, like legal documents generally, is subject to interpretation. There is vague language and lawyers make their living from it—not least myself. After all, this is supposed to be the agreement that brings Quebec into the Constitution. There are only four points to deal with. This is one of them. When you are in that framework you say, "All right, Quebec is to come into the Constitution on certain conditions." One of the conditions is that its distinct identity will be recognized. If you are not able to say what has been done on that very specific point, then I would suggest that is not acceptable.

For certain, in all of this language there are going to be differences of opinion and there will be court cases and so on. But when you come down to a specific like that, you say: "Here is the condition. We have met the condition." Then you ask, "How did you meet it?" The answer is "I do not know." We do not know what we did. You are being asked to put a rubber stamp on something which I say, with great respect, you do not know the meaning of.

#### 1110

Experts are going to come and say it means one thing and they are going to say it means another thing. But the reality is the people who wrote it do not agree. I think you should ask them what they meant. It surely is their responsibility to say what they meant. These, after all, are the elected premiers. Whatever the courts may make of it in the end, we would like to know. The people of Canada are entitled to know what they did intend to do.

To put it in very blunt language: were we, the English, sold out in Quebec; were the French sold out somewhere else; or is this a careful thing which is going to preserve our rights? Let us ask. It is an easy question and an easy answer.

**Dr. Simms:** After we visited with the Senate, it invited Mr. Bourassa to come and give his interpretation. He, of course, refused and said that his statements were public and well known. If you want to read his interpretation, which he very carefully presented to the National Assembly, you will find it is for the promotion of Bill 101 and the kind of society that envisions.

**Mr. Villeneuve:** I really want to thank you for your presentation, because you have certainly brought a different picture from what I had been

led to believe by people who live in Quebec. I represent a riding that is adjacent to the province of Quebec. It has many disgruntled former Québécois living in it, many of whom have joined an alliance called the Association for the Preservation of English in Canada.

We have in Ontario approximately five per cent francophones, a considerably larger number than that of Ontarians of French expression. I would like you to tell me how the graph is going pertaining to English-speaking Québécois. The 20 per cent figure seems to bounce around. Is that flattening, going up or down, or what is happening?

**Mr. Irving:** It has gone well down. The statistic we are most familiar with is the percentage of English-speaking students of the total student population in Quebec, which a few years ago was about 17 per cent. At the time we went to court over the Bill 101 case, the conflict between the Canadian charter and Bill 101 on educational rights, it had fallen to about 13 per cent. It is now down to about 11 per cent and is falling very rapidly. The English population in the Protestant school system—remember, there is a Catholic system too, and there are English Catholics in that system, so we have this double-barrelled system in Quebec, but I imagine it would give you roughly the same figures.

Ours has fallen by 50 per cent since 1976. I might say, just to give you a little more flavour of it, during the course of that case we were arguing with this same gentleman I mentioned, Mr. Castonguay, and others, that the Canadian Charter of Rights took precedence over any other law, and therefore children who qualified for English instruction under section 23 should be accepted into our schools. Quebec's argument was that Bill 101 overruled the charter.

They relied on section 1 of the charter to say that Bill 101 was a reasonable limit and so on. In support of that argument, they brought demographic evidence to show these percentages I just mentioned to you. Their forecast, not ours, was that by 1995—it may have been the year 2000; do not hold me to the date, but it is around there—the percentage of English in the school system, without the Canadian charter, would have fallen to about 6.1 per cent of the total, and that if the charter were allowed to apply, the percentage would only have fallen to 6.7 per cent. That extra 0.6 per cent was unacceptable; the charter should be put aside because it would leave an extra 0.6 per cent of English in the schools by 1995. At six per cent we do not have the school system at all

anyway. The English school system will have disappeared.

But those are the attitudes we have to deal with. It is some of those attitudes that begin to produce rather more aggressive responses than the English in Quebec have traditionally been giving to this sort of legislation. But that is the position.

**Mr. Villeneuve:** I think you have just cause for alarm. Certainly, it gives this committee a great deal of food for thought. Thank you.

**Mr. Chairman:** By way of conclusion, one of the issues we have been wrestling with, in talking with both Franco-Ontarian organizations and, although on a limited level, anglophone organizations from Quebec—we have had Alliance Quebec here and tomorrow it will be the Quebec Federation of Home and School Associations—has been this whole problem of the rights of the collectivities and individual rights. Of course, that becomes compounded in the case of your own province in relation to the francophone community broadly, not only in Canada but in North America.

Without question, no one around this table would want to see anything which would, in effect, lead to the extermination of the anglophone minority in Quebec by allowing some punitive process to exist despite all kinds of protections that we would hope we had in our Constitution, any more than we would want to see that in terms of the francophone minorities.

As Mr. Allen notes, there are some sort of nongovernmental sociological impacts on the francophone minorities which raise a whole series of different issues and problems in terms of how we help them flourish. I think your testimony this morning has been extremely helpful in focusing our attention on those inherent dilemmas, as we go about the process of constitutional change and as we look at the relationship between the charter and charter rights and the accord.

I suppose it is fair to say that, as you leave us this morning, you leave us troubled, but I think that is what is happening in terms of our own deliberations on a number of issues. Then we have to go back and try to wrestle with that and see if there is some way we can come up with something which would assist you in the problems as you see them and, I suppose by the same token, affect the official language minorities broadly in Canada.

On behalf of the committee, I want to thank you very much for the thoughtful presentation

and for your briefs. You have raised some very real questions which we have to deal with.

**Mr. Irving:** Could I just make one comment? If people are looking for practical approaches to the problems of the Franco-Ontarians and others, Dr. Simms pointed out that the English minority in Quebec was a very fortunate minority and, in fact, was quite a dominant minority; it was rich. It is not easy to love the English minority in Quebec historically, and we are not much loved.

That minority was able to create for itself, simply by being left alone. Quebec never discriminated against the English. It did not take part; it just did nothing. We were able, over the years, to build up universities and hospitals and social agencies and all of those things. It is true that those are the things lacking to the French minorities elsewhere. In this day and age it cannot be done through the community's own efforts; other provinces and what not would have to look at creating those kinds of institutions now for their minorities.

If there is going to be a balance of minority rights across the country, which really is a seamless web, provincial governments will have to step in to assist the communities which, unlike the old and rich English community in Quebec, were not able to develop it. If that sort of thing is not done, then in the end, no words in any charter are going to protect minority rights.

**Dr. Simms:** Thank you very much, Mr. Chairman and members. We appreciated the opportunity to speak to you. If, in the course of your deliberations, you should ever want us to return we would be very happy to do so.

**Mr. Chairman:** Thank you very much. We very much appreciate it.

I will now call upon the representatives of the Human Rights Institute of Canada: the president, Marguerite Ritchie, and the first vice-president, Karl Feige, if they would be good enough to come forward. We thank you for joining us this morning. We realize we are running somewhat behind time, but the issues are such that we feel we want to try to explore them as deeply as we can.

I think everyone has a copy of the material that you brought, so perhaps without further ado, I could ask you to proceed and we can follow up with questions.

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#### HUMAN RIGHTS INSTITUTE OF CANADA

**Dr. Ritchie:** Thank you very much, Mr. Chairman. May I introduce Mr. Feige in this



context. I think he is the best first vice-president anyone ever had. He and his wife, television personality Linda Feige, spent probably all last night, except two hours, without sleep to prepare the material before you. The attachments are not done; they will be provided to you. This is not his ordinary kind of work, because he is a research expert. I did want to say that.

**Mr. Chairman:** Some of us have known him in other guises, so we know of his good work.

**Dr. Ritchie:** I am quite sure. Thank you very much.

May I have your permission to use a minute minder?

**Mr. Chairman:** I am sorry?

**Dr. Ritchie:** May I have your permission to use an ordinary household minute minder for my presentation? It will help very much so far as you are concerned. I am accustomed to using it when I speak, and it forces me as a result to keep things very much within limit.

**Mr. Chairman:** Something perhaps the chairman himself should consider at some point.

**Dr. Ritchie:** All right. If I set it for what is your wish with respect to the presentation, 15 minutes or 20 minutes, I will stay within your limit.

**Mr. Chairman:** I think it depends on how much time you really want for questions.

**Dr. Ritchie:** I am interested in the questions. Suppose we set it for 15 minutes. How would that be?

**Mr. Chairman:** Fine.

**Dr. Ritchie:** All right.

**Mr. Chairman:** Mr. Offer can check from time to time to see that it is working.

**Dr. Ritchie:** I have also distributed material that is not included in our brief; that is, copies of the Universal Declaration of Human Rights as well as copies of our own brochure from the Human Rights Institute of Canada. We are a research organization. We do not vote on positions that are taken. I am the president and director of research.

I have distributed, and I would also like to provide for your files, in English and in French, copies of the sixth report of Canada on the International Convention on the Elimination of All Forms of Racial Discrimination. I would like it to be taken into the record that in my view what has been done in the Meech Lake accord raises very serious questions as to whether Canada is in breach of that convention and will also be in

breach of the genocide convention so far as the native peoples of this country are concerned.

Proceeding from there, let us go into the actual brief that we have provided here. In the introduction, certainly we welcome not only the committee but also the way that the committee and the chairman conduct themselves; they show an obvious interest and concern. But the question has been raised before us constantly as to whether our appearing here was worth while or whether it would be in fact a hollow exercise because the Premier (Mr. Peterson) has already agreed to sign the accord. You can understand our concern.

The next page deals with the institute, and as you note, we are independent, citizen-based.

The next page is "The Northern Plea for Justice." In this, in putting it first, we have really reacted to what I heard when I was here yesterday attending your committee hearings, and I could see the obvious concern of members as to whether it is possible somehow to use the courts to get justice. In the view of the institute, it is not possible for this accord to survive if Canada is intended to be a country based on justice, because it is far broader than the question of justice towards Quebec. In actual fact, it is an agreement that deprives the people of the north of their rights, and that has nothing at all to do with Quebec.

As I have pointed out, the Senate task force on the Meech Lake constitutional accord and the Yukon and the Northwest Territories, presented its report to the Senate in February. It is called, appropriately, A Question of Justice, and it is a most eloquent document. We will be providing to you four pages from that as an attachment, although of course we recommend that you read the whole thing.

When you are asked about the Meech Lake accord, I think you can quite properly say that the first issue to be addressed is not the question of disputes between lawyers. As a lawyer, I have been involved in disputes; if you put 50 lawyers in a room, you would have 50 different opinions. But there is no question at all of any difference of opinion when you are talking about the fact that the north has been deprived of its rights. That in itself raises major questions under the Universal Declaration of Human Rights and the binding legal documents that are based on that universal declaration. Canada will have to submit reports internationally, and those reports will be devastating if the Meech Lake accord goes through. That is not the Canada that I want.

I venture to say that of all the French Canadians I know there is not one who would, if this were explained to him, say, "I am prepared to go along with the Meech Lake accord even though, for reasons that have nothing at all to do with Quebec, it will take away rights from the north." The provinces responsible for that may well have been my own province of Alberta, along with British Columbia, Saskatchewan and Manitoba. It has nothing to do with Quebec, and yet it is a part of it. Certainly I think the recommendations with respect to changes in the accord must start with that.

We deal then on page 4—and we have now 10 minutes; you see, Mr. Offer, I will help in keeping track of this.

The argument that has been put forward to all of us is that the problems really should be left to some future second round. That is something that makes, for example, the Honourable Eugene Forsey absolutely furious. Eugene is on our honorary board of directors, and he speaks not only with accuracy but very eloquently and in language that everybody understands. He has expressed his views in no uncertain terms that (a) there will be no second round; (b) if there is a second round as such, then all that has been provided is that there is a right to discuss certain things, the things that are listed, and apart from that, only such matters as are agreed upon. Provinces that do not want to deal with any particular thing have only, with respect to one province, to say no.

In other words, what we are looking at is this point: if unanimous agreement to make changes cannot be made now, in the euphoria of the Meech Lake accord and in the desire of everybody to make sure that Quebec knows that it is welcome, then how will it be possible to make those changes later? The answer is it will not be possible. That, of course, is our concern.

Nine minutes. We go over to page 5. There I recount what happens every time I distribute copies of this official blue document to people who are in the audience. They react with shock. They expect something that they can put up on their walls. What they get is something that, instead of being a seamless web, is a patchwork that requires lawyers and a whole collection of documents to be able to decide what it is even saying.

Page 6, "Why the Accord Cannot Be Believed." It is time to say clearly that the Meech Lake accord is based on false history. There I deal with the fact that really the politicians, for reasons of their own, have misrepresented the events that

occurred. They have misrepresented what happened as far as Quebec was concerned. As I say, the excerpt from the Canadian Encyclopedia will be attached and will be provided to you.

It also deals there with the quote from the preamble. I think we have it a bit reversed there, dealing with the principle of equality of the provinces, but that should also refer to the way that Quebec came back into Confederation. As we all know, Quebec was never out of Confederation at all.

The next pages then have some quotes relating to those particular days. Then page 8, "Did Quebec Lose in the Constitutional Changes in 1982?" We have set out the reasons that, in actual fact, it did not lose by the 1981-82 changes, and we deal with the fact that it actually did make gains.

We deal then at page 10 with, "Trusting the Accord about Equality." That is the statement that this has conferred equality on all the provinces. There we deal with "distinct identity" and "distinct society" provisions, which you have already discussed.

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This is very important, because this document will be studied in the schools in this country. It is important that documents not be produced which the students can see for themselves are simply not true. No other province will have equal powers to Quebec. No other province will have as much power to influence the laws for all Canadians. It is very important. If later problems are to be avoided, if there is not to be a feeling of betrayal on both sides, it is important that all Canadians understand that situation.

On page 11, we deal with—and we have already heard that this morning; we were listening with great interest—the situation so far as the English-speaking people in Quebec are concerned: it is deteriorating. Incidentally, we sent a letter to the Prime Minister asking for a copy of the letter that the *Fédération des francophones hors Québec* sent to him withdrawing its support from the Meech Lake constitutional accord. We received a call from his office this morning refusing to provide us a copy and telling us to go and check with the *fédération*. Yet this is a matter that affects all Canadians.

Page 12 is very important. Mr. Trudeau speaks—and this is a man who always, all his life, has cared about Quebec—and he warns about the meaning of the expression "distinct society," that anyone who believes it does not include special powers is "in for some nasty surprises"—de vilaines surprises—"later on."



We ask, at page 13, for an opinion from the Supreme Court of Canada and we raise specifically the question of whether Canada in fact will be a viable nation.

Page 14: appointments to the Supreme Court of Canada. When questions have been raised about the vagueness of the Meech Lake accord, the response has ordinarily been that the Supreme Court can sort it all out. This is not a solution. The Supreme Court of Canada is already so overloaded with legal questions that it cannot carry any such additional burdens, at least without delays that would last for many years. Provincial governments and federal governments do not tend to wait for legal opinions.

We deal as well there with the fact that the proposals for appointments to the Supreme Court of Canada will further complicate the situation. The argument is made there that the right to appoint or to propose appointment for judges is equal because it has been turned over to the provinces; but again, as we have pointed out, Quebec alone would have the right to appoint three judges. No other province would have it. That is fine, so long as the government in Quebec is one that is interested in being within Canada. It is not fine so far as any government is concerned which actually wants to attain independent status, because it will have the right to appoint to the Supreme Court of Canada, apart from the formality of the approval, persons who actually believe in the same things.

I also draw attention at page 15 to the fact that no provision has been made for increasing the number of judges. That, of course, will operate as a block.

Pages 16 and 17 deal with the shared-cost programs, immigration and aliens. Those you have dealt with.

Page 18 as well contains some quotes that you may or may not have had.

Page 19, on "Senate Appointments." This is a person who believes in a country that abides by law. These are something that not only shocked me, but they also raise the possibility of betrayal.

We have three minutes now.

I set out there the proposals, the provisions about the Senate, not only for appointments to the Senate to be chosen from persons whose names have been submitted by the government of the province to which the vacancy relates, and the powers and so on, but also for the convening of the conference and discussing that later.

As we have said, the convening of the conference is no guarantee of anything. They can discuss that, but the fact is—at the top of page

20—that unless there is unanimous agreement, then in that event the triple-E Senate is dead and the result is that the western provinces, which are very unhappy about their relationship to eastern Canada, will have every possible reason, really, to feel worse. There is talk out there about whether there is any difference between their situation in Canada now and joining the US. There is separatism out there as well.

Then on page 21 I pointed out there as well that group after group has protested against the accord. Even the people of Quebec, regardless of language, will lose some of their rights under the accord, and the fact is also that the accord will balkanize Canada. It will also take down the Charter of Rights and Freedoms, not merely in Quebec, as people tend to believe, but in other provinces as well. The Charter of Rights and Freedoms does provide protection, and it is a matter of very deep concern to people.

I realize that is just basically a very little edge of some of the things that concern us, but they are matters that I know you will take into consideration very carefully. I would like to say again, actually, that I would be very sorry to be in your shoes to have to reach the decision, but I know that you will listen, as you have listened, that you will weigh matters carefully, and I would request that you read in detail the brief that I have not been able to read to you.

Thank you very much. I think we are exactly on the 15-minute mark now, with one or two minutes to go, so I have carried it out.

**Mr. Chairman:** Thank you very much.

**Mr. Feige:** I wonder if I can add a little word to this. Because of the nature of the institute, we have taken a very blanket approach to much of the accord and we have studied it in some detail. Therefore, our presentation is perhaps somewhat spotty, because there is so much to cover, but what it really boils down to is that we are looking at a new arrangement for Canada, an arrangement whereby Quebec joins the other nine provinces and we have an option here of how we want to see the future develop. You, as provincial legislators, probably never thought that you would be in a position to have that kind of a national thrust, to play that kind of national role, but here you find yourself playing that.

We were happy to look at the situation very carefully. The previous presentation made by the protestant school board of Montreal, of which I am a product by the way, I agree with very much and I sympathized an awful lot.

To my mind the accord, if it is passed, would institutionalize a certain form of discrimination.

We are trying here to build a future and a new direction for Canada, and certainly we want Quebec to be in it—who would be against that?—but I think the price is too high.

I do not think there is anything wrong with anybody saying, "Let's look at this again." After all, Quebec did exactly the same thing with the Victoria agreement. Everybody agreed to that and Mr. Bourassa went back home and I presume he went through an exercise, perhaps not quite as public as this, and then decided, "No, let's hold off here." I think the same kind of thing should be done here.

Because we are looking at a nine-provinces-to-one kind of situation, very often this kind of criticism is looked upon as being anti-Quebec. I think, far from it; there are problems with how women are referred to in this document, or the absence thereof, and native people, for instance. My God, if the native people are not distinct people in this country, I do not know who is. Surely they have a right to call themselves "the natives," and their right to a province at some future date is going to be zilch if this thing is passed. It is just not going to happen.

It seems to us that no matter where you turn in the accord you run into some kind of a problem. It seems to me that an amendment to a constitution has to be well thought out, well explained and not made at the 11th hour, in a let's-make-a-deal type of atmosphere, which seems to be what has happened. The fact that you cannot even open it up and fine-tune it seems awfully wrong to me and should be unacceptable.

I say this, too, knowing that all of you at this table who are part of the committee have already been guided, if you like, by your leaders in this regard, because the New Democrats, the Conservatives and the Liberals are four-square behind this. I would be very interested to hear what kind of findings and recommendations you make; but to us the system is very much flawed and it will make it very difficult for Canada to develop as a unit.

**1140**

The Senate amendments we referred to earlier are just not going to happen. We are going to have the provinces appointing senators, but I can assure you that you will never see an elected Senate after that, because you are going to need the consent of all the provinces and it will never happen again.

The last point I would like to leave with you is the discussion about leaving some of these things for the second round. I do not think that is

possible. It also questions a person's intelligence. You are going to back yourself into a corner now from which you will never be able to get out. The decisions you make now are going to require unanimous consent later and you are never going to have that from the 10 provinces ever again. It seems to us that the system is so flawed that it really requires complete re-evaluation.

**Mr. Chairman:** Thank you very much. We are also looking forward to seeing our report. May I say you wondered whether your document perhaps touched willy-nilly. I think it is quite comprehensive and I think the thread, if I may use the terminology of the day, is very clear in terms of what you have put forward.

If we could move to questions, I have Miss Roberts, Mr. Breagh, Mr. Morin and Mr. Harris.

**Miss Roberts:** Thank you very much for your overview and your precise timing with respect to us. It is very helpful for us. I will be as concise as I can be as well.

With respect to your comment about waiting for the second round, it would be my feeling that in 1982 rounds were built into that particular document. The round that was built in was with respect to the native peoples and they let that pass by and there was another round built in in 1982. That document itself is flawed and will have to be changed sooner or later, so there are rounds and rounds and rounds to go.

Although you say not to wait till the second round, I do not think we can do everything that must be done in one round. I understand your concerns with respect to it and I understand where you are coming from, but I think we all have to be clear that getting the Constitution together, if that is what we are going to call it, or the constitutional documents or whatever it will be called, is going to take more time than one, two or three rounds, or decades.

What I would like to do is zero in on your last comment. You have indicated that we should do something if we believe that governments should act in accordance with the law. Not having had a chance to completely read through your brief, are you indicating that the Meech Lake accord is not in accordance with the law and that therefore we should attempt to toss it out on that basis, or that the process that led up to Meech Lake, if in accordance with the law was not what you would consider to be appropriate under the human rights declaration and might be dealt with on that basis? Could you clarify that for me?



**Dr. Ritchie:** Thank you very much indeed. The reason for my saying that is because Mr. Mulroney announced, even before the Meech Lake accord was approved, that he was going to act as though it were in force with respect to appointments to the Senate and therefore act on recommendations that were made by the provinces. That is what I mean.

In other words, he is anticipating there and he is creating what essentially is a *fait accompli*. One senator has been appointed on that basis from Newfoundland. As far as I am aware, there was no input at all from women, although women actually are in a situation in which the 1929 "persons" case essentially has been reversed by that. In New Brunswick, the Premier has refused to make any submissions on that basis. Again, we have this haphazard situation in which he has taken a step ahead of the legal change.

**Miss Roberts:** He could do that without Meech Lake, though.

**Dr. Ritchie:** No. He could do it—

**Miss Roberts:** Informally.

**Dr. Ritchie:** Yes, he could do it informally. But there is a very great difference between a person doing it informally and him saying, "From now on I am going to act as though it were law." Because then it tends to develop into a convention of the Constitution even without law, and it does have a considerable impact; it will be difficult for any other Prime Minister to reverse that situation.

**Miss Roberts:** But legally he could have done that without Meech Lake; whether it ever existed, he could have said, "From now on I am going to consult with the provinces," and started that convention.

**Dr. Ritchie:** As a matter of fact, we will be testing that before the courts. We have a legal opinion from the Osler, Hoskin and Harcourt firm. I expect that we will be raising the question as to whether the Prime Minister should be appointing women specifically.

**Miss Roberts:** Just briefly, what is your time frame for that, if you are going to be doing that?

**Dr. Ritchie:** We have to raise funds. We are broke, but the law firm is taking it on in any event. I am going out and speaking about it to women; I am telling them that the rights they got in 1929 are being reversed and that we need that test.

Just one other thing: we did ask the Prime Minister for a reference to the Supreme Court of Canada on this very issue long before the Meech

Lake accord, so it had nothing to do with Meech Lake at all.

**Mr. Feige:** You are quite right that an informal arrangement probably even existed for the appointment of senators, but this would make it quite different because the Premier would have to supply a list from which the Prime Minister would make a choice and he could say, "None of those is acceptable." At some point this will become a public embarrassment.

What is really happening is that you are putting this into law and making it a structure. You will never be able to have, for instance, a senator from the Yukon. We have one now. What happens to him? Does he resign? If he were to leave his post, you would never get a replacement because you have provinces looking after their own little turf. I cannot imagine that New Brunswick would say, "Well, let us have Mr. Two-Axe Earley from the Northwest Territories as an appointee from New Brunswick." It just would not work.

Again, it is this question of nation-building: are we nation-building with this? You have to conclude that we are probably not.

**Mr. Breagh:** I was interested in your kind of dissection of the accord. We have danced that tune a lot lately. We are all constitutional experts now; most of us are more than 100 miles away from home, so we eminently qualify.

Something I find disturbing in your submission, and it is one that is certainly shared by a lot of people, is that you really have to start from the position that everybody has bad intentions. I do not really feel that way at all. I see the concern, which I believe to be a valid one, but to get it to the point where it is really going to do some damage to some people, I have to draw some pretty bad motives on a whole lot of people. I have been in politics long enough to know that really is not true. Where I come from, nobody gives a damn how they appoint the Senate. They did not yesterday, they do not today and they will not tomorrow, and probably in the foreseeable future they will not either.

I share many of the concerns you have in here. What I do not share is, to put it bluntly, this wave of euphoria I saw among politicians when the accord was announced. I did not share that at all. I did not see Quebec leaving Canada. The province was still there the last time I was in Montreal. There was no dancing in the streets in Oshawa at all about it. Now I see all this analysis of the terrible things that are going to happen, and I do not share much of that either. I think there are

some things wrong with this that have to get fixed.

I am as guilty as anybody of accusing the 11 guys of grabbing a two-four and going to Meech Lake and rewriting the constitution. But in reality, I know they did not do that. I know that there were thousands of little bureaucrats humming around and meetings here and there. There is nothing much new in here. There are a lot of ideas that have been discussed in the past that got put together at one time. So I am having a little difficulty grasping why you have come to the position that all hell will break loose should this accord be finalized.

**1150**

There are lots of things that I would like to do. There are things I would like to fix. There are things that need to be done. There are wrongs in here. On the other hand, when I first got elected in Ontario, there was a really wrong political party in place for 42 years. People said they would never be uprooted, but we just kind of hung out for a while and they did get uprooted, so "never" is a term that is dropping out of my vocabulary. Why do you have that kind of basic, strong negative feeling? There is a sense of urgency in the words you have used in here. It is not: "This is good. This is bad." There is an across-the-board very negative attitude in there. What has taken you to that position?

**Dr. Ritchie:** I suppose it is the basic education I got within the federal Department of Justice, when I saw the Department of Justice that went into the Supreme Court of Canada in the Lavell case and argued that the Diefenbaker Bill of Rights was not sufficient to give equality to Indian women. That is the start of it.

I have seen the Department of Justice in good and in bad. I certainly do not believe that everybody is evil, but we have a Criminal Code of Canada because there are people who are prepared to do things. There are politicians who are wonderful and who are concerned and who care, and there are others who are in the newspaper for other reasons. Unfortunately, we have to make the laws on the assumption that they are intended to apply to persons who are going to be more concerned with themselves than with others.

You only have to look at my own province of Alberta and ask yourself whether every Premier of Alberta can be guaranteed to be the kind of person who will be concerned about what happens in the north or any place else or whether he will be concerned about getting elected and say, "That is my first priority." I really think we

have to make laws on the assumption that we always have, that we have to provide for persons who may not be prepared to do the best. Laws are there for that purpose. Does that help?

Just one other sentence: In the institute, we constantly meet volunteers who are dedicated and who come in after their day's work to work there. We live among people who care about Canada. I understand what you are saying. I do not think it is negative. I think it is rather saying that the goal is worth taking time over. This is what Mr. Feige has said also. If we want Quebec to be satisfied—Mr. Trudeau said this as well—then make sure that this is something it will not regret afterwards, where it will not feel it was simply taken advantage of, that they was cheated. That is all I am saying and that is really all that we are saying and that the institute is saying.

The only other thing is that you cannot say to people whose rights are being affected and taken away that they should wait and see how things turn out, because if the Meech Lake accord goes through, then certain things will have happened. Does that help?

**Mr. Breaugh:** A little bit, yes.

**Mr. Feige:** May I just add one thing to that. I think you are quite right that your constituents could care less how the Senate is appointed, but I think they would care an awful lot how they act. What we have with this accord is that more and more people are speaking for the provinces and for the regions but fewer people are speaking for Canada. That is what you would find with this kind of situation. The Northwest Territories is an obvious example. Nobody will speak for them in the Senate from now on. The people who are appointed to the Senate from whatever province will have a very strong bias. I know you can say: "These people are going to become senators and are going to move to a higher plane. They will have a national outlook."

**Mr. Breaugh:** They might get vertical.

**Mr. Feige:** I think you can argue that point. Look at the recent history we have been through, the Quebec referendum and prior to that with the very hostile Quebec government, hostile towards Canada. Surely the senators—the 24, is it?—that they are allowed to appoint would have been disruptive, to say the least, to the federal government. In fact, they would have been there for the sole purpose of destroying the nation. So I think the appointing of senators has to be held in the hands of a central government that is dedicated to Canada.



**Mr. Breagh:** Just to conclude, where I share some measure of the concerns you have expressed is that when I look at all the component parts, one by one, I really do not have a hangup with very many of them. There are a couple in there that really do bother me a lot, but by and large, on the spending power, the appointment of the Senate and that stuff, I really do not care, to tell you the truth.

I add them all up and I have enough concerns that little flags start going up at the back of my head that say something has to be done here to rectify some of these problems. I am not prepared to wait until the second round. I have to see that there is a process in place whereby I can rectify a wrong.

For example, I think you are quite wrong. For all the good or evil that the Senate has, I would bet, by gosh, that somebody is going to take it upon himself in the Canadian Senate to represent the Yukon and the Northwest Territories, whether he is put there by means of a nomination process from there or not. Somebody is going to pick up that cause, without question. The joint committee has toured the north. They have all found out where it is. They have written a nice report on it. They know what to say now. Some of those folks are going to say those things for a long time.

I have just a little more—it is not really faith in the process; I have just been around it long enough to know how the process works. There will be some scoundrels in politics, just as in every other walk of life. There are some good folks and some bad ones and you cannot do anything about that. A parliament is not supposed to be different from that; it is supposed to represent the people in the country.

I guess, like many Canadians, I do not feel the need to carry the Maple Leaf around with me all the time and wave it, but I do believe that in the long run there is some pride in the nation, some belief that we are emerging. I do not think we quite know exactly who we are yet and I hope we do not go to all the flag-waving extremes that some other nations do. But I do see in my own community occasions when people are really happy that they belong to this country. They are really concerned about the things that are right about it and the things that are wrong. It may not have very much to do with the Canadian Senate. It may have to do with a hockey team or some kid who swims or someone who achieves something else, but there is that sense of pride in who they are as a nation that is emerging.

I appreciate your concerns, but I would caution you just a touch. I do not think there are many people in this room who are going to be swayed by their leaders. I have been questioned by my own leader as to whether I pay any attention to him or not, let alone get swayed by him. I think the process we have here is not a bad one. I wish more legislatures were going through this same process.

**Mr. Feige:** Yes.

**Mr. Breagh:** This is a bit of a pain in the rear end from time to time, but by and large it is a good process. It teaches us things. It makes us aware of concerns in a way that maybe we had not thought of, and that is our job. Most days, I feel a little better that we can fix this thing.

**Mr. Feige:** I look at this almost as you look at a hockey game. You have rules for the game, and you know, more or less, what kind of game you are going to get because the rules are there. The rules change from time to time, the two-line passes or bodychecking or what have you, and it is done in the interest of the game. Here we are fine-tuning the Constitution in the interests of the country. I think there are a lot of flaws. The ones I have mentioned and some of the ones you have raised are the flaws. We are giving those rules to the next generation and so on. You want to give them the best rules possible and you want to do what is best for the country. I do not think this accord adds up to that.

**Dr. Ritchie:** May I just say very briefly, because it does go back to the basis, that I would like to find out what would be your reaction then to two groups—that is, those in the Northwest Territories and the Yukon Territory who feel they have been effectively disenfranchized and the native peoples—who say, “It is a rewriting of history and it has written us out of existence, and our rights within Quebec and in other places are in peril.” What could you say to those groups?

**Mr. Breagh:** I admit that I yield to the temptation to get really righteous about all of that. The guy who straightened me out on that was a chief of one of the bands in Ontario who came in and sat in front of us. We were all excited about, “You have to fix this now.” Somebody was suggesting the Senate had to be fixed by 1992. He sat there with more wisdom than I have seen and said: “Nineteen ninety-two means nothing to me. We have been fighting this thing for a century or two. We will continue to fight this thing. You can write any kind of rules you want. We are not going to lose. We have been here for the long haul. We will be here for the

long haul. Our cause is just, and sooner or later we will get you." The guy has more brains than most people in this room.

**Mr. Feige:** Their cause is just and that is why we should help them.

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**Mr. Breaugh:** Yes, I agree.

**Mr. Chairman:** I have two more questioners and we still have another witness. I might just note in passing that at this particular round in Ottawa, we have been learning a great deal about Oshawa.

**Mr. Breaugh:** We are not even in the Constitution.

**Mr. Chairman:** I should note for the record that one of the reasons Mr. Breaugh is feeling so good is that the Oshawa Generals defeated the Ottawa 67s last night, so it is cause for flag-waving.

**Mr. Morin:** Dr. Ritchie, I was quite impressed by the use of your timer. Perhaps each of us should be issued with one and use it for preambles. Before I am accused of that sin, here is my question. My question relates to your view that Quebec lost nothing in 1982 and remained in every sense a full member of the constitutional family. Can a constitutional document that is imposed on a province over the objections of its duly elected government be said to be completely legitimate politically in that province?

**Dr. Ritchie:** I understand your concern. If you read the brief, you will find that we have taken into account the fact that Quebec was promised, for example, a renewal of Confederation if for whatever reasons it did not feel it had achieved it, whatever that was. My own feeling was that actually the politicians had promised something in very general terms. Mr. Trudeau's statement, which was backed up by others who were there, specifically I think it was Gordon Robertson, was that Mr. Lévesque never indicated at any time anything that would be satisfactory, and you can understand that.

What you are asking me I think is something that is different. You are asking, is it legitimate? What I was dealing with was that Quebec did not lose. You are saying, is it legitimate? For that, I think that is a political answer. Will you accept the fact that we are dealing with two—que ce sont deux questions très différentes?

**Mr. Morin:** Deux questions peut-être différentes, mais c'est justement le fait qu'on veut imposer sur une province certaines choses que les autres n'accepteraient même pas.

**Dr Ritchie:** Oui. Pour moi, dès le moment où M. Trudeau était au courant du fait que M. Lévesque n'allait pas signer, peut-être que M. Trudeau a dit de la refaire pour qu'elle s'applique seulement aux autres provinces et pas du tout au Québec. Mais cela aurait créé d'autres problèmes et, sans doute, il voulait profiter de l'occasion pour la mettre en vigueur.

Mais moi, je ne suis pas politicienne, je peux tout simplement dire qu'à cause de cela, deux choses sont arrivées: D'abord, le Québec n'a pas perdu mais, intellectuellement, la province de Québec n'était pas d'accord avec la Charte. Mais le Québec pouvait refuser d'adhérer à la Charte, et il l'a fait: Le Québec a décidé qu'il n'allait pas accepter la Charte du tout; alors, il n'y avait pas de réaction du tout. Mais le fait que le Québec n'avait pas adhéré à la Charte causait des problèmes, par exemple pour les autochtones, puisque l'accord du Québec n'était pas là pour aider les autochtones à améliorer leur situation.

Alors, pour moi, peut-être que M. Lévesque n'allait pas accepter n'importe quoi, et c'est ça que M. Trudeau a dit. Deuxièmement, le Québec, au point de vue juridique, n'a pas perdu, mais on a laissé l'impression, à cause de toutes ces choses, qu'il y avait vraiment eu un manque de gentillesse, un manque d'ouverture d'esprit de la part des autres provinces envers le Québec. Mais nous avons fait des recherches et nous n'avons rien trouvé pour appuyer ce point de vue-là. C'est peut-être quelque chose pour les professeurs à l'avenir.

Je ne sais pas si ça aide un peu à expliquer ça.

**Mr. Morin:** Oui, certainement.

**Mr. Harris:** I guess I share some of Mr. Breaugh's comments that we are looking at the very worst in people and what they can do. I understand what you are saying. We should look at that. We should guard against that, perhaps.

I want to go back. You have said or implied that Mr. Lévesque would not have signed anything.

**Dr. Ritchie:** Mr. Trudeau said that he would not have and Gordon Robertson, who was there and who was, after all, Clerk of the Privy Council and party to discussions and so on, said the same thing. I think, from the point of view of Mr. Lévesque, he would have looked perhaps as though he had betrayed his own views, and his views were very clear. He wanted a sovereign state. I can understand his reaction.

**Mr. Harris:** Now we have a government which presumably is the most favourable type of government we are ever going to see in Quebec in my lifetime, predisposed to federalism. When I



read all that you are telling me about what this government deems as a condition to stay in Canada, you are saying no.

**Dr. Ritchie:** What I am saying, and this goes back to what Mr. Breagh was saying, is that I think the people themselves are better and that, significantly, the people of Quebec themselves were never given an opportunity to know what was involved in here. If they had been, I think probably they would at the very least have said: "This part concerns us. So far as the north is concerned, so far as the Yukon Territory is concerned, we French Canadians understand injustice. We do not want to inflict injustice."

**Mr. Harris:** I agree with that. I want to talk only about Quebec. I agree with you on that part. So if we solve all that, your brief still says, "No good, we cannot accept Quebec under these conditions."

**Dr. Ritchie:** No, it is not a question of not accepting Quebec, but rather of working out—Karl is quite right in what he said and all of us feel this way—you cannot really work out something that is satisfactory under a marathon session like that. It is just too much.

**Mr. Harris:** For 17 years they had meeting after meeting. They went to Meech Lake. They set back for 35 days or whatever. They had all the experts in the world there and then they came back together. Do you want another 17 years? They had far more time, it was far more democratic, far more open than when we brought it home in 1981-82.

**Dr. Ritchie:** I do not disagree with that at all in many respects, but if you read the newspapers with respect to the disputes now between Mr. Peckford and Nova Scotia, the people of Nova Scotia are saying to their Premier, "How did you let Peckford get away with putting fisheries in there?" That is something that has every likelihood of destroying the fisheries industry in Canada, and that surprised me.

**Mr. Harris:** Because one Premier wants to talk about fisheries, fisheries are destroyed in Canada?

**Dr. Ritchie:** No, I am sorry, just for one moment, you are in the position that I was in before I heard a brief before the joint committee when someone came from the fisheries council. I said to myself: "What have fish got to do with the Meech Lake accord? They do not read very well."

What the fisheries council dealt with was plainly and simply this, and this goes into a very important part of the accord: if jurisdiction over

fisheries, which will be under attack, is handed over to the provinces, then what will happen is, because fish swim in a predetermined way, the first province which has authority will want to maximize its catch. It will take as much as it can. Then the fish go up to the next province and it takes as much as it can, and then to the last one, and they are all essentially competing within themselves. I thought it over and it makes sense.

**Mr. Harris:** So we should not talk about it?

**Dr. Ritchie:** There is a commitment to talk about it, quite true; but I can understand their concern.

**Mr. Harris:** I think it is the stupidest thing in the accord.

**Dr. Ritchie:** You are quite right.

**Mr. Harris:** But I do not see how talking about it is going to—

**Dr. Ritchie:** All right, but let us go back to the point you were making. You were making the point that they had 17 years to think about it. But what we have in the newspapers now is that the premiers are saying, "For heaven's sake, what did I sign?" Even Mr. Getty out in Alberta is now under pressure because they have discovered that he has given away the triple-E Senate. They made some deals under pressure there and, now that they are having difficulty, they are trying to get out of them.

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**Mr. Harris:** You may be right. What really concerns me is that if five per cent of the motive you impute is there, Canada has no chance, with or without Meech Lake.

**Dr. Ritchie:** Oh, let us go back to what Mr. Breagh was saying.

**Mr. Breagh:** We survived Trudeau and Mulroney; we will survive this.

**Mr. Chairman:** On behalf of the committee, I would like to thank you very much, not only for your presentation but also for the documents you have passed on to us. I gather another document was coming as well. Was I right? OK, and we now have that.

If memory serves, I believe you are the first organization we have had that is specifically and sort of completely involved in the area of human rights. At different times, some of us have been raising the question of what some of those major organizations dealing with human rights might feel about the accord. I think this has been very helpful in pinpointing and underlining some of those concerns, not just in their specifics but also in a somewhat broader sense of looking at the

overall development of human rights and the context within which our country fits with respect to the international community and human rights. We thank you very much for coming this morning and for making your presentation.

**Dr. Ritchie:** Thank you. May I just say how very much we appreciate your courtesy and your helpfulness, Mr. Chairman and members of the committee.

**Mr. Chairman:** I will now call upon the representatives of the Assembly of First Nations: Chief Joseph Norton, Chief Billy Two-Rivers and Chief Eugene Montour. Please come forward. I apologize, gentlemen.

**Chief Two-Rivers:** Don't apologize.

**Mr. Chairman:** It is late, but we do want to hear your presentation. I know we have lots of questions. Perhaps I will turn matters over to you and you can begin the presentation. Perhaps you would be good enough to identify yourself for Hansard when you speak.

**Chief Norton:** Hi, it's me.

**Mr. Chairman:** Good. We have that straight. Are you from Oshawa?

Interjection.

**Chief Norton:** Our constituents care.

#### ASSEMBLY OF FIRST NATIONS

**Chief Norton:** I am Grand Chief Joseph Norton of the Mohawk Council of Kahnawake, which is situated just outside of Montreal, in the province of Quebec. I have been given the flexibility and the opportunity to speak on behalf of the assembly, but also to be able to zero in on the region of Quebec or the province of Quebec and some of the issues that have been raised in that particular area in reference to aboriginal rights and the Meech Lake accord.

On my right, we have one of my fellow councillors from our community, Chief Billy Two-Rivers, and, on my left, we have another fellow councillor of ours, Chief Eugene Montour, representing people of the Mohawks of Kahnawake, the Mohawk nation.

We hope there are not too many time constraints, given that the more dominant society took up the time that had been allotted to us previous to this.

**Mr. Chairman:** We are here all day.

**Chief Norton:** I must say that the honourable Mr. Breaugh took some of the thunder out of our presentation when he mentioned the statement that we will be here for ever and that we will

resolve this one way or another because that is, in a sense, the type of situation presently being felt within the native world.

I have had the opportunity to be involved in many issues on a national scale, right across this country. I do not purport to be an expert in constitutional matters or in the Meech Lake accord, nor to be one who is versed in legalisms or anything of that nature. But having had the unique opportunity of being born into one of the first nations in this country and being able to live on a day-to-day basis the actual impacts that one feels in relation to any form of legislation which is developed, first, on a national scale, then relegated to—and I do not mean to say this in a diminishing sense in any way—the provinces, we feel this impact and we have felt it since the first contact with non-Indians coming into our particular territory.

I accept this unique opportunity to speak on behalf of the assembly and to try to put forth some of the thoughts and some of the feelings which have been across this country since, again, the first contact between our society and your society. I guess a bit of historical background review is necessary; not a lengthy one, but one that perhaps could be made understandable to you.

Our ancestors, our forefathers, met your ancestors, your forefathers, many centuries ago. Upon your arrival here, I say quite openly, you had nothing. You had no rights. You had no land. You had no Constitution. You had no government. You arrived here with what you had on your backs and what you had in your minds and in your hearts.

Our people saw there was a difference in your thinking, in your feelings, in the way you viewed land and the way you looked at the spiritual aspects of a human being's existence anywhere in the world. They found this quite odd and quite different.

Therefore, there was a necessity of making what are known today as treaties. These treaties were based on peace, were based on sharing, were based on co-existence—two distinct societies living side by side, one being the original indigenous populations or indigenous peoples of this country, or of this continent, we will say, because at that time we are not talking about when Canada was Canada and the United States was the United States. Our people are of North American extraction, so it is not simply a pan-Canadian point of view we are talking about over here.



With that thought in mind and with that process and those principles which we hold dear to ourselves, the whole relationship of co-existence began in Canada and in the United States. That has been somewhat distorted as time has moved along. If we look at the process which has been established, beginning with the colonization, so to speak, of Canada, the crown, if you will, stating that this country or this continent is part of the British Empire and that there are subjects or people who have surrendered themselves to the crown, to the British Empire, so on and so forth, and that from here on in we have subjugated ourselves to the domination of those principles, that is wrong, in our belief. That is the point of contention. That is what this all breaks down to now, what we are here for today.

Within your process, within your procedure, you believe, and rightfully so, that there is this process that took place: the Royal Proclamation, the Confederation, the British North America Act, the Constitution, the repatriation of it, the first ministers' conferences which took place, and now Meech Lake. That whole process you believed in, and perhaps rightfully so, because you were building Canada as you perceived it to be.

We believe that tokenism in its most obvious sense was introduced into that process in including aboriginal people. Knowing this particular tokenism, we still felt it was necessary for our people to be involved in that procedure just to make sure, as a reminder to you that there were other people in this continent or this country who believed in their own process. That is our alternative, which we are talking about, the process that we are nations alongside of and co-existing with Canada. We have always believed that and we still believe that today. It comes in various forms and various shapes.

Right across this country, my various colleagues, the chiefs, do not always agree, just as your premiers, prime ministers and the politicians of this country do not always agree on a procedure and a process. We do not always agree. We do not always see eye to eye on the method, but that is the diversity of the nations because of our cultural backgrounds. We all have different cultures, in a sense. We all come from different geographic locations. That sets us apart. That makes us unique and distinct within the whole framework of what is being developed.

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But we still hold fast to our original beliefs, our original understanding of where we fit into this process. I think in every aboriginal nation in

Canada you will find that there are prophecies that speak of what we are going through today and you will find people who always say this is another time period in our lives, in the aboriginal world, in which we are faced with another development or another matter in which non-Indian society wishes to grow in one shape or another, but at our expense to a large degree.

Without dabbling too much in the Meech Lake accord, if you look at all facets that are mentioned in there, we have a stake and an interest in each one of those areas and, if you will, a prior interest, a prior stake, in each one of those areas where the provinces and the central government will come to some sort of arrangement among themselves. Our interests will also be either stepped on or somewhat overridden, if they are not already.

That is why you will find presentations that are made to you in which we do also have the vision that you will come to your senses somewhere along the road, but it is during that time period in which we will suffer the most. There are nations that have disappeared from this continent through genocidal means. I am not trying to lay a guilt trip on anybody over here, because that is not my objective here today. It is just to remind you that things have happened in this country that could cause and have caused a revolt, or at the very least place a lot of mistrust in provincial governments or in federal governments as to their intentions.

So there are things that have happened in the past that lead us to believe that we will not be dealt with fairly, that we will not find justice within your process and within your system, but that does not mean we ignore what you are doing. It only solidifies our beliefs more and more that we will continue on and somewhere along the way we will convince you, because we have convinced ourselves.

We have gone through a time period in which we placed a lot of faith in the process and we said: "Go ahead. Make legislation for us. Yes, we are subject to you. Yes, we will make treaties. Yes, we will exchange land for rights." We believed that, but today we do not believe that any more. Today, we believe in ourselves. We believe that the authority and the power, if you will, is vested in ourselves. We are two parties who are working together, who are trying to make a country, if you will.

This question of the Constitution and where it is going to lead is endless. As you well know, each generation that comes needs to develop its own policies, needs to develop its own laws,

needs to change. The Constitution is not something that is written in stone and that cannot be changed. The relationship, or the so-called relationship, right now is very poor, but it does not mean it cannot change. The physical barriers are minor in comparison to the mental barriers that have been thrown up. What is needed is the willingness, the ability, to envision Canada in two realities, because there are two realities. There is your reality and there is our reality. There is our path and there is your path, and we are linked because this is the continent or the country or the land we share.

That is an age-old type of arrangement which our forefathers established at one time. Some of you may not be aware of it, but there is actually an agreement, an arrangement, that speaks of two paths, two ways, two societies, two sets of laws. That scares a lot of people. That concerns a lot of people. How can that be in Canada? How could that be in the modern world? How could it be in a country where there should be only one law, where there should be only one group of people?

That is where the colonial mind has to change. You have not colonized us yet. You may have colonized us physically but not mentally. That does not work.

We have used your educational systems. We have used whatever tools and methods you have provided to try to assimilate us. We have reversed that assimilation process or have at least brought it to a halt, because we are talking about being adaptable and being resilient. Native people are, aboriginal people are, when we have moved through the course of life. We may at times find ourselves at a very low, and that whole process and that whole procedure I spoke of leading up to Meech Lake has brought us to a point of understanding that a lot of things are on our own initiative.

That is why you are now going to find various communities, nations, across this country doing things you consider to be wrong, consider to be illegal, because they are now setting their mental as well as their physical jurisdictions in opposition to the powers that are to come out of the Meech Lake accord for the provinces; the collusion, if you will, which is supposedly within the Meech Lake accord.

For us, it is a period in history in which we now have to express and expand what we believe to be our inherent right. I do not think it is going to change the course of Meech Lake, but I cannot emphasize enough to you the reaction that is presently taking place and what is going to take

place. Hopefully, it will not lead to any armed conflicts, but darn it, I know there are going to be a lot of people, a lot of first nations across this country—if they are not already—gearing and preparing themselves to express what they believe to be their jurisdictions.

They are doing it in various ways, such as coming into these types of forums which you have graciously provided for native people, and in other areas, to speak of and to put forth these thoughts and ideas. You can call them warnings, you can call them alerts, or you can use them as educational experiences, because right now, this generation of native people or aboriginal people who are here have that responsibility to hold the line, to protect whatever jurisdictions or whatever rights we have established so far.

The argument is, "Section 35 of the Constitution is not defined enough so therefore you cannot have self-government," or "We cannot entrench this and we cannot entrench that." We are going to define it now. With or without your support, we are going to define it and that is what is going to happen. You may look upon it as a sad situation, but you may look upon it as a situation that the answers will come from. There may be clashes over that. Hopefully, they will be legal clashes, but they will come about. You must be very sensitive and very aware of that, because if you cannot accept that, if there is no willingness to accept that, then you will suffer the consequences of it more than we will.

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I realize I may veer a little bit from what you expect in these kinds of presentations, but it is part of it and it is very important that you understand what we are trying to get across. You may have heard different presentations from members of the Assembly of First Nations based on specifics, but I think in one way or another we are all saying the same thing.

Some may be more blunt about it, others may be more technical about it, but in one way or another the grass-roots people, our people back in our own communities, are the ones who are the movement. They are even kicking our butts because we are not moving fast enough on whatever is coming forth. So either we are going to be here fighting on their behalf and putting forth those thoughts and ideas or somebody else is going to be here representing the communities.

I think that is all I have to say at this point. Maybe one of my colleagues might wish to add a little more to it, or if you have any questions, please feel free to ask.



**Chief Two-Rivers:** [Remarks in Mohawk]

I welcome the opportunity to address you very briefly. I am going to take some liberties, and in doing so, I have asked the Creator not to be too angry with me for speaking in a foreign language, which I am doing now.

The debate seems to be that two foreign countries or two foreign languages have been established in our land and whether French is going to be dominant or English is going to be dominant, from what I seem to be gathering.

I guess I am going to take the liberty of trying to speak to an issue, Meech Lake, and try to put at least the experience I have in white society to you, or at least to apply that to it.

Basically, Meech Lake has come about and created this board here. To me, I ask myself why it is necessary to have a board after an agreement or an accord is formed or has taken shape and form.

What occurs to me, because of the difference in our societies, is that there is no relationship between governments, provincial and federal, and the people. You seem to have a long line of people here complaining or making statements that they are being oppressed in some way by Meech Lake. Why is that? What causes this?

The way I look at it is that Meech Lake is another form of creating a buffer zone between the accountability of government to the people. It has put up another barrier where the government can function and control the people at the grass-roots level. They do not have an opportunity to have their voices heard in the decision-making.

The government has a mandate for five years to control the lives of people and then utilizes them in a short period of time to get re-elected. This to me does not seem right. Everything along the way has caused the outcry, because the people are not being heard. You get school boards, you get interest groups, you get private individuals, you get people representing the north, and what is happening? They say, "We are being oppressed."

Meech Lake, the way I look at it, is a many-headed snake that is oppressing various segments of Canadian life. It affects the province of Quebec in terms of an imposed language right under the guise of a distinct society. It imposes upon other areas in the economic field where the government can impose its will economically upon some people. We have the resources, fisheries and off-shore, where a province can go ahead and impose its will upon other groups of people or other areas.

What Meech Lake has done, as far as I can read it, is create provinces that can now go ahead and enact oppressive legislation on their people and be unaccountable or not accountable for their actions because it is done in the group or under the guise of Meech Lake. There is no longer an area where—a province will say, "We are doing this because of Meech Lake." They have created another area where they can hide their actions and not be accountable.

The concern of the northern territories cannot be directed now at one province or hard-line provinces that say, "You cannot become a province." It is all the provinces now, according to Meech Lake, that stop this. What they have done is spread the whole method by which a province or provinces can be held accountable for being hard-line. It is no longer as it was in the constitutional process where Alberta was hard-line or British Columbia was hard-line in terms of the constitutional process for recognition of Indian aboriginal rights. The thing now is that it is a country-wide thing.

Meech Lake is not going to be changed, altered, unless the people and their representatives begin to take more control, more of an interest, more of a caring attitude in how governments function. It is a problem I have in watching your society and your government function without having accountability to the people.

As elected people, you give yourselves up to the system and become part of it. There are no reformers. There are conformists. You step into an arena of parliament, an arena of representation at the municipal level or whatever, and there are none of what are called black sheep. There are no free-thinkers. There are party-liners. There are people who go with the establishment. I think that is what people are crying out against. They have no more control over the people who are mandated or elected to represent them. Meech Lake is a clear picture of what is happening, of how government, provincially and federally, is distancing itself from accountability to the people.

I certainly hope that at some future time, when an accord is brought forth and a free trade agreement is signed, we will have some participation by the people it is going to affect. Unfortunately, the way I am looking at it, the governments of today, and yesterday, are basically controlled by the multinational corporations. That is the way it is. Until that can be changed, the interests of the people will be secondary to the interests of corporate bodies.

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Again, in relation to Chief Norton's presentation, I concur with what he has said; certainly our ongoing responsibility to better our quality of life and our participation in co-existence on this continent will be enhanced. The work is going to go on and we are going to continue to try to better the wellbeing of all the people living within Turtle Island, within the North American continent.

When we speak of getting a better way to do things, I think the better way is that when people are represented in the development and involvement of the country, then they do not have to come to committees and vent their frustrations, their sense of loss and their sense of not having any ability or any chance to have some control over their future and the future of their children.

Basically, that is the extent of my comments.

**Mr. Chairman:** Thank you very much. I think you have underlined a couple of areas that are quite important to what we have been doing. First, in the remarks that Grand Chief Norton made, if I think back over the testimony that has been given before this committee by a number of native organizations, what you said brought together for me, at least, a lot of themes.

While some of the other presentations may have dealt with certain specific aspects of the Meech Lake accord, the charter and so on, I think you provided a kind of overview that we needed. It seems to me that Chief Two-Rivers has really put his finger on a fundamental problem that we have recognized, which is that because of the process that has evolved in the development of this constitutional amendment, there is a great sense of frustration among many people in terms of how valid or how legitimate it is and the relationship between those who are elected and the people generally.

There are questions from Mr. Breaugh.

**Mr. Breaugh:** I just want to see if you concur with the recommendations that were put in front of us by the Native Council of Canada yesterday about companion resolutions.

**Chief Norton:** We have not had the opportunity to view any of those yet.

**Mr. Breaugh:** OK. I guess I should say for starters that I wish some of this wisdom had been at Meech Lake. We probably would not have quite so many headaches here today.

Do you have anything in particular about this agreement that you think this committee should take some action on? In other words, have you taken a position that there is a need to schedule a

first ministers' conference on it? Is there any date you have in mind? Is there anything of that nature you want to make us aware of today?

**Chief Norton:** Not necessarily. If my colleague wishes, he can expand on that a little more. We do not necessarily have any recommendations as far as dates are concerned, but we do emphasize and vigorously suggest that discussions continue, because what we are noticing now is a deterioration, a very unfortunate situation where the relations among provinces, the first nations in those provinces and the central government are deteriorating very quickly.

If there is no willingness on the part of Canada and the provinces—at this time, we have to include them because they have become an important reality, if you will, in the whole constitutional concept and in our lives; there is daily contact and daily impact—if no efforts are made to begin to sit down and look at the co-existing relationship in a fashion that looks at it in an equal type of situation—the recognition of inherent rights and self-government or self-determination—if that is going to be put on the back burner, if that is going to become lost somewhere in the shuffle, then indeed there is going to be a large outcry.

The things I spoke of in my presentation, about actions being taken by native people and various organizations or first nations across this country, will be much more amplified. If the governments themselves do not start moving in that area of trying, at the very least, to establish discussions and forums in which the native people can begin to function, both nationally and regionally, then you are going to have a hell of a problem on your hands. The concentration right now is in other areas. Whether you agree with me or not, whether you want to accept it or not, the issue of aboriginal rights is very key to the future of Canada, yet it is not being addressed in that fashion.

**Mr. Breaugh:** We had some concerns expressed to us yesterday that from the point of view of funding, from the point of view of personnel, from the point of view of occasions to liaise with or talk to the federal government, what seemed so close a year ago now seems further away. It seems to have lost its momentum somehow, and there is a need to put that back so there is some clear direction that many of us—I do not know whether everybody shares it, but I think most of us do feel that this is a debt which is long overdue, that this is a problem which has never been resolved and needs to be resolved now, that



the nation is never really going to be a nation until it resolves this problem first.

**Chief Two-Rivers:** The concerns that are there are valid for the people making that presentation. Chief Norton spoke about diversity. There is diversity among us. What we are looking at basically is a responsibility on the part of the governments, both federal and provincial.

There is a concept there of resource-sharing. We are saying, yes, there is a responsibility there. Resource-sharing must come about, but we must have, and we are going to have, political autonomy within Indian homelands. What that means is that the ability to legislate illegally over Indian nations, which has been in place and happening for the last several hundred years, is going to cease. It is our responsibility to ensure that it does cease. We have to work out a relationship of resource-sharing, of co-existence, but also we must erase that colonialistic attitude, which is still alive and well. We must seek and strive for political autonomy.

Maybe I can just cite the example of the United States-Canada trade agreement. What are some of the loudest cries you hear in Canada? One is that we are losing our political sovereignty. When I say "our," I have my white hat on. Basically, this is what it is. If we were going to resolve something, then certainly we have to go back, readdress and try to get things into the right perspective respecting the two realities. We are not a threat to you. We do not outnumber you. We are not going to endanger the English or the French language, but we are certainly not going away.

We are here to stay for a hell of a long time. We have been here for a long time. I am sure you have heard these statements. But when you say, "Do you concur with another presentation or do you go along with certain things?" it is difficult for us because the Iroquoian reality or the Mohawk reality may not be the same as that of some other first nations.

**Miss Roberts:** Briefly, thank you very much for coming and for your excellent presentation. I want to assure you that we are here for the long haul too. We, as a provincial body, are here to work out what the problems are.

I was very interested in hearing about your idea of two paths. I have heard this before. I think one of the most important things is that we are not even sure what our path looks like and we do not know a thing about your path. Do you understand what I mean?

Part of the problem we are going to have to face is what our path is right now, but you have to help us with what your path is, not just to legislatures, not just to the federal government, not just to those people you wish to talk to, but to those people you talk about who must participate more.

We have to be educated, and I mean "we" as people other than of the first nations. I would hope, in dealing in the long run, that you understand we need your help, we need your education, we need to understand what your path is and where that path is going to lead you.

I have listened very carefully to what Chief Two-Rivers has said. He expresses it very well in what I would call an objective, a goal, a standard, to use the weird language we have been dealing with lately, but I say we have to know much more. I encourage you all to educate us not only on this level but on all levels.

**Chief Norton:** It is interesting that perhaps we have made some inroads in trying to explain to people that we need to educate. We first had to learn ourselves where we needed to go. I feel relatively comfortable in saying that the majority of the first nations in this country have begun to take on and begun to understand what their roles are during this time, why they were placed by the Creator in this particular portion of the world and what their responsibilities and duties are.

The people who have come to this continent, your ancestors and others, came from an oppressed situation. I do not think you will disagree with me, if you look at the history of Europe and the wars and the problems that had gone on there long before there were any problems here in this particular part of the world.

That was brought here. It has taken a time period in which the resources and the environment of this country have been brought to a point of destruction or, at the very least, the manner in which so-called progress across this country is being looked at: the rape of the land, the natural resources, oil exploration, total destruction of forests, natural and wild habitats, the destruction of aboriginal ways of living. That is finally coming to the forefront more and more, because it is not just our environment being destroyed; it is yours also. As you said, you are here, you are a reality and you are going to remain. You cannot survive on plastics. You cannot survive on things that are artificially created. You have to live and breathe on something that is natural.

I think that is our message, that is part of our way of trying to educate you in those areas. That you have to understand. That is the basic

philosophy and the basic reasoning under which our ancestors said, "Yes, you can live in our continent." That is a human right everybody has, and that is what we are talking about: the right to be able to live and breathe freely.

Mind you, there are rules and regulations in modern society that have to be established because of the weird thinking that goes on and because of the related social problems, which are many. But that is one of the messages we have to offer in order to correct a lot of the problems that are prevalent in your society but have also had an effect on our society—we have also been influenced by drugs, alcohol and many other things, which I am not going to cry about because that is not the reason we are here today—to educate yourselves about how we should be living in conformity with the natural surroundings.

It does not mean that we do away with industry. It does not mean that we do away with all these things. But we must be conservation-minded. That is why it is important in the Meech Lake accord when you talk about fisheries and about all the other things to ask: Whose fisheries? At what cost? Exploration? At what cost? Is each province going to protect its own little jurisdiction and say, "We can develop all the hydro we want, we can dam up all the rivers we want, because it is going to create employment and we will get rich on it"?

What the hell, if your trees and air are gone, you cannot eat money. If you have destroyed all the water, you cannot drink money. People have to understand it is basic, simple common sense we are trying to establish, besides the argument of co-existence and besides what aboriginal rights mean.

**Chief Two-Rivers:** Chief Norton has dealt with the materialistic aspect of our lives. It is also important that we consider the spiritual aspect and the family unit, the extended family, and our relationship and behaviour to our fellow men.

In materialistic gain, we tend to put a human factor on it. We have got to change this relationship. We have got to turn inwardly and re-establish the family unit and get a feeling of the future. We have got to cease and desist from mortgaging the future of our children and our grandchildren. This concept of "I'm all right, Jack, and to hell with tomorrow" is going to have to change.

Basically, we are not going to be the victim of it. We may have a few coughs, sore eyes and stuff like that, but what is going to be left for our children and their children to follow? We may sit in ivory towers of legislation and stuff like that,

but certainly when the final accounting comes down, it is our children and our grandchildren who are going to pay. We had better start thinking straight in those terms.

**Miss Roberts:** My comment, though, is to help in the education. I live on a farm, on which is an extended family; we have the past and the future as well. I understand what you are saying to me. I am trying to educate people with respect to that way and those thoughts.

Please, you help educate as well. Do not think that your nationhood can just be a nationhood in Canada. You must explain to the rest of Canada where your nationhood is going. All I am trying to do is encourage you. I do not want to argue. All I want to do is encourage you to go to the schools, to go to the people and to participate in educating them. Help us out.

**Chief Norton:** Invite us, first of all.

**Chief Two-Rivers:** Yes, invite us. We will go anywhere and we will travel anywhere. Just as an example of broadening our scope, I guess, you will notice that one of our Mohawks crossed your imaginary line yesterday. There again is just an expression of our mobility rights within our territory.

**Mr. Chairman:** A final question, Mrs. Fawcett.

**Mrs. Fawcett:** I want to carry something that Miss Roberts said just a wee bit further. I think you have to educate us, yes, but I think it is most important that we listen. Obviously, you have been listening to what we have been saying and doing. You have even turned it around and you have been able to use it. I think you are fine examples to us in that it is fine for you to come to us and educate, but unless we are open and we listen, it will be to no avail. Would you agree?

**Chief Two-Rivers:** I am glad you addressed that to the committee.

**Mrs. Fawcett:** Well done.

**Mr. Chairman:** I would say you have been around a few political meetings.

From time to time in these hearings we get into very specific and detailed discussions. I think what has been tremendously useful in your presentation today and in the questions afterwards is that you have brought a lot of things together and you have suggested some ideas and ways of looking at things.

It is hard. Committees are given a task, they plunge in and get into all the details. The old saying about from time to time stepping back and looking at it becomes awfully important. Several times over the last couple of months we have had



presentations which have, if you like, challenged us to do that and given us an opportunity to do that.

I think we are all very grateful to you today for not dealing specifically, line by line, with Meech Lake but rather stepping back and giving us a perspective, and, as Mrs. Fawcett quite correctly underlines, for "playing back what you have

seen" in terms of what others have been saying to us and relating that to our own society, distinct or not.

This is perhaps a good point to take that food for thought and break for some other food. We thank you very much for coming today.

The committee recessed at 1 p.m.

## AFTERNOON SITTING

The committee resumed at 2:09 p.m. in Algonquin Salon A, Delta Ottawa Hotel.

**Mr. Chairman:** Good afternoon, ladies and gentlemen. We will begin our afternoon session. I would like to welcome Ken McRae, who is here. I may thank you as well for a somewhat late start so that we could all have some food, which will make us a much cheerier group to dialogue with this afternoon. We want to thank you very much for coming. As you are aware, our procedure is to have you make your presentation and then we will follow up with questions in the usual fashion.

KEN McRAE

**Mr. McRae:** Good afternoon. In my presentation, I shall address several specific concerns I have regarding the Meech Lake-Langevin Block constitutional accord. In some cases, I shall offer possible solutions to concerns raised, while in others I shall simply explore what I see as potential dangers due to vague, ambiguous wording and shall ask for a clear definition. Then I shall address the issue of the process of constitutional change and how this present change has been handled by our country's politicians. Following that, I will answer any questions the committee members may have.

Before getting down to brass tacks, however, I would like to say that I am not a lawyer or a constitutional expert. I appear before you simply as a concerned private citizen who has followed constitutional issues with great interest since 1979.

Amending formula, Senate reform and creation of new provinces:

The present formula is superior to the one put forward in the accord in that as few amendments as possible should be left to unanimous consent. The possibility of any one province holding up reform by itself should be limited as much as possible.

Paragraph 41(b), "the powers of the Senate and the method of selecting senators," and paragraph 41(c) dealing with the number of senators a province is entitled to:

Being left to unanimous consent makes reform of the Senate probably impossible compared to highly unlikely now under subsection 38(1). I will not go into all the possibilities for reform of the Senate, but I would like to comment on the proposed triple-E—elected, equal and effective—Senate. The elected part is OK, the effective part

depends on what that would entail and the equal part, no way.

A triple-E Senate is wanted by the west to counteract the superiority of numbers the central provinces enjoy in the House of Commons. If this were to happen, it would make a mockery out of the principle of representation by population. While I do not think it fair for the four western provinces to have only 24 senators when the four Atlantic provinces have 30, a triple-E Senate is not the answer. It would be more just for the country to have no Senate than to have a triple-E Senate. Just because our federal government has signed a free trade agreement with the United States does not mean we have to adopt its form of Senate.

Paragraph 41(i), dealing with the creation of new provinces:

I would prefer to see it remain under subsection 38(1), but I do not believe the western provinces, in particular British Columbia and Alberta, would go along with that. I suspect they want an individual veto over the creation of new provinces because they do not want the possibility of a native-led provincial government attending constitutional conferences and having a vote.

Knowing that the territories would not become provinces for a very long time anyway and that Senate reform, even under subsection 38(1), is highly unlikely, does not make an individual veto over these matters any more fair or just.

Appointment of Supreme Court judges:

Subsection 101B(2) says, "At least three judges of the Supreme Court of Canada shall be appointed from...Quebec." The Supreme Court Act also says "at least three" shall be appointed from Quebec. I do not question entrenching three judges to be appointed from Quebec, even though it has a quarter of the country's population. I do, however, question the words "at least." They leave the door open to the possibility that one day perhaps a majority of the justices on the Supreme Court could be from Quebec. If the paragraph read, "At least six judges of the Supreme Court be appointed from outside Quebec," do you think Quebec would object? I am sure it would.

"At least" should be dropped. An additional paragraph should be added that, "At no time may a majority of the nine justice positions of the Supreme Court of Canada be made up of appointments from any one province." Some may think it would never be allowed for one



province to have a majority of the nine justice positions. The fact is that our Constitution is a legal contract, and as such, any loopholes seen should be closed.

Quebec "distinct society" clause:

There are several grey areas in the accord. A case in point is the section dealing with Quebec's "distinct society." Do paragraph 2(1)(a) and subsection 2 provide legal grounds for the official-language minority in each province to go to the Supreme Court and have it impose minority language rights or services legislation upon the provinces, no matter what the majority of the electorate in a given province might think or want, the argument to be used being that in order for provincial legislatures to conform to subsection 2, "to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a)," they must provide minority language rights and/or services?

Some provinces presently provide some services, some are in the process and others are not. Could this paragraph lead to still more services from those that already provide some?

What about subsection 2(4), "Nothing in this section derogates from the powers, rights or privileges...of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language"? Does this mean a minority-language group cannot go to court over paragraph 2(1)(a) because it is up to the individual provinces to decide what, to them, constitutes preserving the fundamental characteristic of Canada referred to in 2(1)(a)?

Another question arising from the section is whether Quebec may be an exception to the aforementioned possibility of court-imposed language services in that paragraph 2(1)(b) and subsection 3 might be be legally construed to overrule paragraph 2(1)(a) and subsection 2. Will this mean Canada might one day consist of one officially French province and nine officially bilingual provinces?

Just what exactly does paragraph 2(1)(b), "the recognition that Quebec constitutes within Canada a distinct society," mean? The obvious answer is that due to its majority French language and culture, it constitutes a distinct society. By reason of logic, if Quebec constitutes a distinct society within Canada due to its French language and culture, then the rest of Canada must constitute a distinct society due to its English language and culture. Perhaps New Brunswick should be considered individually distinct because of its more balanced English-French mix.

Since it says in the preamble and the resolution to authorize an amendment to the Constitution of Canada that the accord amendment recognizes the principle of the equality of all the provinces, this equality should be clearly demonstrated or else it is a lie. As the accord now reads, it is a lie, a remarkably shocking error that Senator Murray should be told about.

Paragraph 2(1)(b) should be changed at least to read "the recognition that the province of Quebec individually and the other provinces as a whole constitute within Canada distinct societies." Actually, I believe it should read "the recognition that the provinces of Quebec and New Brunswick individually and the other provinces as a whole constitute distinct societies within Canada." Then, too, if this equality of the provinces is true, subsection 3 should be changed to read, "The role of the legislature and government of each province to preserve and promote its distinct society referred to in paragraph (1)(b) is affirmed."

Like the vast majority of Canadians, I want to see Quebec sign the Constitution as a full and equal partner in Confederation. However, like the vast majority of Canadians, I do not want to see it sign as a more-than-equal partner, as this accord would make it.

Judges and the Constitution:

Another concern is that the accord usurps the democratic process in that it gives judges the power to impose legislation upon governments, with the electorate having no say in the matter. Every government enacting any piece of legislation should be able to be held accountable for that legislation by the voting public. If this accord, with its vague wording and ambiguous meanings, in a number of cases, is entrenched as is, the courts will have not only to interpret but also to define legislative consequences.

This will result in the Supreme Court's imposing legislation upon governments, which can say to a perhaps angry electorate: "Don't blame us. We didn't do it. It was those nasty old judges on the Supreme Court."

Judges are appointed officials who cannot be held accountable by the electorate. A judge's purpose is to interpret laws enacted by elected representatives of the public who are accountable to the public. It should not be the purpose, duty or responsibility of judges to define laws; that should be up to the politicians. Judges should simply interpret how each individual case relates to already defined law.

The question of how the Supreme Court will interpret and then define legislative conse-

quences in regard to these matters should not have to be asked in a democratic society. Some would say the Supreme Court is already making such judgements as regards the Charter or Rights and Freedoms due to the vague wording and ambiguous meanings in it. I would answer that two wrongs do not make a right.

If a government, responsible and accountable to its public wants, or does not want, to enact something, to whatever degree, it should be done in a straightforward, honest manner and should include the public in the process. If elected politicians of this country cannot face up to their responsibilities on all issues, hard or not, rather than forcing them off on to appointed judges, they should resign and let someone else try. We do not need or desire a form of involuntary judicial dictatorship in this country.

#### 1420

Premier Peterson, who has said in the past that the courts will define the meaning of the accord, recently said about an anti-Sunday-shopping rally held in Ottawa, "Just because 1,600 people huddle in a hall on any side of any issue, those are not the people democratically charged to make decisions about the future of the province." I remind the Premier and his government that Supreme Court of Canada judges are not democratically charged either.

Another case of trying to play both sides of the fence has been the federal government saying on the one hand that it is OK for unelected, appointed judges to define the accord, while complaining on the other hand that unelected, appointed senators should not be interfering with legislation such as the drug patent bill passed by the democratically elected House of Commons.

At the first ministers' conference on aboriginal rights, native self-government was rightly not entrenched because the parties involved could not come up with a clear definition. A number of premiers rightly did not want it left up to the courts not only to interpret but also to define "self-government." Now our politicians owe it to the Canadian public not to leave definition of the accord up to the courts. If they cannot define the accord, then they should not entrench it either.

A number of politicians have said that any changes should wait until the next round of talks. Why wait? I am suspicious that if this flawed accord is entrenched, it will be the first and last time for unanimous first ministers' agreement on anything directly affecting the country as a whole and we will be stuck with it for ever.

Process of constitutional change:

Some politicians said that public input into the constitutional amendment process was unnecessary as there had not been any such involvement in the past. Today, the public is more aware and wants to have a say in things that affect it. The Constitution, after all, is not the private preserve of politicians and expert witnesses. It belongs to and affects everyone.

With this present amendment, I believe it would have been better if the first ministers, after writing the accord, had not signed it but had taken it to public hearings in their respective jurisdictions and then held another first ministers' meeting to write a final document and sign it. It still probably would not satisfy everyone, but using that process would have alleviated dissent by hopefully reaching a broader consensus from the public.

I recommend in this particular case that the government of Ontario make a constitutional reference to the Supreme Court asking for its opinions regarding unclear meanings of parts of the accord so we know what we would be getting before entrenching it.

The federal government did allow public hearings after being pressured. Those hearings were quite restricted, however; only four weeks, if I remember correctly, and only in Ottawa. Basically, it was just a public relations exercise to politely listen to the public and then ignore it again. Federal leaders are allowing themselves to be ruled by politics rather than principles on this issue. They appear to be interested only in how much of the Quebec electoral pie they can get and hold on to.

I do not know if the public is being much better served provincially. Several provinces are not having any public hearings. As for public hearings here in Ontario, I congratulate Premier Peterson on being wise enough to change his mind about allowing hearings and I congratulate and thank the committee for, as far as I am aware, letting anyone who asked to appear before it attend. I do not know if this is perhaps just a better public relations exercise than on the federal level in that Premier Peterson keeps saying there will be no changes. I believe it is important that the Legislature not only listen to the public but also be seen to hear it.

**Mr. Chairman:** Thank you very much. We are always delighted when someone who is neither a lawyer nor an expert appears before us. We feel very much at home then, as we do not all fit into those categories either. I think also, as we have gone through the hearings, the number of individual citizens who have come forward is



important. Frankly, one would hope more would feel welcome to do so because there is no question that one can always find the experts and people who are representing different organizations and groups. That is fine, but sometimes it is nice to get others who do not necessarily represent anyone other than themselves.

We appreciate the work you have put into your brief and your presentation. I wonder if I might start the questioning. You make the point in the last part of your paper about public participation and, fundamentally, how we go about constitutional change and reform and ensure that there is some kind of a process that allows you and others who are not first ministers or legislators not to dictate what the conclusion will be but simply to have a reasonable and fair hearing and to be able to say, "These are the things that I think are important."

I think it has been made very clear by virtually everyone who has come before us that we have to deal with a number of process questions. Have you given some thought to how you think that might work in an effective way? How do we ensure that interest groups, individual citizens and so on can make their points and how might we structure that so we have a process that will function?

**Mr. McRae:** In this particular case of constitutional amendment, a number of people have commented critically on how 19 1/2 hours of negotiations were used to bring about this document, implying that it was all rushed into. Defenders of that have said the constitutional amendment process has been going on since 1984, but it was not until 1986, I believe, that there were actual concrete proposals put forward by the government of Quebec, its five proposals.

For the public, what we need is to be able to have a finalized document that we can look at as a proposal, something to work with, rather than simply going out in a shotgun-blast way and saying, "This is what we would like to see in the Constitution." The politicians could work out the basic structure or, as in this case, a specific structure and let the public have a look at it and have input into it and then go back and redraft, if necessary. In this case, there are three years for ratification, so there is time.

**Mr. Chairman:** I understand the point. I think you were saying that they could have come out of the Langevin Block and said: "Hey, we think we've got something here. We think this is really good but we are going to go back and have a certain period of time for discussion."

What about at the front end as well? Is there a need, particularly if we get into ongoing constitutional meetings, whether every year or every other year, for some means for input before they get to that stage?

**Mr. McRae:** I would not have thought so before the Charter of Rights came along. Since it has been brought in, and it is such a new ball game and it is vaguely worded in a number of cases, nobody really knows just what the effects are going to be upon society, so it is an ongoing process.

In that case and in the case of this accord, which, unfortunately again, is vaguely worded in a number of cases, it should be an ongoing process as well, so that every few years or whatever, after the public has had a chance to see how it is working, there should be perhaps a reviewing process to try to correct anything that is seen to be not working properly.

**Mr. Offer:** I have not so much a question as a point of clarification. It seems that what you are saying is that we did have two documents. We had the Meech Lake document and we had the Langevin document.

**Mr. McRae:** Right.

**Mr. Offer:** You are not questioning the right of the first ministers to sit down and hammer out what was, in the first instance, the Meech Lake document. All you are saying, the way I see it, is that if the time period between Meech Lake and Langevin had been wider and there had been public process in that spot—

**Mr. McRae:** No, because as it turned out—

**Mr. Offer:** If not, then where do you see the public process coming in? It could have come in the middle there, and then what might have emanated is something that is like the Langevin agreement, or it might be something different. I am just trying to find out where you see is the best spot for the process to have public input.

1430

**Mr. McRae:** After the Meech Lake part of the accord—I would have liked to have had public hearings at that point but, in retrospect, in hindsight, looking back at it now, the Langevin Block part has a number of considerable differences to the Meech Lake part. I guess it is something like the free trade agreement: You have to wait until the lawyers have sat down and worked out all the legalities and you have a legal document. That is what happened with the Langevin Block part. So it would be after that that I would think the public should be able to have a say.

**Mr. Offer:** OK. I just wanted to get a clarification as to where you felt was the best spot for public input.

**Miss Roberts:** Thank you very much, Mr. McRae, for your excellent presentation. It certainly brings out many points we have been looking at, from your own perspective.

As a private citizen, you have spent a lot of time learning about the Constitution, if that is what you wish to call our constitutional document. Have you thought about how we get the rest of the private citizens involved in this? I do not mean just the process itself. We have constitutional documents which you seem to be very well aware of. The charter itself has many problems. People are not aware that we have had a Constitution for many years. We have just brought it home and we are trying to make changes to it from time to time as well. How do we interest the rest of Canada in this nation-building?

**Mr. McRae:** Unfortunately, the vast majority of members of the public are pretty well wrapped up in their own lives, and there is a great deal of apathy. Quite frankly, a lot of people would prefer to be able to simply rely upon their elected representatives to take care of those things so that they do not have to worry about them. Personally, if politicians were perfect, which I know they are not—

**Miss Roberts:** Thank God.

**Mr. McRae:** —and I could rely upon that, I would be quite happy not to be sitting here today. I would much rather be out fishing or working or something. As to how to get more people involved in the process, I think more and more people are becoming involved simply because of instant communications nowadays.

People sit down and have their supper while listening to the six o'clock news on television or they read the newspaper on their way to work on the bus or the streetcar. I think people are becoming more aware but, in a number of cases, there are people who will never get involved. They may sit at home at their supper table with the family and complain from here to high heaven about what the politicians of the country are doing but they may never get up from that table to go out and actually say it to their elected representative or to come to a meeting such as this.

It is just a reality. I think the only thing that can be done is simply to have public hearings such as this and advertise them so people know well in advance they are going to be taking place and

that, if they wish, they can attend or send in a brief or get their two cents in.

**Miss Roberts:** But you do agree that somewhere down the road, from what you have said, the politicians, whether they be the premiers or the legislators, make the final decision; even if we went back and changed Meech Lake or if it stays the same, it is up to the politicians to make that final decision. You just want some input into that process.

**Mr. McRae:** Right, but also—

**Miss Roberts:** You are not suggesting a referendum or anything like that?

**Mr. McRae:** No, I am not suggesting anything like that. In this particular case, there is vague wording, ambiguous meanings that are going to leave it up to the Supreme Court judges.

**Miss Roberts:** As we do with the charter.

**Mr. McRae:** Yes, and as I said, two wrongs do not make a right.

**Miss Roberts:** That is right.

**Mr. McRae:** It is going to result in judges, who are appointed and not accountable to the public, deciding legislative consequences. That is what I disagree with.

**Miss Roberts:** But you always realize that the legislatures have the right to change that law so it comes back into conformity with the charter.

**Mr. McRae:** Ordinarily, if it was simply a law made in the individual provincial government or the federal government, that would be the case. But in the Constitution, with the amending formula, it is not just the individual government that is involved. If this amending formula goes through, then in a number of cases it will need unanimous agreement. If the electorate of one province does not like some part of the accord as it affects them, they cannot simply say to their provincially elected government that they want it to change that part, because it would take all those governments to change it.

**Mr. Chairman:** Mr. McRae, I want to thank you very much again for coming this afternoon and setting out your views. As I think was clear from our questions, the issue of process has become one of some importance. Not that other matters raised in your paper are not, but one of the things we felt strongly about is that, at least as part of our mandate, we have to look at that so that we do not get into the same situation.

If we are doing this in some three or four years, it would be a delight to see you again, perhaps for different reasons, not that you are having to be concerned about that part of whatever the accord



of the day might be but that you are simply putting forward views at that point about what you would like to see.

**Mr. McRae:** There is one question I would like to ask the committee members. After these hearings you are going to write up your report and you will submit it to the government.

**Mr. Chairman:** To the Legislature. Our mandate in the motion that created us states that we must submit a report to the Legislature by the end of the spring session. Presumably, the spring session will end towards the end of June, unless honourable members want to stay longer. That is our mandate as a committee.

**Mr. McRae:** Do you think that if there is an overriding feeling, if the committee recommends changes, there is any chance that the government will make any?

**Mr. Chairman:** This is an ongoing process. We are in the middle of our public hearings. I think the government, indeed all the parties in the Legislature, will be very interested in seeing what conclusions this group, which is made up of members of all three parties, comes to. In that sense, we feel it is incumbent upon us to listen very carefully to what people are saying to us, to assess what they are saying. Then we are going to have to go away and think very hard about what we heard and come up with a report. All one can really say is "Stay tuned" and, when it is all over, I hope you will feel that your presentation and our discussion today have been useful.

**Mr. McRae:** I thank you for the opportunity to at least get in my two cents. I think it is always best, if the public feels strongly about something, to let it verbally blow off steam than otherwise.

**Mr. Chairman:** Right. Thanks very much. We appreciate your coming today.

I now call upon Havi Echenberg of the National Anti-Poverty Organization to come forward. First of all, welcome. We are pleased you could join us today. We have all received a copy of the document you have brought with you. I will simply ask you to proceed with your presentation, and we will follow up with questions. Welcome.

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#### NATIONAL ANTI-POVERTY ORGANIZATION

**Ms. Echenberg:** Thank you. Rather than read this verbatim, I think what I will do is go through the major points in it so that perhaps we could leave a little more time for discussion.

I would like to make just two comments by way of preface. One is that despite the fact that I am from an organization, I am no expert either, and neither is anyone else in our organization. Deuxièmement, je vais faire mes commentaires en anglais, mais je suis certainement prête à répondre à des questions en français, si vous en avez.

I know that I sent to the committee a copy of our submission to the federal committee and I hope you had an opportunity to look at it. Essentially, we raised three major points. One is the shift in policy-making from normal legislative processes to federal-provincial conferences, which led not only to the Meech Lake accord but will also in future discuss economic issues on an annual basis at least; two is the fear that the federal government will be unable to impose minimum standards on the programs that it creates in areas of provincial jurisdiction; and three is that existing federal-provincial cost-shared programs might well become subject to the opt-out provisions of the Meech Lake accord.

It is the third one that I have focused on here; and that because when we made our submission last July, quite frankly, the last clause was conjecture, it was our best guess. Since then, we have found out, to our dismay, that we were right, and that is a little worrisome; or at least that government officials are behaving as though we are right. The example I have gone into in some length here is the one of legal aid. If you will bear with me, I will go through it with you verbally.

Currently, legal aid in this country is governed by two different cost-sharing agreements. Criminal legal aid is governed by one that is nonexistent in legislation; it is a global agreement between the Department of Justice and provincial attorneys general. There are also bilateral agreements that put it into place. It has quite high minimum standards and quite low spending ceilings. Civil legal aid is governed by the Canada assistance plan and agreements between the Department of National Health and Welfare and the provincial ministers of social services. It has absolutely no minimum requirements—well, there are actually a couple, but very few, and no spending ceilings.

The Canadian Bar Association's legal aid committee recommended in 1985 that these two programs be amalgamated. They, of course, would like to see the high standards required under the Justice agreements and the no-spending limits under the National Health and Welfare agreements, but that remains to be seen. There are certainly negotiations going on now

between federal and provincial officials looking to amalgamation by 1990.

The reason this became relevant is that when I asked the question of Canadian Bar Association members and of Department of Justice officials, and in fact of legal aid plan representatives in several provinces across the country, as to whether an amalgamated program would be subject to the opt-out provisions of the Meech Lake accord—in other words, would be a new program—no one could answer, which was a little bit worrisome. In fact, some of the Justice officials have speculated that this may be the first test case to the Supreme Court of Canada.

I think it is a particularly worrisome example, because we in fact have the people who drafted the accord, the Department of Justice officials, not being able to tell us whether the program will be subject to it, and we have fairly high-profile and expert lawyers in the Canadian Bar Association legal aid committee not knowing whether it will be subject to the accord.

I would suggest, as I did to the federal committee, that perhaps no one knows precisely what this means—which I found reassuring, you can be sure. The average Canadian is no more in the dark than anyone else. It poses real problems because it means that even existing programs and the level of federal conformity and uniformity that we have are not safe.

The other example I have gone into briefly is the child care agreement. Our concern, which we put forward to the federal government last July, was that the opt-out provision could be used to bargain down what national objectives were stated. We gave the example that we knew federal government officials wanted to see a requirement for fairly tough provincial licensing standards within the agreement. It now seems those will not be there. In fact, again, the provincial governments are essentially saying, "If you don't like it, we'll wait until the accord is ratified; then we will operate on the opt-out and get compensation that way." It is an example of how we thought it would be used, both for new programs and for existing programs.

I have gone through as well in some detail, towards the end of this, some of our concerns about the absence of federal standards. I have said clearly in here, and I will draw it to your attention, that I think the Ontario government is one of the few provincial governments these days that is exceeding federal standards in federal-provincial cost-sharing agreements that affect poor people. So this is not particularly a concern of yours perhaps, other than an exercise of

leadership and perhaps even moral leadership, if I can say that. In other provinces, provincial governments are not meeting federal standards. We are having to pressure the federal government to enforce its own legislation as it now exists. As of a Supreme Court decision last fall, individuals can take the federal government to court to make it enforce its own standards.

Right now, federal standards do provide protection for low-income people against what I have described as a mean-spirited attitude that sometimes results when provinces are faced with budget constraints. Their best way of trying to cut their costs is to somehow attack the people who are the victims of the downward economical cycle they are trying to deal with. That is our concern.

We are looking to the Ontario Legislature to provide some national leadership here and to say that low-income Canadians have a right to be protected from the whim of provinces dealing with constraint. The existence of federal standards provides that protection now, but in our view is not likely to provide it in future programs and may not even provide it in existing programs as they are renegotiated or renewed. All of them are subject to renewal regularly: the health act, the assistance plan act, housing legislation and agreements are all subject to regular renewal and so they could all be at risk.

Perhaps I will leave it there and respond to questions if there are any.

**Mr. Chairman:** Thank you very much. You have really underlined in the brief here, and I know from the earlier one, some specific examples. Particularly at this stage of the committee's hearings that is very useful, because it helps us to keep thinking, "Now, how is this going to work or not work?"

Let me start off by asking you a broader question. There is a tendency, I think understandably, on the part of national organizations, and perhaps on our part a certain wariness that comes because we are provincial, for us to get concerned sometimes that it almost appears as if there is a sense that the federal government knows best; it is the one that should be doing these things. Yet when you look at the record in a broad number of areas, some of the best initiatives have come forward provincially. Clearly, some of the worst examples exist provincially as well.

In grappling particularly with this section, it is an interesting one in that there are two things that happen. One is that for the first time, the federal government was given a role in shared-cost



programs within the Constitution. By the same token, the provinces were given, if you like, some kind of constitutional protection, or at least there was some attempt at some kind of balance. We are talking about areas of exclusive provincial jurisdiction.

As you look at that and the number of the issues that have come up that have related to objectives versus standards, and I would like you maybe to comment on that phraseology, do you yourself or does your organization feel that in effect the federal government should have the sort of full responsibility to define standards and the provinces in effect would implement; or do you see that there is room, region to region perhaps, for some variation in the way certain programs might be delivered because one province has a different kind of makeup, maybe a lot more seniors or whatever the group? As you work your way through that conundrum, what conclusions do you come to?

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**Ms. Echenberg:** One of the points I make in the brief is that we are certainly not suggesting provincial governments should not take initiatives. In fact, provincial governments historically have taken initiatives and those have sometimes then been enshrined in federal-provincial cost-sharing agreements. We are not suggesting that the federal government should all of a sudden dictate to an extent that provinces do not have the power to opt out and create their own programs. Provinces have never been required to participate in federal-provincial cost-sharing agreements; they have only been required to meet federal standards if they want federal funds.

That is a really important comment to think about because our view is that there are only two reasons for the federal government to spend money in a provincial jurisdiction. One is to provide some kind of national social program that some provinces probably cannot afford on their own. That one, I think, will continue to be met under the provisions of the accord. The second one, though, is to provide a certain level of national uniformity and a certain equality of access. Even in the Canada Health Act, which has the toughest regulations, I think we need only look at the current abortion debate to see that the provinces have all kinds of leeway; more, quite frankly, than my board members, including the ones from Quebec, would like to see.

There has never been any suggestion that the provinces should not have room to manoeuvre. We are just saying that in return for federal dollars, there should be some kind of account-

ability and some kind of national standard set. It would be only a minimum standard. I go back to the point I made: with all the programs that matter to my organization, the Ontario government is exceeding the minimum standards and is not being penalized for doing so. Under the Canada assistance plan, there is no ceiling on what will be matched. The provincial governments can spend money on all kinds of things, and as long as they meet some very broadly defined standards, the feds will kick in 50 per cent. But other provinces are having a hard time just meeting existing standards and it is creating real hardship for low-income Canadians. I do not know if that answers your question.

**Mr. Chairman:** In that context, do you see a real difference between national objectives and national standards?

**Ms. Echenberg:** Yes, I do; and so did the federal committee in its interpretation and its document. I am told by people who were in the room, or who were briefing and being debriefed by the premiers in that room, that in fact a couple of premiers argued very strongly for the inclusion of the word "standards" and lost. I think they knew that meant they were settling for something much more diluted. I do not think there is any doubt about that. As I said, the standards that exist do not provide full protection as it is, but they at least provide a minimum level of service or criteria or eligibility across the country. I think even that is going to be lost.

**Mr. Chairman:** Short of amending that, are there other things that governments can do to take that clause and give it bite, or do you really feel it is the clause itself that has to be changed?

**Ms. Echenberg:** I suppose theoretically they could go on to define "national objectives" in some way that in fact made it read "standards," but I do not think there is any reason to believe they are going to. I think, quite frankly, in terms of the politics of this, that what happened was that when the "distinct society" clause came up, some of the premiers said, "If Quebec is going to get 'distinct society,' then we want this"—"this" being the right to compensation without having to meet federal standards. I think, in the horse-trading that went on, that was given to them.

There is just no doubt in my mind that they could go on to define "objectives," but that would not be part of the Constitution and would be subject to the whim of provinces. There is a level of mean-spiritedness in some provinces that is frightening; and that, I think, has taught poor Canadians that they need federal protection.

**Miss Roberts:** If I might go back to your first page and the three major areas you spoke of, I know you appeared before the special joint committee in July of last year. Could you elaborate on the first one, the shift of policy-making away from the legislatures to federal-provincial conferences resulting in policy changes that have not benefited from traditional consultation processes. Can you just comment briefly for the purposes of this record, because that is the process we are looking at, and say where it went wrong and where we can help with that.

**Ms. Echenberg:** It is not just in reference to the Constitution that I make reference to that. As I said, I think there are increasing numbers of issues that are being dealt with in that forum. The amendments include the annual federal-provincial economic conference, which of course includes employment, interests rates and all those macropolicies that have a pretty severe impact.

I guess, at least at the federal level, the federal government has decided that, in its policy-making, it needs to hear from a number of groups of Canadians through their voluntary organizations, and in fact has set out to fund those organizations, including the National Anti-Poverty Organization. Over the years, there have been more or less refined consultation processes that have evolved. Some departments are better than others.

**Miss Roberts:** You are referring directly to the feds.

**Ms. Echenberg:** Yes. Again, with varying effectiveness, we often have a chance, not just low-income people and their representatives but a number of groups, to comment on legislation in its draft stages, to provide policy input; and then of course, through the legislative process, to comment. I refer to the federal process because most provincial governments have not done the same thing. Most provincial governments have not funded interest groups they believe should be part of the policy-making process.

Consequently, as more things devolve into federal-provincial jurisdiction, including this very committee, our members across the country are not equipped and funded to have input into the policy process and they are relying on their national organizations to do it. If you are hearing from a lot of national organizations, my guess is that is why. NAPO does not have a provincial counterpart. Poor people, by definition, cannot afford to fund this kind of organization. Unless the government does, it is not going to exist.

We have had input. We are aware of what the provincial governments do. I have a staff of four. It is not easy, but we monitor to the extent we can. We rely on board members within the provinces. We try to collect data and have input. When it is moved to the federal-provincial conference level, when it is taken out of the legislative process, all our means of intervention are also gone. That is essentially what happens.

We have spoken with the federal-provincial relations office here, federally. I say, "If we could even just get a list of the meetings, we would at least have a chance to address them." We are told: "Oh, no, most of them are secret. We cannot tell you that," which is a little worrisome to us.

It is partly just an opportunity to comment on policy as it is being made. In the example I used federally, and I am not in a position to comment provincially as I have not been monitoring Ontario closely enough, I am quite sure that Mr. Wilson, the Minister of Finance, did not intend to pass two budgets in a row that hurt poor people, but he did. That was the net effect and the data show that. Had there been more consultation in advance with the Minister of Finance, which there now is I would point out, that would not have happened.

It is an example that, if we do not have that input all kinds of inadvertent negative effects can end up in policy. When it is in a federal-provincial conference format, there is no consultation in advance. It is all happening in a room that is closed off and we just do not have those opportunities.

**Miss Roberts:** Do you feel that a conference should go on anyway after you have had your input on a national level, if that is where you want to be, so that you have your input and then the federal-provincial people get together, or do you feel the power should be with the feds?

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**Ms. Echenberg:** No, I am quite happy to see federal-provincial conferences. What I am not happy to see is policy sort of hatched in a closed room, without an opportunity to hear from individual Canadians and the organizations they form to comment on policy on their behalf. Traditionally, until now, this is what happens at federal-provincial conferences. The agendas are not public, which they certainly could be. You could put the agenda out there and say: "This is what's on the agenda. Here's what we're going to talk about. If you want to provide your comments, do it by such and such a date and we'll go



into the conference with them." That has not happened. That does not exist.

I suggest to you, as a provincial committee, that if the provinces want to play a stronger role in the formulation of what traditionally has been mostly federal, like economic policy, then they might want to think about having to fund interest groups to provide that input for them, because it does not exist. There are not a lot of provincial interest groups that are well funded and can provide some policy analysis for you.

**Mr. Harris:** Thank you for the presentation. I have one question that maybe does not even tie into these questions; I think it does a little. I am really shocked that you tell me there are in Canada today provincial governments which are mean-spirited and can get re-elected.

**Ms. Echenberg:** Are you really?

**Mr. Harris:** I am. I do not see how you can get re-elected in Canada today anywhere if in fact you are mean-spirited. When you described Michael Wilson, you said Michael Wilson hurt poor people.

**Ms. Echenberg:** Unintentionally.

**Mr. Harris:** I am taking from this that there are some governments which mean-spiritedly go out of their way to tromp on the poor. I really find that hard to believe, that they can do that and get re-elected in Canada today.

**Ms. Echenberg:** I could give you a dozen examples. My favourite one is probably that we have—

**Mr. Harris:** Well, give me some. I want to hear who these guys are and how they—

**Ms. Echenberg:** We have somewhere between 100 and 200 people in Saskatchewan who have been cut off social assistance for refusing to participate in work programs which, by the agreement between the province and the federal government, were supposed to be voluntary in nature. We could start with that. I think that is pretty mean-spirited.

**Mr. Harris:** So you think that government, in a mean-spirited way, said: "We're going to get you poor people. We're going to take this money away from you. We're going to stomp on you."

**Ms. Echenberg:** The social services minister has said that poor people are lazy and abusing the system and that he is going to kick them off unless they take these jobs. Yes, he has.

**Mr. Harris:** So you think he is doing it in a mean-spirited way? I do not know the guy and I do not know the case. But you really believe he is not acting in what he thinks is the best interest?

**Ms. Echenberg:** Well, he is acting to reduce the deficit. How he would go about it and how I would go about it are different.

A better example which was very public was the Premier of British Columbia being prepared to impose his morality only on poor people. I think that was pretty mean-spirited. He was prepared to provide abortion to anyone who could pay, but if you could not pay then his morality ruled. I think that is mean-spirited.

**Mr. Harris:** So you think that his stand on abortion, his stand that the province would not fund abortion under the principle that he felt it was not a medically necessary service and therefore did not have to be covered, was a mean-spirited tack to get at poor people?

**Ms. Echenberg:** I think that was the effect of it; I think the effect was mean-spirited. I think when it was pointed out to him, he said, "Too bad."

**Mr. Breaugh:** I have a couple of things. Most of us, I think, would agree with what you are trying to do. I have a little problem I want to share with you, which I have had with a couple of the groups that have talked here. In many ways, it is the same argument about the standards and objectives and all that.

I will start by saying that one of my first experiences in government was around this kind of stuff, where we went from a municipal government into a regional government. We tried to extend services into a different area, a slightly more rural area. Of course, in our municipality, in the city of Oshawa, we had established all these very carefully defined standards for our performance: about response times for fire departments, that they should be able to get there in three minutes; response times for police patrolling; availability of social services, child care facilities, senior citizen facilities, a whole range of standards.

The problem that we ran into was that when we took our urban standards and applied them to the rural areas of the new region, it became apparent to us in a hurry that this was ridiculous. The first sign of it, oddly enough, was farmers phoning in saying: "What the hell are these police cars doing driving up and down my lanes? There is no need for them. It's silly." It became apparent to us that what was a very good urban standard, probably quite the nation's norm, did not apply once we moved five miles outside Oshawa.

This is where I have the problem about getting all wrung out with standards and objectives being set at a national level. I really have to say that in my own political experience, every time I have to

deal with the federal government of Canada, my teeth go down another quarter of an inch or so. It is very frustrating to try to deal with people who have set up—I do not want to be unfair, but it almost seems in splendid isolation from the rest of the world; they set their own standards and they decide how to go about things. Even if it is clearly the most idiotic way to proceed, it is of no concern to them. They do not report to anybody. They report to Ottawa.

I do not share your desire to get to a federal standard. I appreciate the point you are making and I am looking for a way to find some common ground here. I appreciate the notion that I think most federal governments would want to know how a province is spending their money. They may use standards, they may use objectives, they may use a number of criteria for laying out why they are going to give you \$4 million or \$20 billion or whatever it is.

I do not want to get hung up on the idea of setting a standard, because it seems to me that if we did that, we would be inviting trouble. If the model is that the federal government of Canada sets exact standards for performance in almost any field, my experience with that is a sad one. It does not work particularly well. I want to get your feedback on that, because I know you will have a different side to the story.

**Ms. Echenberg:** Far be it from me to defend the federal government: let us start with that. I too come from a municipal background. I think we are talking about different things when we talk about standards.

A member of the Prime Minister's staff gave a speech in public in which he said that the Meech Lake accord would not in any way affect the formulation of social policy in Canada. When I asked him publicly, following his speech, whether or not, if we were now negotiating the Canada Assistance Plan Act, the federal government would be allowed to require the provinces to establish an appeal procedure, whether that would be considered a standard and be among national objectives and whether the provinces would in fact be able to opt out, he said, "Well, yes, it is probably true in all likelihood we would not get an appeal procedure now."

That, to me, is a federal standard. It is not three-minute response times. It is not how many social workers there will be for X number of social assistant recipients—I cannot believe I used that last example; poor people generally do not like social workers anyway. It is a question of what is the minimum level of uniformity across

Canada that we are going to require. What are the minimum things that people can count on?

The Canada Health Act, which is supposedly such a tough standard, is the example I gave earlier. We need only look at the response on abortion to see the flexibility. I can live with the level of standards required by the Canada Health Act. My problem is that under the Meech Lake accord I do not think that is going to be possible. There is already a lot of flexibility allowed. I guess we are just saying that we do not want to see the status quo weakened and we are convinced that is going to happen under the Meech Lake accord.

**Mr. Breagh:** Via that argument, I think I might come to a slightly different conclusion. The problem I want to put to you next is, in practical terms, what can we do that will help people? That is of more concern to me than whether we use the word "standards," "objectives" or anything else.

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In practical terms, I think it would be more useful to have something in here which clearly says all Canadians must be treated equally, which in essence is what the charter talks about, and to make it clear that you have a legal right to go to court to enforce that. For example, a person living in poverty in Newfoundland would have a clear, legal right to go to court to say, "The government of Newfoundland is not treating me fairly, is not treating me equally using federal funds for a program;" just as, say, a person in Ontario might be able to do. That is the right I would want.

I do not want to get off on this argument about whether their standards are up to snuff, because I have seen the bureaucrats enter into the rooms and provide their arguments about whether they meet standards for things. I have seen long, long debates and more money spent on the debates than on the program in many cases, debates revolving around professional standards and responses and areas of need and services provided and all of that. My option is to see if we could find the legal right to ensure that you are being treated equally and fairly under the Charter of Rights. I prefer that one, rather than getting into this long debate about standards or objectives.

**Ms. Echenberg:** That legal right, as you have just pointed out, exists. As I pointed out earlier, the Supreme Court of Canada has now ruled that individuals in fact can take either government to court.



That is important, but I guess I will go back to the example of there being somewhere between 100 and 200 people in Saskatchewan who have been cut off social assistance in the last few months. Certainly the federal minister's response was that they could appeal, which they have done, and most of them have won on appeal. Some of them have not. Yes, they can now go to court, but in the interim they have no income. Right? None. All the legal rights in the world do not put food on the table and do not put shelter in place.

That is not to mention the concerns I have about legal aid, which are in the brief, and what might happen to it under the accord, so that in fact that poor person might never get a lawyer to represent him in a court. I suggest to you that it is highly unlikely that any legal aid plan would cover that kind of appeal, that kind of legal challenge, right now. That is a problem. Maybe we can enhance the legal aid plans, although you certainly cannot set federal standards now. It is sort of a circuitous argument. The legal rights are there and they can be used, but litigation, by and large, does not serve poor people very well.

**Mr. Breagh:** Exactly.

**Ms. Echenberg:** It may work for middle class people.

**Mr. Breagh:** Let us say I accept your argument totally and we move an amendment and the rest of the world agrees with us that there must be standards in here. I have been in politics long enough to know that there is not a bureaucrat out there worth his salt who could not take our definition of standards and just wrap 8,000 pieces of paper around it, and while they are diddling away in their offices somebody is starving to death out in the hall. I know that to be true.

I could win the theoretical argument that we set standards; meanwhile, while we are trying to resolve whether they meet a federal standard or not, the poor will still be out in the cold. They may or may not get a lawyer and go to court to resolve that, but I am doing them no good by setting standards. That is a bureaucrat's game.

**Ms. Echenberg:** My board of directors would say that what you are doing, if you allow for the creation of federal standards in return for federal dollars—and I think it is important to point out that is what we are talking about—is giving them a second line of defence. OK? It just comes back to whether or not provincial governments can be mean-spirited. Certainly right now I can tell you that low-income people in the three westernmost

provinces see the courts as a better way to defend their rights than appealing to their governments.

**Mr. Breagh:** I agree.

**Ms. Echenberg:** They are using the federal standards to try to force their provincial governments to act.

I will just point out that we are one of the few national social policy organizations that came out on this very strongly, and it is because when I spoke to my board members in Quebec, which is where most groups ran into problems, and asked, "What do you want me to do on this?" they said: "We remember Duplessis, and we know what is happening right now with welfare in Quebec. If we don't have federal standards to pressure our governments with, we're in trouble."

**Mr. Breagh:** I appreciate that.

**Ms. Echenberg:** All I can tell you is that their experience on the ground is, even outside courts, even in the advocacy process and the lobbying process, federal standards helped them make their case. That is what they tell me. So it does help.

**Mr. Breagh:** Let us conclude on this. I do not disagree with you for a minute. It is just that it is a place where I would choose my ground differently from yours. I understand the argument about whether they are meeting federal standards is a good one. For a bureaucratic mind, that is the mindset; that is the way you think and those are the criteria you use to measure almost everything.

In practical terms of actually helping poor people across the country, I do not think we are doing much for them that way. It is just my own political experience of trying to deal with things like standards and criteria, all of that. That has been where most of my frustration has emerged. That is a game which does not do any of the people I represent any good. I admit that when we argue whether the program does or does not do what it is supposed to do people always want measuring sticks. What are the standards? Do you meet those? But it really has nothing to do with people's needs. It has to do with bureaucrats' arguments.

**Ms. Echenberg:** Perhaps, as a final comment, I will just say poor people are so used to having to jump through a million hoops and meet a million requirements that they are used to using those kinds of sticks.

**Mr. Chairman:** Just as a comment, and perhaps you will want to comment on it as well, it seems to me one of the things which comes up here as we look at some of these issues is to

remind ourselves that if at times people have problems with the bureaucratic process—maybe I should say this as a former bureaucrat—the question of political will is awfully important.

In the discussion you were having, in a number of instances I would still argue, Meech Lake or no Meech Lake, if there is national will and political will for a certain program, there is a political dynamic and a political process out there that, quite frankly, will go through a constitutional amendment, over it, under it, around it. The dynamics of any of these major programs we talked about—medicare, CAP, what have you—there were all kinds of built-in institutional reasons why we should have had them or they might not have been realized. I am not saying your organization is saying this, but we want to be careful not to try to constitutionalize every problem, thereby thinking that it is resolved. "If we can only get something into the Constitution, it will happen."

I suspect that over the next few years we are going to see, in charter cases before the Supreme Court, some decisions whereby people will say, "Gee, that is not what we meant" or "That is not what we thought we were getting." Whatever we put into that Constitution, there is still a political process out there. You made the comment earlier about provinces perhaps funding certain organizations. Maybe one of the things that emerges in the light of Meech Lake is that it would be useful for your own organization to try to have a provincial body, if you like, because in effect the programs for the most part are often delivered there and that impact might be even greater.

That is not a constitutional matter, but we do not want to lose sight of the fact that whether section 106A stays or goes, there is still a very dynamic sort of mechanism out there, which is called good old politics. I think that if a government at Queen's Park, Victoria or Ottawa said, "Look, this is a social program which we believe is of the highest importance," you proceed and do what you can to implement that.

**Ms. Echenberg:** Yes. I feel the need to comment because what is at issue here is that what becomes constitutionalized is the right of the province to receive compensation even if it does not take part in the program as it is spelled out. That is what is new and important.

The example I give is that of civil legal aid in Alberta. Alberta has chosen not to participate in the legal aid section of CAP. They have chosen not to do it because they do not want to have to define a level of need in the social assistance legislation. They cannot get their social services

minister to do this. The justice people would like it to happen. Consequently, poor people do not have the same access, essentially, to legal aid in Alberta as they do elsewhere. That already exists, but my concern is that under the Meech Lake accord they would receive money anyway—right?—money that they are now not getting. That is the concern.

**Mr. Chairman:** I guess that may be the part that is still—

**Ms. Echenberg:** They can say they are providing legal aid and they are, but they are doing it with a million barriers.

1520

**Mr. Chairman:** It may depend there, I suppose, on how one has defined the objectives. I agree that is not perfectly clear, and I think perhaps we really will not know until we get through a few programs. My only point is that I think there is still the element there that is awfully important and we must not forget it, which is the political will of that government in determining to do that. I appreciate the point.

That has been a very interesting exchange. We thank you again for the specific examples, because I think as we come to review this later you have given us some specifics about which we will want to get some answers from some of our own people in terms of how that dynamic might work. We very much appreciate your taking the time and coming to us. Perhaps we will see you or your colleagues in a provincial perspective over the next little while.

**Ms. Echenberg:** Thank you.

**Mr. Chairman:** If I might call on Gordon Robertson to come forward, it is a pleasure for the committee to welcome you here. We certainly are pleased you could join us. Your many years of experience with the federal government will be particularly helpful to the committee as we look at some of the different issues.

We are aware, of course, of your presentation before the Commons-Senate joint committee but we felt, particularly at this stage in our hearings, that it would be helpful if you could share some of your thoughts on the accord itself. Then we could follow up with questions in relation to your own experience in the federal government and your experience with a variety of constitutional discussions and agreements and see where that leads us as we find our tortuous way through this whole process.

HONOURABLE GORDON ROBERTSON

**Hon. Mr. Robertson:** I am delighted to have the opportunity to appear in front of this



committee. In getting ready to do so, I gave some thought to what I might say that could be of most relevance and use to the committee. It seemed to me that it was very much in line with what you, sir, have said: things relating to my experience in constitutional discussions and federal-provincial relations. Perhaps I could start with that and then leave it to the committee to ask any specific questions they might want to.

As far as the experience is concerned, I think it may be of some value in relation to some of the questions that are most important at this time. My experience has been an unusually long one. I think I have been present at all the constitutional discussions from January 1950 to 1979. I do not know whether there is anybody else in the country who has been present at as many of them, and this perhaps has given some background.

The initial ones I attended, in January 1950 and September 1950, were when Mr. St. Laurent was Prime Minister of Canada, Mr. Frost was Premier of Ontario and Mr. Duplessis was Premier of Quebec. The next significant one was 1964-65, with a new array of actors. Then, from 1968 to 1979, there was pretty well a continuous session of constitutional discussions with interruptions from time to time.

As far as other federal-provincial negotiations are concerned, I have an equally long experience—not quite as long—from the federal-provincial conference of August 1963 through again to my retirement from the public service at the end of 1979. I think I was present at virtually every federal-provincial conference of first ministers.

It is that kind of background I think might perhaps give some experience which would be of use to the committee. I have tried to consider what that experience suggests which may be relevant to the situation with regard to the Meech Lake accord, and it struck me that there are three points that perhaps I could mention.

The first is that in my observation the circumstances that can produce agreement on constitutional change are extremely difficult to achieve and very rare. In those years I referred to, I have seen when I was present only two occasions when there was complete agreement on a constitutional change. One was in 1965, when there appeared to be agreement on what was called the Fulton-Favreau formula for constitutional amendment. The other was in 1971, the Victoria conference, when we appeared to have complete agreement at Victoria. On both occasions that agreement fell apart. It fell apart in a matter of months in 1965. It fell

apart in a matter of days in 1971. There has been one occasion when there was agreement of all provinces minus one: 1981.

During the entire period I have referred to, those three were the only occasions when there was close to complete agreement. Two of them fell apart. One of them lacked one government. We are left with the constitutional accord of 1987 as the only case in those nearly 30 years of constitutional discussions when it appears we may have the agreement of all 11 governments. I think this is of some relevance because it does suggest how difficult it is to achieve that degree of agreement and how unusual it is to have it.

The second thing that has impressed me in the various discussions on the Constitution is that it is virtually impossible, if not impossible, for a moderate federalist-oriented government in Quebec to appear to retreat. Once it has agreed to something, if there is pressure from outside to agree to something less, it is virtually impossible for a Quebec government to do it. Why? Because all the criticism, all the opposition is from the nonfederalist or more extreme side within Quebec, and it becomes politically impossible to withdraw. This was shown in 1964 or 1965, when Mr. Lesage was promptly attacked for what he had agreed to; it was shown in 1971, when Mr. Bourassa was attacked for having agreed to the Victoria conference on the Constitution; and it is shown today when Mr. Bourassa again has been attacked provincially for having sold Quebec out in agreeing to the Meech Lake accord.

At the present time, of course, Mr. Bourassa has been able to go further than the agreement. He has the agreement of the Legislature of Quebec to the accord. On the basis of experience and what I know of Quebec and what I have seen there, I would say it is absolutely impossible for Mr. Bourassa to go back to the Legislature and to say to the Legislature that he wants an amendment to accept something less than what is in the constitutional agreement.

The third thing that struck me as important in my experience and perhaps very relevant to this committee is the importance of the role of Ontario. I do not know whether it is generally recognized in Ontario how it is considered to be—not consciously, but seen to be—so very much the balance-wheel in Confederation. Mr. Roberts in my experience was the one who understood this best. He operated very much on the basis that Ontario had not simply a provincial interest but a national responsibility to operate as the balance-wheel in federal-provincial affairs. That is why I

think that what Ontario does about the constitutional accord is going to be more important than what any other province does; although all have to agree, the Ontario position is terribly important.

1530

Another thing that has struck me about Ontario's role is the way Ontario is seen in Quebec. Ontario is seen in Quebec as being the voice it so often is looking for but finds so hard to find, the voice of English-speaking Canada. It is a sort of frustration to them that there seems to be no place where there is a representation of this other culture, English-speaking Canada, which they look for. Ontario is the one they look at most as being that. Again, I think what Ontario does, from the point of view of Quebec, is very important.

Coming to the Meech Lake accord itself, you suggested, Mr. Chairman, that I might express some views from my own perspective. As I see the Meech Lake accord, there are a lot of warts on it. There are a lot of things I wish were not there, a lot of things I would prefer to see changed, but for the reasons I have mentioned, my own assessment is that it cannot be changed. It cannot be changed now in advance of agreement. If it is agreed to and entered into the constitutional fabric, there is a process of amendment that will go on and possibly some changes can come about later. I do not think it can be changed between now and completion of the process on constitutional amendment.

If that is correct, the question is whether it should be accepted or rejected. I have said there are a lot of warts on it, a lot of things I would prefer to see changed, but if I have to choose between acceptance and rejection, and I think I personally do, I come down clearly in favour of acceptance for several reasons.

The most important reason relates to national unity, the unity and integrity of the country. I think nationalism in Quebec is something that is constant. It is always going to be there. It is going to have varying intensity, stronger and weaker, but it is never going to be absent. There is nothing surprising about this because it is a completely distinctive culture, quite different, and has its own sense of identity. In many ways, the remarkable thing is that it is still a part of Canada, rather than having gone its own way.

If the constitutional accord is rejected, it is going to be a slap in the face of Quebec. It will be seen that way, particularly since the Legislature has approved it. That slap in the face would stand in the way of the participation of Quebec in all

manner of things that are important in Canada. We saw this in the conferences on aboriginal self-government. Quebec did not participate. It was an observer. It will not participate unless and until the constitutional situation is remedied. That is one danger.

The greater danger, I think, is for the future. If we have a situation in which the accord is rejected, and we have that slap in the face to Quebec, and if we have a situation in which we operate on the basis of the 1982 Constitution to which Quebec is not an agreeing partner, I think it will be open to some future leader of the independence faction in Quebec to argue that the Constitution of Canada is illegitimate, is a Constitution that was imposed on Quebec, not agreed to by Quebec, and therefore does not and should not command the loyalty of Quebec. I cannot think of anything more dangerous for the future of the country than to have a situation like that.

To repeat, my own conclusion is that there is no real possibility of amending the accord before acceptance or rejection. The question is acceptance or rejection, and if that is the choice, acceptance is much the better course.

Those are all the comments I would like to make at the outset.

**Mr. Chairman:** That gives us a lot of room for questions and discussion. Let us follow that route for a bit and let us, for the sake of argument, accept your premise that one has to choose between accepting or rejecting. In looking at the groups and individuals who have come before us who have concerns either about parts of the accord or with all of it, I suppose one can begin to narrow down certain issues and problems. How would you see proceeding?

One of the messages that is coming back is that as a result of the charter, a number of minority groups of different kinds, whether an official-language minority, an antipoverty organization, women's groups or what have you, have seen in the charter protection for a variety of things that they now, rightly or wrongly, say is threatened. As you yourself have said, constitutional agreement is difficult to reach, so they are saying, "If we don't force changes now we're never going to have them."

How can the first ministers proceed to demonstrate clearly that those concerns have been heard and that there will be some process to deal with them? At the present time, in terms of the accord, the only two future items that were covered were the Senate and fisheries, yet certainly if we were to list major issues on our



plate, there would be the question of the relationship of the charter to the accord, aboriginal questions and several others.

As we look at the accord, I think we realize it is not just a question of whether we say aye or nay, because regardless of what our answer is there still have to be other things. There has to be some further route, either to go back to Quebec or to continue with the problems as other people see them. I wonder if you have given some thought to that and what kind of process we could be looking at in terms of dealing with it in the event it is accepted. How can one demonstrate that we can deal with these other issues, not in 10 years but in a much more expeditious way and in a convincing way?

**Hon. Mr. Robertson:** There is provision in the accord, as you know, for annual constitutional conferences, and item 1 on the agenda, as I understand it, is the Senate and item 2 is jurisdiction with respect to fisheries. Then after that it is other matters.

I would assume that the normal and desirable process would be to have these other items entered on the agenda for one of those constitutional conferences, the first or second. They are going to take place every year. I think this is a rather worrying prospect in itself, quite honestly. Just the same, that is what the constitutional accord provides for and I would think that at those meetings there could and should be discussion of these various points.

As far as I am concerned, the case is anything but proven that the constitutional accord of 1987 has the adverse effect on these various rights that has been alleged. I am far from persuaded that this is the case and I would think the first thing governments would engage themselves with at those meetings would be: "Is it true? Does the accord really have those adverse effects?" As I say, I do not find it myself; I am sceptical.

I do not see any problem about the process. The process is there and change can be achieved, if there is agreement. It will be very difficult.

1540

**Mr. Harris:** Mr. Robertson, you have put it pretty bluntly to us. Maybe you could go a little further as to what the implications are of the rejection of Meech Lake, if that happens, on Quebec. There are things you do not like in the accord but the alternative is worse. Could you go a little further? Where do you see the alternative leading?

**Hon. Mr. Robertson:** The worst alternative, assuming rejection?

**Mr. Harris:** Yes.

**Hon. Mr. Robertson:** I mentioned a few of the things I think would happen. I assume that if there were rejection, it would be with recommendation that X, Y, Z be changed, amended or rewritten, something like that. Conceivably, I suppose, it could be with a resolution of approval by the Legislature of Ontario that would include some changes. I do not know how it would be done, but whatever it was, the matter would have to go back to a constitutional conference to see if agreement could be achieved.

**Mr. Harris:** I would like to go further than that, though. I am accepting everything you have said, that if the rejection has anything whatsoever to do with Quebec's relationship with the rest of Canada, it would be politically impossible for Quebec to accept that.

**Hon. Mr. Robertson:** I think it would be politically impossible for the government of Quebec to go back in front of the Legislature of Quebec and say, in effect, "We must change what we have recommended to the Legislature," and thereupon move some amended resolution. The government of Quebec has been attacked already, quite sharply, for having gone too far, as I said, for having sold out Quebec.

The Parti québécois thinks and hopes it is in the process of resurrection. Mr. Parizeau has said that the program of the Parti québécois must be independence this year, independence next year, independence the year after. Nothing could play into the hands of Mr. Parizeau and the PQ better than for the government of Quebec to have to go back. I do not think it would. I think it would say flatly that it would not go back.

**Mr. Harris:** I am asking you to take it further. You see this as leading to Quebec's independence.

**Hon. Mr. Robertson:** It would gradually lead to that.

**Mr. Harris:** Many people have criticized this accord, saying they see it leading to Quebec's independence.

**Hon. Mr. Robertson:** I know, including my old Prime Minister, with whom I had long and happy relations, Pierre Trudeau. I have the greatest admiration for Mr. Trudeau. I have agreed with him on a great many things. I disagree with him totally on this. I think he is quite wrong. I think the constitutional convention is not the road to separatism. I think the failure to implement it may well be the beginning of a road to separatism, because as I said, I do not think the thing could be put back together again.

**Mr. Harris:** I think you have given me the best reason I have heard to ratify this. If all the things that many say are wrong with it prove to be wrong, then the worst that is going to happen is that we will not be able to live with that and Quebec will separate.

**Hon. Mr. Robertson:** Yes, that could happen.

**Mr. Harris:** It will happen quicker if we—

**Hon. Mr. Robertson:** I think the more likely thing that will happen, if I may say so, is that you would have these constitutional conferences that come up chewing away at the problem. If the case can be proven, if these arguments are right, you probably will get agreement on a change. If the case cannot be proven, you will not. But I do not think that would be nearly as bad as the consequences of rejection.

**Mr. Harris:** The thing that scares me—I am talking great generalities now, which we have not done very much in this committee. Usually we are specific: “What does this mean? What does it mean to me or my group?” One of the generalities that worries me is that, let us say neither route leads to Quebec separating—which is, let us face it, why we are here—but it leads to a view of federalism of the lowest common denominator. It is the lowest common denominator theory that Quebec views a federalism with a much weaker federal government and a much stronger provincial government than, perhaps, other provinces do. What has happened, it appears to me, is that other provinces have said we have found a way, finally—as you have said, since 1964—but to a large extent we have found the way by saying: “OK, we will accept your view of federalism. We want all the same powers that you want. That is the only way we seem to be able to agree to it.” Is that price too much to pay?

**Hon. Mr. Robertson:** If I may say, I think I agree with a lot of what you have said. Although this has been, to a fair degree, the process, however, I think one has to see it in perspective. Suppose one goes back to the beginning of the constitutional discussions in 1968. I take this series from 1968. Many people think they were started by Mr. Trudeau. They were not. They were started by Mr. Pearson in February 1968. From 1968 on to 1976, when the Parti québécois came into power, there was every kind of government that one could think about in Quebec: Liberal, Union Nationale, and finally Parti québécois. What was sought was very much more extensive than what is involved in the constitutional accord of 1987.

The intention of those governments well before the Parti québécois came into power was a substantial change in the distribution of powers in sections 91 and 92 of the British North America Act. The present accord represents no change whatever in the distribution of powers in sections 91 and 92. Governments of Quebec before the Parti québécois very much wanted to have the capacity for Quebec to enter into international agreements and treaties. There is nothing of that kind in here.

So there has been over the years, and it culminated in a sense in Mr. Bourassa's proposals of 1986, a rejection or a stonewalling or a sidetracking of all sorts of very extensive Quebec demands. What we have here is a very moderate residual. So it is not as if the process has been one of conceding everything Quebec, even the federalist governments of Quebec, wanted. I think it is terribly important to keep that perspective of where we have been over all these years, and what has not been agreed to, in mind.

**Mr. Offer:** You indicated from your experience that, apart from this accord, there has never been lasting unanimity. You alluded to two examples where there was at one time, but it fell apart. You then went on to a second stage where you said that the accord itself has, in your opinion, some problems, some warts—I think those were your words—but those could be addressed some time in the future.

I would like to get an idea from your experience, having expressed the fact that there has not been unanimity apart from this particular accord, and having expressed the fact that there are some concerns which you have—without getting into them; we have also heard some of those concerns—is there a different spirit, a different sense, with respect to the whole constitutional reform, with respect to the attainment of unanimity which would have to be achieved which was not there in the past but might be just evolving for the future?

1550

**Hon. Mr. Robertson:** I suppose it is possible that this could well be, that there will be a somewhat different climate. I think that somewhat different climate would be assisted if you got unanimity once, on the accord that is now there. I guess the other thing that might be different is that if one had the accord accepted and then was working on the specifics, a specific thing, one or two or three, it might be easier to get complete agreement than if one is working on a number of things.



There was, I guess, unanimous agreement on the insertion in the 1982 Constitution of the commitment to a series of conferences on Indian-aboriginal rights. I think that was unanimous. What I was referring to was the broader things in the Constitution.

It may well be that if one is tackling in the future the impact of, say the charter on particular rights, it may be you will get unanimous consent and can get agreement. I would be going too far, and I would not have intended it to be going this far, if my suggestion were taken to mean that I think unanimity is going to be impossible on specifics. Unanimity on specifics can perhaps be achieved.

**Mr. Offer:** Carrying on with respect to the specifics, and without getting into the specifics but dealing with process, my feeling is that since the Charter of Rights and what has happened to this point in time more people every day are becoming much more aware of how the charter and judicial decisions really do impact upon their lives, which was not there in the past. The numbers are continually growing in terms of people saying, "I not only want but I demand to be part of this process." I am talking about looking at the specifics.

Realizing that Meech Lake for some does have drawbacks, does raise concerns, and we have heard many of them, can you suggest a process which would bring into this particular process in a very real sense the concerns that people have with respect to a specific item? It does not matter which item.

**Hon. Mr. Robertson:** I think one can certainly envisage possibilities of doing that and I think it becomes easier to the extent that one would be dealing with specifics.

What was done in, I guess 1980-81—I am losing my dates a little bit—on the charter itself was, as you may recall, to have sessions of a joint committee of the Senate and the House of Commons televised, in which there was discussion of the charter. It went on over a good many weeks, if not months. It was carried pretty well nationally, I think, on the parliamentary channel and it got a great deal of reaction from all sorts of people. I think it did provide the kind of sense of participation you are referring to.

I would see no reason there could not be done in some fashion either that or the equivalent of that, if one had some consideration of modification of the Constitution in respect of the impact this particular thing has on women's rights, on francophone rights outside Quebec, where I gather there is a sensitivity, and English-

speaking rights within Quebec. I can see the possibility of segmental concentration and publicized discussion on these things.

**Mr. Breagh:** You are probably one of the best people in the country to talk about how we do this. I think it is not unfair to say that the process so far has been a very private, men's club kind of process, where if they think about it afterwards, they tell you what they did. One of the things we would have to say is that that is the end of this process as we know it. I do not think these 11 men could go back to Meech Lake again to do this.

I do not know whether it is a consensus among all of our committee members here, but to be blunt, I do not share a lot of the concerns about Meech Lake that people have brought. It is not that their concerns are not valid, but I think they are things that can be corrected. I think there are flaws in the system that need to be worked on, and I can envisage this kind of national network on a number of issues in this decade around women's issues, around poverty interest groups, around a number of things. These are people who are now used to dealing with governments as they prepare constitutional change. They know how to phrase amendments; they know about seeking consensus; they know how to appear in front of a parliamentary committee like this and present a brief; they know who to have on their boards; they know how to connect with governments at all levels.

One of the things we are struggling with a bit is that I do not think it is unfair to say that the process as we have known it so far is legit, legal and all those things but cannot be done any more, that it must change. Are we being wildly impractical to suggest things such as that each of our legislatures has a committee that is designated to do public hearings of this kind? We had a proposal this morning for a national joint committee of people from all of the assemblies in Canada to meet on a fairly regular basis to see if you can get a public identification of how the changes might occur, what is a priority and how to do it.

The end of the process would be that perhaps our first ministers would meet at a conference and they would say, "We've had hearings on all of these things; this is the wording that's been approved in our chamber and we will match that up with you." The end of the process is that the first ministers meet and ratify an agreement, and all of the public hearings and all of the access by the interest groups and the public at large is provided well in advance.

To me, anyway, one of the things that has caused a problem here is the way this was done. There is all this suspicion and there is questioning of intent and motives. Everybody else seems to know who double-dealt whom and who were the villains in the piece and who was unwilling to change. I do not know any of these things, but groups from across the country are reporting in to us that they know who did the dirty deed. They are not always willing to name that evil person in public, but the inference is clear in brief after brief that somebody did us in.

It would have been much better for them to do this in some forum in public, at least the ratification process. None of us is fool enough to say that this is all going to happen in public. If you put 85 people in a room and they have to discuss something and come to a conclusion, sooner or later some of them are going to gravitate to the back of the room or the men's can or the hall, and there they will decide, "Well, let's try it this way for a while and see how that flies."

I would be interested in your comments now about how we go about it from this point on.

**Hon. Mr. Robertson:** I do not think I would want to try to give a prescription for that, but I do have a few comments on the questions you have raised.

I have given a good deal of thought to this, because one could not be involved in all those constitutional discussions without wondering whether there was not a better way of doing some of these things. I was not involved in the final ones, but I was up to 1979.

Two things seem to me to be relevant. One is, and I agree with you, that the whole thing cannot be done the way it was done, totally in private. On the other hand, the other side of it is that it cannot all be done in public; that is impossible. There is no way that negotiation can take place in public on constitutions, far less than on most other things, and most important things you cannot negotiate in public anyway.

It seems to me that what has to be done is to recognize a distinction between public education and presentation of arguments and considerations on the one hand, which should be public, I think—and it would not be too hard to have a public process, whether in each province and the federal government or a single one; it could be done in some fashion or other—but to distinguish that part, the presentation, the argument and the public education that goes with it being public; and then to recognize as legitimate and proper,

privacy for the final discussion and decision-making process.

**1600**

I think we have suffered, if I may say so, from a failure to sort out those two different parts of the process, and I think there are two very different parts. We have failed to meet the argument against the kind of total privacy that you have been talking about. But I think we have also failed to really provide for the legitimacy of private, closed-door negotiation and decision.

The results of failure to recognize the legitimacy of that is that first ministers have had to resort to a lot of hole-in-the-corner processes which are very inefficient and dangerous. I have seen all sorts of constitutional conferences where the discussions took place in front of television. There is no way in which negotiations were going to be concluded in front of the television screen so the first ministers adjourned for lunch. The lunch lasted for four hours and they sat around lunch tables. They did not have any place to put their papers, they did not have any advisers to say, "Oh yes, sir, that is very right, but you are forgetting so-and-so," and they arrived at a decision that was dangerously flawed because of the fact they did it in an inefficient way. You would not really decide on the sale of a property in as inefficient a way.

In 1981, it is well known that a lot of the final negotiation took place in the hotel and at night, again in totally inefficient circumstances. I think the Meech Lake agreement was worked out in very inefficient circumstances. If it had been worked out in better circumstances, some of the warts that are there would not be there. I think there are processes that could be worked out which would meet the points you mention, with which I completely agree.

**Mr. Breagh:** May I just conclude with this? I do not deny for a minute that every once in a while the folks are going to go away and shoot pool for an evening and, over the course of the game, discuss what they are going to do the next day.

**Miss Roberts:** With or without a coach?

**Mr. Breagh:** With or without a coach.

**Mr. Chairman:** I should explain there was some pool playing going on earlier.

**Mr. Breagh:** The distinction I choose to make would be that if, for example, tomorrow morning the federal Parliament said, as parliaments used to do, "We'll close the doors. There'll be no television cameras and no reporters in here. There will be no Hansard kept.



We will meet in private. And when we have reached our decision, we will publish that—maybe,” I think the people of Canada would say: “What the hell is going on here? That is not the way you do it any more. Perhaps you used to. Maybe at one time, when the King was banging on the door with a sword in one hand and a mace in the other, there was a reason for parliaments to do that, but there is not any more.”

I would not deny anyone the right to private consultation, I would not deny them the right to discuss it in whatever way they see fit, but I do think that the agenda going in must be known. Part of the problem we have with Meech Lake is not that any of the component parts are brand-new, radical thoughts, but no one thought they would get fitted the way they were. A lot of people are very uncomfortable with the way they were kind of jammed together. They are not quite sure that it is wrong, but they are suspicious of the way the decision was made, uncomfortable with the way the wording was done and just unhappy with the process at large.

I argue that it is someone's job, probably ours frankly, to begin to try to define a new and different process that allows people who have to make these decisions enough latitude, as I think any reasonable Canadian would give us, in terms of discussing what you do and negotiating back and forth, because I agree that the negotiating part is probably not very well conducted in public. I do not know of any labour union that is happy about negotiating in front of the cameras. You want to get behind closed doors and trade as evenly as you can.

But I do think the agenda must be public. There really cannot be surprises like this popping out the other end of this.

In some way, to some degree the decision-making process itself must have public visibility to it, because time and time again I find groups in here really questioning the motives of the people who probably thought they were up all night doing the job they were elected to do. People are accusing them of all kinds of evil deeds. I am not sure they are all guilty.

**Hon. Mr. Robertson:** I see the points that you have made. I would urge that if the committee is making recommendations on process—and I think it would be highly desirable if the committee were so to do—the recognized right of privacy has to include the right to do the negotiating that can see tradeoffs and that can see agreement arrived at, because this is going to be done, in private. It will not happen in public. If it is public, it will not occur. If it is not recognized

as something that can legitimately take place in private, it will take place in the kind of private ways that we have seen in the past, which are inefficient and which lead in many cases, I think, to wrong results.

What could be done, it seems to me, is to have a considerable open stage and process that involves all the presentation of the issues, the argument of different positions and that sort of thing until, in a sense, one had identified what the problems are, what some of the basic positions are, what the considerations are and that sort of thing. One could then have the private stage of negotiation, after which one could have a public stage of presentation and explanation of the results.

In the case of Meech Lake, I guess one did not have either the first part or the last part. You simply had the central part, the private part. But I do think there has to be recognition of the legitimacy of privacy for negotiation and decision-making or else we will be in a very dangerous situation—dangerous because mistakes will be made.

In the Meech Lake accord, as far as I am concerned, the worst wart is the agreement that has been made with respect to the Senate. No change in the Senate was sought by Quebec. This is something that was introduced elsewhere. Why do I think it is the worst thing? Not because nomination of the senators will be in the hands of the provincial governments rather than the federal government in future—if anything, that is an improvement. But it is not Senate reform.

Senate reform in the future is going to require unanimity. That means that all the provinces have to agree. The provincial governments will now have the patronage that is involved in Senate appointments. Put those two together, the requirement of unanimity and the provincial patronage, which perhaps Ontario does not want—Mr. Peterson may not want it, but lots will want it—and it is going to be very hard to get unanimity. If we have an unreformed Senate exercising the total powers that the Senate has, we can be in a very difficult situation in this country in making government work.

I think that would not have happened if you had had a legitimate process of private discussion with people present. Officials can help. They can say to the boss up in front, “Yes, that looks very interesting, but this is what will happen and this is what is wrong with it.”

I know. I have been in that role for many years myself. Even Mr. Trudeau did not think of everything.

**Mr. Breugh:** Listen, do not feel bad. I made a mistake myself.

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**Mr. Cordiano:** I just want to deal with the situation as it presents itself now, following on your comments about what may result in Quebec if Meech Lake is rejected anywhere in the country by any of the legislatures. I do not want to comment on what is happening at the present time. No one really knows what will happen in a couple of provinces, but our attention has been drawn to some interesting proposals about companion resolutions.

**Hon. Mr. Robertson:** Companion resolutions?

**Mr. Cordiano:** Yes, resolutions by the native peoples. Correct me if I am wrong, Mr. Chairman. I think we had that yesterday. We have also had a couple of other interesting proposals which would not upset the accord itself but would go along with it. I am not sure if you are familiar with those.

**Hon. Mr. Robertson:** No, I am not.

**Mr. Cordiano:** We are trying to come to grips with that possibility for passage of the accord with respect to the recommendations we might be making.

**Hon. Mr. Robertson:** Would the idea be that a Legislature might approve the accord but, in approving it, say that it thinks attention should be given to X, Y and Z?

**Mr. Cordiano:** Yes, something like that. I think the details have been spelled out in the briefs we had yesterday, and we could certainly approach it that way. I think that was the intention of the native groups. Also, there has been some suggestion that we have a reference to the courts prior to the passage of the accord.

**Hon. Mr. Robertson:** A reference to the courts on what?

**Mr. Cordiano:** On the charter or, in fact, the whole accord with respect to the charter and its supremacy.

The reason I bring these things up is to know, from your point of view, understanding what the situation is in Quebec, if this were to take place, could we withstand the pressure that might build in Quebec?

**Hon. Mr. Robertson:** If I understand rightly what the idea is on these companion resolutions or recommendations, if my understanding is correct, they would not be modifications of the agreement on the accord but would leave agreement on the accord to take place with a

suggestion that immediate attention must be given to various things. I do not see any problem in that at all. It seems to me that this might be a very reasonable way to meet some of these concerns.

On the second one, again if I understood rightly, I would think that any reference to the courts would almost certainly result in a side-tracking of the accord and probably be just about as destructive as anything else one can think of because, in the first place, you would have to get agreement on the wording for a reference to the court. That would be extremely difficult. I would be astonished if all governments agreed that there should be a reference to the court. I do not think the government of Quebec would agree.

**Mr. Cordiano:** OK. What if individuals were to do that? Certainly, there are time elements involved, but if one government were to do that, what you are suggesting is that you have to have or should have agreement from other governments right across the country—is that what you are saying?—before there is a reference put to the court.

**Hon. Mr. Robertson:** A provincial government, unless I am wrong, cannot itself make a reference to the Supreme Court of Canada.

**Mr. Cordiano:** No, but in the spirit of having everyone agree that, indeed, this is going to be the actual case that is brought before the courts so that there is not an argument after the court makes its comments.

**Hon. Mr. Robertson:** Quite.

**Mr. Cordiano:** Where one group might say: "No, no. It was not this particular case we were interested in, it was another." How do we get to that kind of consensus, where everyone is going to agree?

**Hon. Mr. Robertson:** Really, in a sense, that is what I was in a way trying to think through. This is a new idea to me. I have not heard this before. It seems to me that if there were to be a reference to the Supreme Court, it can be made constitutionally by the government of Canada. There is no way I know of, constitutionally, for it to be made by governments collectively; but the government of Canada could, of course, seek to get the agreement of the 10 provincial governments to a reference. In order to do that, there would have to be agreement on the wording of the reference and, of course, on the principle of the reference.

I do not think for a moment the government of Quebec would agree to participate in a reference. I think it would see this simply as a devious way



to derail the constitutional accord without having the guts to say, "We're derailing it."

**Mr. Cordiano:** In effect, what you are telling me is that if you could not get agreement, and virtually all 10 provinces would have to agree with the federal government on the wording and the intent of what you are trying to do, there is no way you could have a reference.

**Hon. Mr. Robertson:** I do not think so.

**Mr. McGuinty:** I thank Mr. Robertson for his statement, which I think was very forthright, very clear and, I think, very simplified, and I do not use that term in a pejorative sense. I would like very much to be able to accept it. What bothers me a bit about the statement of Mr. Robertson is the imagery. Maybe I am being hypersensitive, as an old English teacher, but your image of the warts—a wart is something which, when on the body, is rather painless, cosmetic. It does not really interfere substantially with the wellbeing of the body.

I have heard concerns expressed by many people, francophones outside Quebec and English people within—in a brief this morning, for example, from the Protestant school board—and in very convincing and very compelling statements from the native peoples, from women and others about the phrase "distinct society," and others expressing concerns about whether federal programs of the kind we have had in the past, medicare, for example, could necessarily be brought about in the future. These, I think, are considered by many people with whom I have spoken as a very substantial part of the fabric of the system we have developed.

The interpretation of a significant number of people is that, notwithstanding the legitimate concerns we have about the implications of the accord in these areas, are we going to give in at this time in terms of ratifying the accord because of what is considered intimidation, if you will, at the hands of the province of Quebec?

My point is that to say simply that we should ratify because of the alternative is like Mr. Trudeau's reply to, "How does it feel to be 60?" The alternative is not nearly as attractive.

I find it difficult to find that convincing. I would like to, very much. It certainly would solve my own mental turmoil as I grapple with this and try to weigh and consider and evaluate and respond and feel for the considered views of those who have come before this committee. That is the problem I have, Mr. Robertson.

**Hon. Mr. Robertson:** Well, sir, under your eloquent criticism of my imagery about warts, I will change it. I do not know what I will change it

to, but clearly warts is not a satisfactory image in connection with it. Though I change the statement, I do find a number of defects in the Meech Lake accord, a number of things I do not like and a number of things I wish were not there or wish were somewhat different. Having said all that, as I said in my opening statement, believing as I do that amendment at this stage, before acceptance of the accord, is not possible, therefore, if I have to choose between acceptance of the 1987 accord, with these defects I think are there, or rejection, I opt strongly for acceptance of the accord.

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I do not myself see this at all as a matter of giving in to Quebec or being intimidated by Quebec. As I said, one has to see this whole thing in perspective, and if one sees the process, starting from, say 1968 when the constitutional discussions started up to the present time, the five points put forward by Quebec in 1986 are extremely modest in relation to the aspirations put forward even by federalist governments, not by *indépendantiste* governments. These are very, very modest, so one should not think this is a sort of blackmail demand. I think it is the most reasonable set of propositions one could possibly hope to get from a government of Quebec.

The other thing that I think has to be seen in perspective is what does that 1982 Constitution look like in Quebec. This is not really understood sufficiently in the rest of Canada. It looks like an agreement by English-speaking governments. The federal government was led by Mr. Trudeau, and Mr. Chrétien was the Minister of Justice, I recognize that; but they are really exceptions of federal persuasion, and as far as Quebec is concerned the total provincial interest was quite different from what these people were representing at Ottawa.

They see it really as an agreement that was worked out, arrived at in the dark of the moon, without any Quebec representation that was provincial in character present, and finally accepted by all the other governments except Quebec. It was Quebec that had started the whole process and sought some change, so you had agreement, not only minus Quebec but against Quebec.

You cannot expect the government of Quebec or the province of Quebec to be content with a Constitution like that. It has to change. I think in that double perspective of the serious deficiency of the 1982 Constitution from the point of view of Quebec, and the modesty of the five points in relation to what has been sought at various

stages, it is not a question of intimidation at all. I think it is a very reasonable set of requests.

**Mr. Chairman:** Mr. Robertson, on behalf of the committee, I want to thank you very much for having shared not only your experience but also your thoughts. I suppose after one retires, one of the nice things is that you do not have to carry a lot of the baggage from those days and can let a lot of these problems and issues float around. I think it then becomes very helpful for us to share in those reflections. I think you have been very frank in setting out the options as you see them and explaining the reasons for your choices. That has been very, very helpful for us this afternoon, and we thank you.

**Hon. Mr. Robertson:** Thank you very much, Mr. Chairman. One of the nice things about retirement is that you can say what you want.

**Mr. Chairman:** I was going to call on Mr. Breagh's brother to join us at the table.

**Mr. Breagh:** We have a new accord.

**Mr. Chairman:** Yes, this is the accord of former Liberals and present New Democrats perhaps.

I now call upon our next witness, Jean-Luc Pepin, if you would be good enough to come to the table. I should say, sir, that we enjoyed having you as a member of the committee. Just so those reading Hansard 25 years from now will understand what we were talking about, you had joined us at the table for part of our deliberations.

**Mr. Breagh:** And you notice where he joined us.

**Hon. Mr. Pepin:** There was lots of room there.

**Mr. Chairman:** There will be no more comments from our colleague, I am sure.

I was reflecting, Mr. Pepin, and it struck me when you came in the room. I think it was March, it might have been February, but it was February or March 1964. I was somewhat younger and green behind the ears and was sitting on a stage at the University of Western Ontario with a Western student by the name of David Peterson and yourself. You had come down. It was a student meeting. I was there from the University of Toronto. We were supposed to be involved in some kind of debate. I cannot remember whether it was Peterson or myself who was supposed to be the separatist and who was the federalist, and then you had to comment on that after.

You were very generous, because I do not know what the quality of debate was like, but I remember that you gave a very impassioned defence of federalism, of the role of French

Canadians in Ottawa. I think it is probably useful for us to remember that before 1965 there were many French Canadians arguing for a strong French presence in Ottawa, and not only arguing but getting elected and going out to do it. In welcoming you here this afternoon I put that on the record, that there is at least somebody around this table who was influenced very strongly by you many years ago. I am particularly delighted to welcome you to the committee this afternoon and to share your thoughts on the Meech Lake accord.

When we were talking on the telephone, I had suggested as well that your experience, particularly with the commission that you and former Premier John Robarts led in the late 1970s and some of the conclusions you came to in that report and perhaps their relation as well to Meech Lake, would be useful and helpful to the committee. We are very pleased you could be here and look forward to your remarks, and we will follow it up with questions.

#### HONOURABLE JEAN-LUC PEPIN

**Hon. Mr. Pepin:** Mr. Beer, I will not be diverted by the flattery. I came here to say three things, really, and I intend to say them as strongly and as clearly as I can.

First, I would like to say what I am going to say. I am going to talk, first, very rapidly—one second; as a matter of fact, I have already done it—about the importance of reading; and I am talking not to you, obviously, I am talking to the population. I made a number of speeches on Meech Lake in recent months. I can take pride in having made a speech on Meech Lake before Meech Lake took place, because I talked about what was coming ahead and I anticipated some of it.

I have made a number of speeches where I simply got up and read the text. It has a very comforting effect. I may have a certain way of reading it, which might help, but I just want to say—somebody was asking a question of Mr. Robertson a moment ago about what could be done to help the case. One of them is to simply help the people to get acquainted with it. I think, I hope, I wish that some day, having done a series on TV Ontario on how the federal government works, somebody is going to let me explain how Meech Lake works, because that would be very useful, do you not think? That is the first point I wanted to make. It is good to have read it.

The second point I want to make is that I have already made a number of analyses, of commentaries, somewhat academic, on the subject. I



came with my music and I am going to leave it with you because I do not want to repeat everything I have said before.

Je vais évidemment parler en français puisque c'est ma façon d'applaudir aux progrès qui se font en Ontario au point de vue du bilinguisme.

J'ai cinq documents avec moi. Le premier, c'est une petite étude que j'ai faite en classe sur l'idée de dualité. Vous allez remarquer que je parle de dualité quand je veux signifier le fait de l'existence des deux groupes, francophone et anglophone, et je parle de dualisme quand je veux exprimer la théorie attachée à ce fait-là.

Alors, je parle de la dualité et j'affirme ce que tout le monde sait, à savoir qu'elle est fondée essentiellement sur deux choses: premièrement, sur la réalité sociale, économique et politique et, deuxièmement, sur l'histoire. J'ai une série de citations ici d'historiens, surtout anglophones, qui mentionnent cette réalité de la dualité. Ce que je cherche à souligner, c'est que les mots ont changé depuis 125 ans, depuis 1867, mais la réalité de cette dualité, elle a été exprimée dans toute la littérature politique du Canada depuis le commencement.

On a employé des mots différents. On a dit «two races», qui était vraiment tout à fait détestable. On a changé ça, on disait parfois «two nationalities, two nations». Après ça on a dit «two founding peoples»; ça ne marchait pas très bien. Alors, aujourd'hui on dit «duality» et on espère que ça va aller, mais on ne sait pas, peut-être que ça ne marchera pas ça non plus, et peut-être que dans dix ans on aurait un autre mot pour essayer d'exprimer cette réalité des deux groupements, francophone et anglophone. Mais la réalité de la dualité, elle est là depuis fort longtemps. La réalité également de la spécificité québécoise, elle est là depuis toujours, et j'ai des textes ici qui font allusion à ça.

Comme on va vous demander dans votre rapport d'expliquer ce que veut dire «société distincte», j'ai apporté deux pages de mon texte de classe, l'une sur le mot «communauté» et l'autre sur le mot «société». J'essaie d'exprimer ici la différence entre «communauté» et «société». J'insiste sur le fait qu'une communauté est un facteur psychologique, la conscience de l'existence, dans un groupe de personnes, de facteurs communs, de spécificités communes, si vous voulez; tandis que le mot «société» se réfère à quelque chose de beaucoup plus structurel. Quand une communauté a un nombre suffisant, en quantité et en qualité, de structures — structures économiques, structures sociales et structures politiques — on dit qu'elle constitue

une société. Quand elle en a un nombre suffisant, on dit qu'elle constitue une société distincte. Alors, j'essaie de vous aider à expliquer le terme «société distincte», qui n'est pas facile et qui n'est évidemment pas expliqué dans l'accord du lac Meech. Il n'y a rien, il n'y a aucune définition de ces mots-là dans l'accord du lac Meech. Voilà pour mon deuxième document.

Mon troisième document, et je vais aussi vite que je le peux, ce sont des notes de classe encore une fois — vous voyez que j'enseigne — sur la préparation de l'accord du lac Meech. Il s'appelle: «Courte étude comparative de récents documents constitutionnels». J'ai écrit ça pour mes étudiants au mois de février 1987 et je ne fais que citer des textes de M. Trudeau, des textes de M. Lévesque et de M. Johnson, des textes de M. Bourassa, les cinq points de Bourassa, des textes de M. Mulroney, des textes de M. Donald Macdonald, des textes de M. Turner, des textes de M. Broadbent et des textes de M. Peterson. J'ai écrit ça au mois de février, et je conclus:

«À moins qu'on insiste pour obtenir des définitions claires,» — if somebody wants clear definitions, we are in trouble — «et d'en connaître à l'avance les conséquences politiques, les mots “Québec société distincte,” (je ne pense pas qu'il soit nécessaire de dire en quoi, d'ajouter le “comme foyer principal des francophones du Canada” qui naturellement déplaît du moins à l'Ontario et au Nouveau-Brunswick), et les mots “dualité canadienne” (linguistique, culturelle, juridique) (je doute qu'on aille plus loin), ces mots seront acceptés en fin de compte et remplaceront ceux de “spécificité du Québec” et “égalité des peuples fondateurs” mais n'en seront pas différents.»

Alors, on a remplacé par des mots qui étaient plus acceptables, des mots qui l'étaient beaucoup moins, mais la réalité n'a pas changé pour autant. Voilà le petit essai du mois de février.

Le quatrième document, c'est un discours que j'ai donné devant le Conseil pour l'unité canadienne à Québec, le 22 mai 1987. Là, j'insiste sur deux choses. J'insiste, comme l'a fait M. Robertson il y a quelques minutes, sur la continuité dans ces débats depuis 1969, et depuis 1982 en particulier. Ma thèse, c'est que Meech a été préparé, de 1982 à 1987, remarquablement bien et que les différentes pièces ont été édifiées avant l'accord lui-même. Quand je suis d'une humeur partisane, je dis que tout ce que M. Mulroney a eu à faire, c'était de fournir une table et des chaises, puisque les idées avaient été préparées bien avant que la conférence du lac Meech ait eu lieu. Alors là, je donne des citations pour tout ça.

Je parle encore une fois de la dualité et de la spécificité québécoises et j'attaque, à la page huit, un des problèmes qui vous tourmentent, qui vous torturent j'imagine, celui des conséquences politiques de la reconnaissance de la spécificité québécoise, celui des conséquences politiques de la reconnaissance du caractère distinct de la société québécoise. Je dis ceci, c'est peut-être valable:

«Quelles conséquences "l'existence d'une société distincte québécoise" a-t-elle sur la vie politique canadienne? Rien de plus facile à démontrer. L'accord de Meech en donne en effet une illustration.»

La meilleure façon de montrer quelles sont les conséquences de la reconnaissance de la spécificité de la société québécoise, c'est de dire: Voilà, Meech est la conséquence de ça, et tout ce qui peut arriver dans l'avenir, ce sont d'autres Meeches.

«C'est en effet au nom de cette spécificité, de ses responsabilités dans la promotion des intérêts du secteur francophone de la dualité dont 85 pour cent vivent sur son territoire, que le gouvernement du Québec a demandé et obtenu un pouvoir élargi en matière d'immigration, un veto de fait sur les modifications à apporter aux institutions centrales de la fédération, un droit élargi de se retirer avec compensation de tout transfert de compétence des législatures provinciales au Parlement fédéral et de tout nouveau programme à frais partagés.»

Alors, Meech est une merveilleuse illustration des effets de la reconnaissance de la spécificité québécoise. J'insiste sur ça puisqu'il y a un tas de gens qui me disent: «Oui, mais quel effet est-ce que ça va avoir?» Bien, le même effet que ça a eu, c'est aussi simple que ça.

D'ailleurs, il n'y a pas que la constitution écrite qui rentre dans ces choses-là: «Le "caractère distinct" du Québec explique aussi, par exemple, la pratique établie, depuis Pearson», et surtout depuis Trudeau, je pense, «de l'égalité numérique et qualitative, en termes de l'importance des ministères qu'ils occupent, entre les ministres québécois et ontariens dans le Cabinet fédéral.» Il y a quelques mois, il y a avait douze ministres du Québec dans le gouvernement de Mulroney contre dix ministres ontariens. Le principe de l'égalité est un principe à peu près accepté. Je ne dis pas que c'est une convention de la constitution, mais c'est un usage. Présentement, il y a douze Ontariens et dix Québécois, mais évidemment, Bissonnette et d'autres sont passés par là. Alors, on ne peut pas prendre ça pour une situation anormale, mais

j'essaie d'expliquer comment cette reconnaissance de la spécificité québécoise a des conséquences dans la vie politique fédérale.

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Un autre exemple que j'en donne, c'est la représentation québécoise dans la fonction publique fédérale. Il y a une forte préoccupation dans la fonction publique fédérale pour que le nombre d'employés du gouvernement fédéral dans la fonction publique soit en rapport avec ce que représente la population québécoise dans l'ensemble du Canada. Ce sont là des conséquences de la spécificité québécoise.

Mon cinquième texte, c'est la même chose en anglais. Voilà mon deuxième point.

Mon troisième point maintenant. C'est pour vous dire que le contenu de Meech-Langevin, comme je l'appelle, comme vous l'appellez, si important qu'il soit, n'est pas tout. Il y a autre chose dans une constitution, autre chose dans la vie constitutionnelle d'un pays que les documents écrits. Un professeur français que j'aime beaucoup, qui s'appelle Georges Burdeau, dit qu'il y a dans une constitution des éléments para-, infra- et supraconstitutionnels qu'on ne peut pas mettre dans une constitution, et c'est beaucoup plus ces éléments infra-, supra- et paraconstitutionnels qui causent les difficultés que le contenu de la constitution lui-même, que le contenu de l'accord Meech lui-même.

Je vais tâcher de m'expliquer. Il est bien évident, premièrement, que la conception qu'on se fait du Canada influence considérablement l'idée qu'on se fait de l'accord du lac Meech. Si on pense qu'il y a au Canada déjà suffisamment et même trop de diversité et même trop de décentralisation, il est bien évident qu'on ne sera pas particulièrement sympathique à l'accord du lac Meech.

Le point de vue qu'on a sur l'accord du lac Meech dépend considérablement aussi, deuxièmement, de la conception du fédéralisme qu'on a, et ça, c'est très profond. Il y a des gens qui me disent — et je ne sais pas si c'est vrai et ça ne m'intéresse pas de savoir si c'est vrai — que le rapport de la commission Pepin-Robarts aurait influencé passablement de gens, plus chez les fonctionnaires que chez les politiciens qui ont travaillé à l'accord du lac Meech.

Pourquoi? C'est parce qu'il y a, dans le rapport Pepin-Robarts, une certaine attitude, une certaine conception du fédéralisme qui leur plaisait. Vous savez quelle est cette conception-là. Le fédéralisme de la commission Pepin-Robarts était beaucoup plus un fédéralisme d'égalité, beaucoup plus un fédéralisme sensible au régio-



nalisme, à la dualité, et beaucoup plus sympathique à l'égard de l'asymétrie que ne l'était le fédéralisme qui dominait au Canada depuis plusieurs années. Ce genre de fédéralisme plaît à certaines personnes et, comme par hasard, il plaisait particulièrement au nouveau premier ministre du Canada, et c'est pour ça qu'il a eu son influence.

Ce qu'on pense de l'accord du lac Meech dépend aussi beaucoup de l'opinion qu'on a de la politique. Il est évident que l'accord du lac Meech appartient à un point de vue beaucoup plus conciliant que le point de vue qui prévalait antérieurement. Quand je dis ça, ne pensez pas que je pense à M. Trudeau. Non, je ne pense pas particulièrement à M. Trudeau, je pense à l'atmosphère générale qui existait au Canada avant récemment, c'est-à-dire une atmosphère beaucoup plus sympathique à la confrontation.

Pour ma part, j'ai même de la sympathie pour M. Trudeau quand il se plaint du manque de coopération, quand il se plaint du manque de sympathie de la part des autres premiers ministres dans la période où il a été premier ministre du Canada. Je le comprends très bien. Il a manifesté une patience énorme quand il a attendu 1982 pour obtenir ce qu'il pensait avoir eu en 1971. Il a fallu de sa part, à mon avis, une patience considérable. Alors, quand il se plaint de l'esprit de confrontation qui existait dans son temps, je pense qu'il n'a pas tort du tout. Mais heureusement, à cause d'un nombre considérable de facteurs, nous sommes passés dans une période marquée par beaucoup moins de confrontations; et, par conséquent, l'accord du lac Meech, qui vient en 1987, bénéficie de cette atmosphère beaucoup plus relaxe que celle de la période qui l'a précédé.

L'impression, l'opinion qu'on a de l'accord du lac Meech dépend aussi de l'opinion qu'on a des politiciens qui nous gouvernent présentement. Je souris en disant ça; j'espère que vous m'avez compris. Je ne veux pas discuter pour savoir si les politiciens de la génération à laquelle j'appartiens, étaient ou sont supérieurs aux politiciens de la génération à laquelle vous appartenez. Tout ce que je vais dire, c'est qu'il y a un jugement à prononcer. Pour ma part, je ne crois pas que les politiciens de la génération actuelle soient inférieurs aux politiciens de ma génération. Par conséquent, si je vois devant moi un texte auquel dix premiers ministres, peut-être un de moins maintenant, ont acquiescé, onze avec le premier ministre fédéral, un texte dont un grand nombre de politiciens, un grand nombre de fonctionnaires, un grand nombre de constitutionnalistes ont dit du bien, eh bien, j'ai du respect pour un

document qui a reçu un tel niveau de consentement. Je pense que ça, c'est très important à souligner.

Finalement, l'opinion qu'on a de l'accord du lac Meech dépend également, comme l'a dit mon prédécesseur à cette table aujourd'hui, des priorités qu'on a. Pour ma part, il me semblait que la grande priorité de 1987, de 1988 et des années subséquentes, c'était de s'assurer que le Québec accepterait l'accord de 1982; cela me semblait fondamental, et les premiers ministres des autres provinces l'ont accepté également. Par conséquent, dans la masse de choses, de points politiques qui méritent une analyse constitutionnelle au Canada, le retour du Québec à la table constitutionnelle était prioritaire et il fallait s'occuper de ça d'abord. C'est ce que M. Bourassa a fait valoir devant les autres ministres des provinces et c'est pourquoi ils se sont entendus sur cela.

Si vous me demandez ce qui me préoccupe le plus dans ce débat-là, c'est de voir qu'il y a un grand nombre de personnes qui ne semblent pas encore avoir compris que l'exercice du lac Meech, c'était essentiellement un exercice québécois et que, par conséquent, on ne pouvait pas, à lac Meech, résoudre tous les problèmes concernant les peuples autochtones, concernant les femmes, concernant la division du pouvoir, concernant la réforme du Sénat, etc. Ce qu'il m'apparaît intéressant d'observer, c'est qu'il y a bien des gens qui discutent encore de choses qui, d'après eux, auraient dû être incluses dans l'exercice du lac Meech et qui ne l'ont pas été. Pourquoi? Parce que l'exercice du lac Meech était essentiellement un exercice pour résoudre les problèmes du Québec.

Alors, voilà ce que j'avais à vous dire en introduction. Merci.

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**M. le Président:** Merci beaucoup. Nous allons accepter vos documents pour les étudier comme des étudiants.

**L'hon. M. Pepin:** J'ai apporté aussi un article très intéressant que vous ne connaissez peut-être pas. C'est un article du Devoir du 15 mai 1987 qui montre comment le concept de dualité s'est précisé depuis la commission Laurendeau-Dunton. C'est un bon article aussi.

**M. le Président:** Nous avons un problème en tant que comité, en ce sens que les gens qui viennent devant nous et qui nous expliquent les problèmes qu'ils constatent dans l'accord du lac Meech — qu'ils aient raison ou non — surtout parmi les groupes minoritaires, que ce soient les femmes des minorités linguistiques, pensent

quand même qu'ils ont vraiment perdu quelque chose. Jusqu'à un certain point, une autre réalité existe, et du point de vue politique, nous devons aborder cette question. S'il y a beaucoup de gens qui pensent qu'ils ont perdu quelque chose et qu'il y a des problèmes majeurs et graves dans l'accord du lac Meech, l'accord manquerait donc une certaine légitimité.

À votre point de vue, que peut-on dire à ces gens ou que peut-on faire comme comité pour essayer de leur montrer, d'abord, qu'on a entendu leur point de vue et qu'il y a un processus pour voir si le problème est réel; et, si le problème est réel, qu'il y aura une façon d'améliorer la situation, de faire des changements? Je pense que c'est une chose de dire: «Écoutez, lisez l'accord, il ne dit pas ce que vous pensez qu'il dit». Mais il y a un autre aspect, et c'est un aspect politique: S'il y a assez de gens qui pensent qu'il y a un problème, alors nous, les politiciens, nous devons essayer de trouver une façon soit de changer leur point de vue ou au moins de trouver une solution.

**L'hon. M. Pepin:** Il y a deux catégories de personnes qui peuvent se penser lésées par l'accord du lac Meech. La première catégorie, ce sont ceux qui auraient voulu soulever des problèmes constitutionnels et qui n'ont pas pu le faire parce que l'accord du lac Meech ne portait que sur des problèmes qui étaient d'un intérêt particulier pour le Québec. Alors, à ceux-là, vraiment il n'y a pas d'autre chose à dire que leur tour viendra un jour, que l'accord du lac Meech ne porte pas sur le sujet qu'ils voulaient soulever. Cela, c'est la première partie. La deuxième catégorie, ce sont ceux qui pensent que l'accord du lac Meech a un effet indirect sur eux. Cela, c'est évidemment la catégorie la plus sérieuse.

**M. le Président:** Ou même direct, selon eux.

**L'hon. M. Pepin:** Donnez-moi des cas particuliers.

**M. le Président:** Je parle des femmes et des questions par rapport à la Charte.

**L'hon. M. Pepin:** Les femmes. Alors, c'est indirect, les femmes. Les femmes peuvent dire, d'autres peuvent dire que la reconnaissance de la spécificité ou du caractère distinct de la société québécoise aura sur eux certains effets, dans le sens que la spécificité québécoise, le caractère distinct du Québec pourra primer, pourra avoir la primauté, la priorité, à l'occasion, sur la Charte des droits et libertés ou sur la division des pouvoirs.

Alors là, c'est beaucoup plus difficile. Là, il faut expliquer tout ce qu'il y a à expliquer,

c'est-à-dire que, premièrement, il est dit dans l'accord lui-même, au paragraphe 2(4), que l'accord du lac Meech n'a pas d'effet sur la division des pouvoirs. Il faut dire que l'accord du lac Meech — je ne me souviens plus dans quel article — stipule que l'accord n'a pas d'effet sur la situation des immigrants, sur la situation des autochtones, sur la situation des communautés multiculturelles, etc.; bien qu'on s'interroge encore, comme vous le savez, pour savoir si le caractère distinct du Québec pourra avoir son influence dans d'autres secteurs qui ne sont pas indiqués dans la Charte des droits et libertés, ce sur quoi certains auteurs disent non et d'autres disent, comme M. Robertson le dit, qu'il faudra attendre les décisions des cours pour le savoir.

Mais il me semble que la meilleure réponse à donner, c'est que l'accord du lac Meech ne traite qu'un certain nombre de sujets et que des progrès ont été réalisés dans ces sujets-là; que ce n'est pas la fin du monde, l'effort de révision constitutionnelle va se poursuivre; que c'est merveilleux, pour une fois dans l'histoire du Canada, de ne pas avoir attendu une crise pour s'occuper de questions constitutionnelles; qu'on semble évoluer, on semble faire des progrès, et que tout ça est dans la ligne qui, finalement, sera avantageuse pour les intérêts qu'il défend.

**M. Villeneuve:** Merci bien, Monsieur Pepin, pour une présentation qui, étant donné votre vaste expérience, nous ouvre vraiment les yeux.

La spécificité du Québec: D'après vous, vous ne voyez aucune réduction des pouvoirs fédéraux avec une telle classification?

**L'hon. M. Pepin:** D'abord, je veux simplement souligner que le mot «spécificité» est une invention des penseurs. Le mot «spécificité» n'est pas, je tiens à le souligner, dans l'accord du lac Meech. L'accord du lac Meech décrit une situation, il ne théorise pas sur une situation. La théorie vient après la description.

Quelqu'un m'a expliqué comment cette chose-là s'était passée, et son explication portait tout simplement sur le fait qu'il était plus facile de convaincre des gens par une description de la situation que par l'invocation de certains principes comme dualité, spécificité, etc. Alors, ce que fait l'accord du lac Meech, c'est de reconnaître, de prendre une photographie d'une situation et non pas d'en faire une théorie.

La spécificité du Québec, ou le caractère distinct de la société québécoise, a eu, aura et devrait avoir des conséquences constitutionnelles. Je vous en donnais tantôt un exemple. Pourquoi le Québec a-t-il, depuis X années — je ne dis pas un droit, c'est trop fort peut-être —



autant de ministres dans le Cabinet fédéral que l'Ontario, malgré la différence assez considérable de population? Pourquoi? Est-ce que les Québécois sont plus ceci ou plus cela que les Ontariens? Sûrement pas.

Pourquoi a-t-on cette situation? Bah! C'est parce que historiquement, depuis 125 ans, la situation québécoise a été particulière, a été spéciale, a été différente. Si vous avez lu le rapport du comité de la Chambre des communes et du Sénat, vous saurez que les anglophones, ceux de votre parti en particulier, sont venus dire au comité: «Nous avons toujours admis que le Québec avait un caractère distinct, que ce n'était pas "une province nécessairement comme les autres", pas supérieure mais différente des autres». Alors, ce caractère distinct de la société québécoise a déjà donné lieu à des différences et puis va continuer à donner lieu à des différences.

Pourquoi le Québec a-t-il trois juges à la Cour suprême par droit statutaire alors que l'Ontario, qui a une plus grande population que le Québec, n'a pas un droit semblable? C'est par coutume que l'Ontario en a trois. Un beau jour, il y aura un ministre de la Justice qui dira: «Ah! Mais cette coutume-là, il faudrait peut-être un jour la débattre pour savoir si les Maritimes n'auraient pas droit à plus de juges à la Cour suprême». Pourquoi ça? Encore une fois, c'est le caractère particulier du Québec, la seule province qui utilise le droit français. Pendant longtemps on voulait tout simplement s'assurer que le droit français avait suffisamment de représentants à la Cour suprême pour qu'on puisse l'interpréter d'une façon valable. Oh, vous le savez très bien, peut-être que de moins en moins de questions de droit civil québécois vont devant la Cour suprême du Canada. Est-ce que ça veut dire qu'on va écarter les trois juges du Québec? Sûrement pas. Encore une fois, ça fait partie de ce caractère particulier du Québec.

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Je pourrais multiplier des exemples comme ça. Comment se fait-il qu'on est particulièrement sensible à s'assurer qu'il y aura une représentation quantitative et qualitative québécoise au sein de la fonction publique? Pourquoi ça? C'est une préoccupation de sensibilité qui relève du caractère un peu particulier du Québec. Je pourrais continuer à énumérer les cas.

**M. Villeneuve:** Le chef du Parti libéral, le premier ministre québécois, et M. Parizeau, eux deux entre autres, semblent nous dire que la spécificité québécoise va leur donner des pouvoirs considérablement plus élevés qu'ils n'en

avaient dans le passé. Est-ce que ce fait-là n'enlève pas du poids au fédéralisme?

**L'hon. M. Pepin:** Ce qui préoccupe le plus M. Trudeau, si vous avez lu son témoignage, c'est que personne ne peut lui dire d'une façon claire et précise les conséquences qu'aura la reconnaissance de la spécificité québécoise. Alors, il y a des gens d'un côté qui disent: «Oh, vous savez, les conséquences sont minimes». Il y a des gens de l'autre côté, M. Bourassa et M. Rémillard en tête, qui disent: «Les conséquences pourraient être considérables».

Ce que je dis, moi, est peut-être une réponse valable; vous en jugerez vous-même. Les conséquences dans le passé ont été importantes, assez considérables, les exemples que je vous ai donnés ne sont pas des exemples négligeables, et je pense qu'ils vont le demeurer. Mais de là à dire que, à la suite de la reconnaissance de la spécificité du Québec, il va y avoir un changement considérable dans la constitution, à mon avis, ce n'est pas évident, loin de là. Pourquoi ça? C'est parce que — encore une fois je le répète — la spécificité québécoise n'est pas une invention de l'accord du lac Meech, pas du tout. Ce n'est qu'une reconnaissance formelle de quelque chose qui existe depuis très longtemps et que les historiens du Canada et les hommes politiques du Canada reconnaissent depuis 125 ans.

Alors, on ne peut pas s'attendre que la simple reconnaissance en droit écrit d'une chose qui l'était presque en convention pourra du jour au lendemain apporter un changement énorme dans la constitution du pays.

Voyez-vous, il faut souligner encore une fois que la constitution d'un pays n'est pas seulement une addition de textes écrits; la constitution d'un pays est beaucoup plus large que ça. La constitution du Canada, en particulier, est faite d'interprétations judiciaires, est faite de conventions constitutionnelles, est faite d'accords entre les exécutifs, est faite de toutes sortes de choses autres que du droit écrit. Alors, le simple fait de prendre une convention, une interprétation de la constitution qui était, jusqu'à ce moment-là, conventionnelle et de la mettre dans un texte écrit, n'apporte pas pour autant une transformation extraordinaire de la constitution réelle de ce pays-là.

**M. Villeneuve:** Alors, en deux mots, vous ne voyez aucune réduction du pouvoir fédéral?

**L'hon. M. Pepin:** Je ne peux voir ni une réduction ni une augmentation. Je vois simplement la continuation d'une chose qui existe depuis 125 ans.

Je veux être plus précis que ça. Si vous me demandez quel effet cela va avoir, je vous ai déjà répondu il y a dix minutes que le meilleur exemple de l'effet que ça va avoir, c'est l'effet que ça a eu. Le meilleur exemple de l'effet que pourra avoir la reconnaissance de la spécificité québécoise, c'est l'accord du lac Meech. Pourquoi ça? Parce que M. Bourassa, répondant à cette spécificité, a dit: Il y a des choses que le Québec doit avoir, des choses, par exemple, au chapitre du retrait compensé; au chapitre du veto sur l'amendement des organes du gouvernement central; au chapitre de l'immigration. Il y a certaines choses que la spécificité québécoise commande comme politique au gouvernement du Québec, et on les réclame: «Si l'ensemble du Canada ne partage pas ce point de vue, dommage. Nous espérons qu'ils vont le partager; mais s'ils ne partagent pas ce point de vue, nous allons faire valoir que le Québec devrait avoir ces pouvoirs-là et nous allons demander des espèces de compensations pour y arriver.»

Voyez-vous, la beauté de l'accord du lac Meech, c'est que les cinq desiderata de M. Bourassa — et M. Robertson disait tantôt combien il pensait qu'ils étaient modestes, qu'ils étaient moins immodérés — ces cinq desiderata de M. Bourassa ont été jugés acceptables par les autres provinces du Canada, ce qui a fait l'accord. S'ils n'avaient pas été jugés acceptables, on aurait eu un problème.

Il y a un texte que vous devez lire. C'est le texte du sénateur Tremblay à la fin du plaidoyer de M. Trudeau devant le comité fédéral, dans lequel le sénateur Tremblay dit qu'il comprenait très bien que M. Trudeau soit vexé du sort qu'on lui a fait, et il l'a répété plusieurs fois, puisque du temps de M. Trudeau il semblait continuellement y avoir une enchère: Quand on avait quelque chose, on voulait autre chose. Et M. Tremblay de souligner que la différence est que dans le cas de l'accord du lac Meech, M. Bourassa s'est présenté avec cinq demandes assez précises et qui ont eu l'heur d'être jugées acceptables par la majorité des premiers ministres. Ce faisant, M. Bourassa a créé un petit peu un précédent dans le mode de négociation constitutionnelle au Canada.

**M. Allen:** Nous sommes très privilégiés d'être en votre présence et d'avoir votre opinion, Monsieur Pepin, sur cette question très importante en ce moment. Je voudrais vous poser une question à l'égard des francophones hors Québec. On aurait pensé que, de tous les groupes canadiens qui auraient aimé avoir un document qui souligne la spécificité du Québec et augmente

certaines des pouvoirs de cette province pour promouvoir la société distincte, les francophones hors Québec auraient le plus aimé un tel document. Mais, comme nous le savons, les organismes des francophones hors Québec ont déclaré leur opposition à l'accord du lac Meech. Avez-vous un commentaire sur cette situation remarquable?

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**L'hon. M. Pepin:** Je ne suis pas conscient que les francophones hors Québec soient aussi fortement en opposition à l'accord du lac Meech que vous semblez vouloir me le dire; je ne suis pas aussi bien renseigné ou aussi mal renseigné que vous sur ce sujet-là. De toute façon, le sort des francophones hors Québec dépend de bien d'autres choses que de l'accord du lac Meech, et ceux qui pensent que l'accord du lac Meech n'est pas favorable à leurs intérêts devraient d'abord me le dire, ou le dire à la population en général. Voulez-vous me dire, vous, sur quoi ils pensent que l'accord du lac Meech leur est défavorable, aux francophones hors Québec?

**M. Allen:** Le problème, semble-t-il, est dans l'article 2, où on parle de la préservation des minorités, de la dualité des provinces autre que le Québec et, pour les Québécois, du pouvoir du gouvernement de promouvoir et non simplement de préserver la société distincte. Donc, les anglophones du Québec, par exemple, verraient peut-être la promotion de leurs intérêts par le pouvoir de promotion de cette société distincte et de la dualité de cette société, mais pour les francophones, par exemple en Ontario, il y aurait seulement la préservation. Il semble que nous nous retrouvions dans un musée, dans le passé; c'est le langage de quelques groupes qui ont présenté des mémoires devant notre comité. C'est cette terminologie de «préservation» contre «promotion».

**L'hon. M. Pepin:** Alors ça, c'est un peu complexe, mais laissez-moi vous donner ma réponse. La première chose, c'est qu'il faut savoir pourquoi il y a une différence entre «préserver» et «promouvoir». Quand il s'agit de la dualité canadienne, le texte de l'accord du lac Meech dit «préserver».

**M. Morin:** Excusez-moi, c'est «protéger».

**L'hon. M. Pepin:** «Protéger». Excusez-moi.

**M. le Président:** Et on souligne la différence entre le mot français et le mot anglais dans ce sens.

**L'hon. M. Pepin:** Alors, «protéger». Ce qu'on m'a raconté à moi, c'est que certaines



provinces ne voulaient pas ajouter le mot «promouvoir», contrairement à ce qui arrive dans le cas de la spécificité ou du caractère distinct du Québec, où le gouvernement et le Parlement du Québec ont la responsabilité de protéger et de promouvoir, seuls. Mais ça n'a rien à voir avec le Québec, ça. Ce sont les provinces qui n'ont pas voulu être tenues responsables de promouvoir les intérêts des francophones chez eux qui ont donné au Québec une raison également de ne pas vouloir promouvoir les intérêts des anglophones chez lui. Ils se sont entendus comme larrons en foire pour ne pas aller plus loin que de protéger. Mais je ne vois pas pourquoi les francophones hors Québec accuseraient le Québec de ce qui s'est passé dans ce cas-là.

**M. le Président:** Non, ils n'accusent pas le Québec.

**L'hon. M. Pepin:** Ils accusent qui alors?

**M. le Président:** Je ne sais pas, mais dans la lettre de la Fédération des francophones hors Québec... Êtes-vous au courant de la lettre de la Fédération?

**L'hon. M. Pepin:** Non, je ne suis pas au courant.

**M. le Président:** On a envoyé une lettre aux premiers ministres, et que ce soit l'Alberta ou la Colombie britannique, peu importe, la Fédération dit clairement qu'il faut changer l'accord en ajoutant le mot «promouvoir», faute de quoi ils n'accepteront pas l'accord. Ils ont dit aux premiers ministres qu'ils ne donnaient plus leur appui à cet accord, sans ce changement.

**L'hon. M. Pepin:** D'abord, il faudrait discuter de la différence entre «protéger» et... est-ce que c'est «protéger»?

**M. le Président:** En français, c'est «protéger».

Interjections.

**L'hon. M. Pepin:** Ce que je voulais dire comme deuxième point, c'est qu'il est intéressant de voir que dans le projet de loi C-72, qui porte sur les langues officielles, l'expression «promouvoir» les deux langues officielles s'y trouve. Ce qui est assez intéressant à constater, c'est que dans un texte purement fédéral, le gouvernement fédéral n'hésite pas à utiliser le mot «promouvoir», ce qui laisse facilement croire que ce sont certaines provinces qui n'ont pas voulu l'utiliser au plan de l'accord du lac Meech.

**M. le Président:** Je pense quand même que la question, c'est que les minorités linguistiques

hors Québec, dans le passé, ont toujours accepté de faire des arrangements pour assurer au Québec sa place à l'intérieur du Canada. Cela, c'était très important, c'était même la chose la plus importante. Mais ce qu'on voit ces jours-ci — qu'on parle d'Alliance Québec, de l'Association canadienne-française de l'Ontario, de la Société des Acadiens du Nouveau-Brunswick ou de la Fédération des francophones hors Québec — c'est que maintenant ils nous disent: «Peu importe ce que ça donne au Québec globalement au point de vue de la famille canadienne, il faut ajouter à l'accord le mot «promouvoir», ou bien nous, les minorités, pensons clairement que nous avons perdu quelque chose de si important que nous ne pouvons plus accepter l'accord».

**L'hon. M. Pepin:** Vous n'aurez aucune difficulté avec moi. Je suis, de toute évidence, en faveur de «protéger» et de «promouvoir»...

**M. le Président:** D'accord.

**L'hon. M. Pepin:** ...et de la dualité et de la spécificité québécoise. D'ailleurs, je comprends fort mal que la protection et la promotion du caractère distinct du Québec soient uniquement la tâche de l'Assemblée nationale et du gouvernement québécois. Cela devrait être aussi la tâche du gouvernement fédéral. Non seulement ça devrait l'être, mais c'est présentement la tâche du gouvernement fédéral que de promouvoir ce caractère distinct du Québec, à preuve les exemples que je vous ai donnés. Il est évident qu'un meilleur texte utiliserait «protéger» et «promouvoir», autant sur le plan de la dualité que sur le plan du caractère distinct du Québec; c'est évident.

Mais comme l'a dit mon prédécesseur, si on veut réécrire ce texte-là jusqu'au jour où il soit parfait, les chances sont énormes qu'on n'y arrive jamais. Alors, il faut, je pense, accepter au point de départ que le texte ne sera pas parfait et qu'on passera le reste de nos jours à essayer de l'améliorer, avec d'autres textes qui ne sont pas parfaits non plus.

**M. Morin:** Je voudrais vous dire encore une fois que je suis très heureux de voir un autre de mes bons commettants comparaître devant notre comité. Monsieur Pepin, je vous remercie énormément d'être ici cet après-midi. J'ai eu plusieurs expériences dans ma vie, mais je n'ai jamais eu l'expérience de vous avoir comme professeur et je m'aperçois que j'ai manqué beaucoup. Alors, peut-être qu'après ma carrière d'homme politique, j'aurai l'occasion de vous écouter ou d'aller vous entendre à l'Université d'Ottawa.

Ma question est la suivante. Nous siégeons depuis cinq semaines déjà et la question la plus fréquente, je crois, que nous entendons, c'est sur le processus: la façon dont l'entente a été créée, la façon dont les premiers ministres se sont réunis, sans consultation, sans laissez savoir à qui que ce soit le contenu de l'agenda. Et là, tout à coup, par un miracle et par le Saint-Esprit descendu, on a dit tout simplement: «Voici, ça c'est l'accord, ça c'est l'entente». Dans les rencontres des prochaines rondes, croyez-vous que le processus que nous employons présentement serait le bon processus, ou encore recommandez-vous un autre processus?

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**L'hon. M. Pepin:** Merci bien de vos compliments.

La nécessité d'information dans une société n'est jamais atteinte, en ce sens que toujours, quand des gestes sont posés, quand des documents sont écrits, 95 pour cent de la population se plaint de ce qu'elle n'était pas au courant.

Pour les besoins de la circonstance, je vais prendre la thèse tout à fait opposée à la vôtre. Il n'y avait pas de raison valable, quand on regarde les discussions qui ont eu lieu depuis 1982, pour qu'au moins les gens qui suivaient ces choses-là n'aient pas prévu ce qui allait arriver. Je vous en ai donné un exemple dans mon cas.

M. Lévesque, en 1985, est venu voir le gouvernement fédéral et a fait toute une série de propositions; ça, c'est appelé le «beau geste», en 1985. En 1986, M. Bourassa a présenté ses cinq points, il en a fait littéralement la parade; M. Rémiillard a fait je ne sais combien de discours sur ça. Tous les chefs politiques, M. Turner en tête, ont réagi aux suggestions de M. Bourassa. Le Parti libéral, lors de sa convention à Montréal, a adopté des résolutions sur les recommandations de M. Bourassa. Le Nouveau Parti démocratique a fait la même chose. Cela a été dans les journaux littéralement pendant deux ans.

Alors, le processus d'information a joué considérablement, mais il y a ce phénomène de base: C'est que les gens ne s'intéressent à ces choses-là que in extremis, à la dernière minute, ou quand ça devient réalité; et alors, les gens se plaignent qu'ils n'aient pas été informés.

Non, il y a eu énormément d'information dans les deux années qui ont précédé l'accord du lac Meech. Alors, M. Mulroney a fait des discours, M. Turner a fait des discours, M. Broadbent a fait des discours, tout le monde a fait des discours; mais ça ne semble pas avoir mis la population du Canada au défi à ce moment-là.

C'est seulement quand ça a été fait que les gens se sont posé la question: «Mais d'où ça vient, tout ça?»

**M. Morin:** Pour l'avenir?

**L'hon. M. Pepin:** Moi, je suis un ardent défenseur, un ardent promoteur de l'information politique de la population. A l'Institut de recherches politiques, nous allons publier un petit volume dans quelques jours qui porte justement sur l'éducation politique des Canadiens. Au Canada, les partis politiques autant que les gouvernements, les universités autant que les écoles secondaires et primaires, et les groupes de pression, etc., n'ont pas suffisamment assumé leur responsabilité dans ce domaine-là.

Ce qui me frappe le plus, c'est que la population, quand on lui présente ces choses-là, est fortement intéressée. J'ai coprésidé, comme vous le savez, la commission sur l'unité, et nous n'avions pas de problème à attirer la population. Les gens venaient et participaient vraiment à ces discussions-là. J'ai fait, il y a quelques mois, une série d'émissions à TVOntario sur le fonctionnement du gouvernement fédéral; ça a eu pas mal de popularité. J'ai fait, il y a trois semaines à la Canadian Broadcasting Corp. anglaise, une émission, une espèce de visite guidée de la Chambre des communes. Ils n'ont jamais eu autant de téléphones sur un sujet d'actualité politique.

Alors, les gens sont vraiment intéressés, mais il faut qu'on essaie de leur présenter la matière première d'une façon assez intéressante. Encore une fois, je pense qu'il est bien dommage que, sur un problème aussi difficile que celui de l'accord du lac Meech, il n'y ait pas eu une série de trois ou quatre émissions à la télévision anglaise, à la télévision française, à la radio, etc., expliquant ces choses-là à la population.

**M. Morin:** Je voudrais seulement clarifier, Monsieur Pepin, la question soulevée par mon collègue M. Allen et le Président tout à l'heure au sujet de la position prise par l'Association canadienne-française de l'Ontario. Si j'ai bien compris, ils ont dit, eux, tout simplement que le Québec a la responsabilité de protéger et de promouvoir le caractère distinct. Eux prétendent, si j'ai bien compris, non seulement que ça devrait être la responsabilité du Québec mais que ça devrait être aussi la responsabilité des autres provinces et du pays en entier que de le promouvoir et de le protéger.

**L'hon. M. Pepin:** Quoi?

**M. Morin:** Le caractère d'expression française. Autrement dit...



**L'hon. M. Pepin:** La dualité.

**M. Morin:** La dualité? Pas tout à fait, non. Ce n'est pas la dualité. Ce qu'on dit bien, c'est la promotion de la société distincte. Alors, eux disent tout simplement: Si le Québec protège les intérêts des minorités en protégeant et en promouvant, alors la même responsabilité devrait être donnée aussi à l'Ontario, la même responsabilité devrait exister aussi dans les autres provinces. C'est bien ça. C'est ce qu'ils ont présenté. C'est là qu'ils se choquent. Comment répondez-vous à ça?

**L'hon. M. Pepin:** J'ai déjà répondu.

**M. Morin:** Pas tout à fait.

**L'hon. M. Pepin:** Si. J'ai dit que j'étais tout à fait, 102 pour cent d'accord pour que le fédéral et les gouvernements des provinces protègent et fassent la promotion de la dualité canadienne, je suis tout à fait d'accord avec ça. Je pense qu'il est normal que les provinces du Canada n'aient pas à faire la protection et la promotion du caractère distinct du Québec.

**M. Morin:** Non, d'accord.

**L'hon. M. Pepin:** Alors, il est normal de laisser ça au Québec.

**M. Morin:** Oui.

**L'hon. M. Pepin:** Mais j'ai ajouté tantôt que je considérais normal que le gouvernement fédéral fasse la protection et la promotion du caractère distinct du Québec. Si un principe est suffisamment important pour être inclus dans la constitution, il est suffisamment important pour que le fédéral s'en mêle aussi. Alors, je trouve absolument incongru et inacceptable que seuls le le Parlement et le gouvernement du Québec aient la responsabilité du caractère distinct du Québec.

**M. Morin:** Là vous avez ajouté les provinces. Tout à l'heure vous avez dit seulement le Canada.

**L'hon. M. Pepin:** Ah non, je ne voulais pas dire cela. Je n'ai pas changé de position. Vous allez la retrouver, cette position-là, dans mon discours de Québec.

**M. Morin:** D'accord. Seulement une autre question, Monsieur le Président. Je m'excuse.

En anglais on dit «to preserve», en français on dit «protéger». «Preserve», à mon point de vue, veut dire tout simplement: «mettre quelque chose en boîte, la fermer, puis on le garde». «Protéger», à mon point de vue, ça veut dire: «Moi, je te protège, Noble. Tu as toute l'action que tu veux. Tu peux faire tout ce que tu veux. Si tu as des difficultés, je vais te protéger.» C'est ça que ça veut dire, «pro-

téger». «Preserve», ça veut dire: «Bien, d'accord. Tu gardes ce qu'il y a là, mais tu n'en auras pas plus». Je ne crois pas que ce soit ça dont on parle...

**L'hon. M. Pepin:** On parle là des choses les plus difficiles qui soient possibles au monde, ce sont les mots; il n'y a rien de plus difficile que les mots. Je peux faire une analyse littéraire pour montrer que «protéger» inclut «promouvoir», puisqu'on ne peut pas véritablement protéger une chose qu'on ne promeut pas, dans le sens que si une chose n'avance pas, elle recule. Notez que je peux faire toutes ces analyses-là et on n'en finira littéralement plus. On a expliqué tantôt le pourquoi de cette variation des mots dans l'accord du lac Meech. Tout ce qu'on peut dire, c'est qu'il est regrettable qu'ils n'aient pas suivi votre conseil, Monsieur Morin, que je fais mien.

**M. Morin:** Merci, Monsieur Pepin.

**M. le Président:** Alors, Monsieur Pepin, au nom du comité...

**L'hon. M. Pepin:** Pouvez-vous me permettre de dire une autre chose en finissant?

**M. le Président:** Oui, absolument.

**L'hon. M. Pepin:** Il y a un point sur lequel je veux dire trois ou quatre mots puisqu'il ne ressort pas suffisamment, et la preuve en est que personne ne m'en a parlé. Il y a bien des gens qui disent que le Québec sort triomphant de l'accord du lac Meech, et il y a du vrai là-dedans. M. Bourassa a fait cinq demandes et a obtenu gain de cause et même plus, de dire certains, sur les cinq demandes qu'il a faites. Il n'y a personne, du moins à ma connaissance, qui a souligné les concessions que M. Bourassa avait faites lors de l'accord du lac Meech. Alors, j'ai deux pages là-dessus et je vais vous les lire dans une minute. Je voulais simplement que les gens sachent que M. Bourassa a été conciliant.

## 1730

La première chose qu'il a concédée, c'est la primauté de la Charte canadienne des droits sur la charte québécoise, et c'est la législation québécoise. Lévesque n'avait pas accepté ça. Il y a bien des gens qui n'acceptent pas ça facilement puisque, ce faisant, le gouvernement du Québec accepte que la Charte des droits s'impose dans certains cas, même en matière provinciale. Cela, évidemment, c'est important et c'est comme ça que la Charte du Canada influe, disons par exemple, sur l'affichage et sur l'enseignement dans les écoles du Québec. C'est nettement l'acceptation par le Québec d'une juridiction sur ses propres affaires. C'est assez important pour

que ça vaille la peine d'être souligné. Il accepte en même temps la clause Canada, que vous connaissez; il accepte en même temps un tas de choses qui relèvent de la Charte.

Deuxièmement, M. Bourassa a renoncé à un veto spécial pour le Québec qu'il avait réclamé d'abord. Vous savez qu'au début M. Bourassa réclamait un veto spécial pour le Québec. Vous savez que M. Trudeau, à Victoria, avait offert un veto Québec à M. Bourassa. Finalement, M. Bourassa a renoncé à ça pour se contenter d'un veto comme celui de toutes les autres provinces. C'est vraiment assez important pour que ça vaille la peine d'être souligné.

M. Bourassa, troisièmement, juste pour en faire une nomenclature complète, n'a obtenu aucun changement aux droits en matière d'immigration. L'article sur l'immigration demeure essentiellement ce qu'il était depuis l'accord Cullen-Couture de 1978, essentiellement la même chose; il n'y a pas de changement véritable. Si vous me dites qu'il y a un changement, je vais me battre contre vous pour souligner qu'il y a une affirmation extraordinairement sérieuse et dure de la prépondérance du gouvernement fédéral en matière d'immigration dans le paragraphe 95B.(2).

Quatrièmement, il n'y a pas de véritable limitation du pouvoir de dépenser dans l'accord du lac Meech; véritablement, il n'y en a pas. Et si vous voulez vous battre contre moi sur ça, je vais même insister pour dire qu'il y a un renforcement du pouvoir fédéral de dépenser en matière provinciale. En d'autres termes, il y avait eu un débat sur ces choses-là, devant les cours de justice en particulier, et l'accord du lac Meech, à ce point de vue-là, dit: «Voilà, il pourra intervenir, mais il y aura un droit de retrait, etc.». Certains peuvent penser qu'il y a même un renforcement du pouvoir du gouvernement fédéral en cette matière-là.

Cinquièmement, le droit de présenter des listes de noms pour la nomination des juges et des sénateurs n'est pas véritablement le commencement de la balkanisation du Canada. Ceux qui ont

dit ça charriaient, exagéraient singulièrement. Si vous êtes ministre provincial de la Justice ou si vous êtes premier ministre, je vais insister auprès de vous jusqu'au jour où j'aurai reçu de vous des listes où il y aura au moins un nom de personne acceptable. C'est moi qui vais commander la situation, ce n'est pas vous. Voyons! Il faut être adulte quand même. Cela, c'est le cinquième changement, la cinquième chose que M. Bourassa a acceptée.

Finalement, il a accepté également des limitations formelles aux effets possibles du caractère distinct de la société québécoise. Il y a dans l'accord du lac Meech toute une série d'acceptations de limitations formelles.

Alors, M. Bourassa sort grandi de l'accord du lac Meech, mais je vous suggère le plus simplement mais le plus fortement que je peux qu'il a fait, lui aussi, des concessions intéressantes et importantes, et tout ça souligne la nécessité d'obtenir cet accord-là, qui est de ne pas tout remettre en discussion.

Je veux finir très positivement. Il est très rare au Canada que nous ayons l'intelligence de nous préoccuper de questions constitutionnelles avant qu'il y ait une crise. Alors, pour une fois qu'on s'intéresse à obtenir des changements de la constitution sans qu'il y ait de crise, ne provoquons pas une crise pour pouvoir s'occuper de la constitution.

**M. le Président:** Merci beaucoup. On ne va certainement pas se battre contre vous sur ces six points, surtout en fin d'après-midi. Nous aimerions vous remercier infiniment d'être venu cet après-midi et d'avoir partagé avec nous non seulement vos notes de classe mais surtout vos idées, vos impressions de l'accord. Nous vous remercions et nous allons certainement étudier ces idées durant la rédaction de notre rapport.

Just before adjourning, the clerk has a couple of administrative notes. Perhaps we can go in camera and go through those.

The committee continued in camera at 5:36 p.m.



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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Chairman:** Beer, Charles (York North L)

**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Substitutions:**

McGuinty, Dalton J. (Ottawa South L) for Mr. Elliot

Villeneuve, Noble (Stormont, Dundas and Glengarry PC) for Mr. Eves

**Clerk:** Deller, Deborah

**Staff:**

Bedford, David, Research Officer, Legislative Research Service

**Witnesses:**

**Individual Presentation:**

Holtby, John

**From the Quebec Association of Protestant School Boards:**

Simms, Dr. John, President

Irving, Colin, Legal Counsel

**From the Human Rights Institute of Canada:**

Ritchie, Dr. Marguerite E., President

Feige, Karl, First Vice-President

**From the Assembly of First Nations:**

Norton, Chief Joseph, Grand Chief, Mohawk Council of Kahnawake

Two-Rivers, Chief Billy, Councillor, Mohawk Council of Kahnawake

Montour, Chief Eugene, Councillor, Mohawk Council of Kahnawake

**Individual Presentation:**

McRae, Ken

**From the National Anti-Poverty Organization:**

Echenberg, Havi, Executive Director

**Individual Presentations:**

Robertson, Hon. Gordon, Fellow in Residence, Institute for Research on Public Policy

Pepin, Hon. Jean-Luc, Fellow in Residence, Institute for Research on Public Policy











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No. C-18

# **Hansard**

## **Official Report of Debates**

### **Legislative Assembly of Ontario**

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Thursday, March 24, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, March 24, 1988

The committee met at 9:28 a.m. in the Capital Hall of the Ottawa Congress Centre.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin today's session, I would like to welcome our first witness, John Amagoalik, and with him is Michael McGoldrick. As I set out, Mr. Amagoalik, if you would like to proceed and make your presentation, we will then follow that up with a period of questions. Welcome to the hearings this morning.

### INUIT COMMITTEE ON NATIONAL ISSUES

**Mr. Amagoalik:** Thank you. My name is John Amagoalik. I am the co-chairman of the Inuit Committee on National Issues, which is the constitutional arm of our national organization. I am appearing before this committee because I just happened to be in town on other business. I do appreciate the committee taking time to hear from us.

The Inuit Committee on National Issues represents the Inuit of Labrador, northern Quebec and the Northwest Territories on constitutional issues. I pointed out that I just happened to be in town. The government of Canada has cut off our funding as of Canada Day this summer, so we do not have any resources to prepare for hearings and to lobby different premiers across the country.

I want to demonstrate to this committee just how deeply felt some of our feelings are on the Meech Lake accord and the whole constitutional process in general. To demonstrate that depth of feeling, I want to quote Zebedee Nungak, who is the co-chairman of this committee, in a speech he made at the Canadian art resources conference after the 1987 first ministers' conference and also the Meech Lake accord.

He said: "I would like to start by giving my impression of the premiers and the Prime Minister congratulating themselves after the marathon negotiations on the Meech Lake accord, followed by the Prime Minister going on national television and, with all due emotion, saying that Canada is whole again. We have a saying in Inuktitut which describes my impres-

sion of those honourable gentlemen. Roughly translated, it means 'great shameless liars,' great shameless liars for proclaiming that Canada is one again when they know it is not, because the aboriginal peoples are still excluded from the comfortable little deal they have made at Meech Lake."

He also said, when asked what is going to happen next or what could happen next, "The Prime Minister's assurance that he will call another conference when he deems it appropriate is, to us, an empty gesture."

It has become quite clear to us that the federal government has written off the aboriginal constitutional process in an effort to win the support of some western provinces for the Meech Lake accord. If anyone doubts this, consider that the federal government tells us to seek a consensus among all parties for an amendment and then promptly cuts off all our funding.

It also explains why a meeting between the three federal ministers responsible for the aboriginal constitutional process and the four aboriginal leaders, which was scheduled to take place last December, was postponed to early January, then to late January and then until February. After all this, the meeting was promised for absolutely no later than mid-March. As unbelievable as it may sound, the meeting has yet to take place and probably never will, under the current ministers.

The federal government has done a very good job of gutting the aboriginal constitutional process. It has done such a good job that ICNI has no travel money, no staff, no offices, no phones, no organization to speak of. Our political mandate continues and this is why I am here today. However, I hope you will understand our situation. Limited resources means that my presentation is not up to standard and that I am not as prepared as I would like to be.

I should also acknowledge that Ontario has always been one of the more supportive provinces in terms of our efforts at the constitutional table. I said that ICNI enjoyed a good relationship with Ontario and this continued throughout the Meech Lake process. Attorney General Ian Scott was in personal telephone contact with our office even while the first ministers were meeting in the Langevin Block, but despite his good efforts our worst fears came to pass.

In a letter to ICNI last June, Premier David Peterson stated that the Meech Lake accord actually advances the cause of aboriginal rights within the context of constitutional reform. On this point he is wrong. The Meech Lake accord clearly sets out an ongoing process for constitutional reform in Canada. It clearly sets out an agenda which includes Senate reform, fisheries and other matters to be agreed upon. It is equally clear that aboriginal issues will not be one of the matters to be agreed upon at a later date.

I would like to remind the select committee that Premier Don Getty went out of his way to state on the public record that if the 1987 first ministers' conference on aboriginal matters had succeeded in entrenching self-government rights, he would have given serious consideration to pulling Alberta out of Confederation.

ICNI sent a short telex to Mr. Peterson and a few other sympathetic premiers on the eve of the Langevin Block meeting that asked why the Meech Lake accord conspicuously ignores aboriginal matters as an outstanding constitutional issue. The telex made it clear that such an omission, coming after the failure of the 1987 March first ministers' conference, would spell the end of the aboriginal constitutional process. We also specifically warned the premiers that the wording of the Meech Lake accord indicates that matters not identified in the constitutional reform agenda would not be constitutional issues until first ministers later decide that they are.

We met with McKnight, Hnatyshyn and Senator Murray last summer. At that time, we made proposals on the ongoing process of aboriginal constitutional matters. They told us that they would respond to our proposal by the end of summer. We never heard from them. A meeting was arranged between ourselves and Senator Murray in, I believe, September or October. More reasons were found to cancel that meeting. Further efforts were made to have a multilateral sort of meeting with the three ministers and the four aboriginal leaders in December. The government of Canada, with some help from the bureaucracy, has very conveniently found reasons for the meeting not to take place.

We are now convinced that the government of Canada does not want the aboriginal issue to be on the national agenda down the stretch towards the national election. That is very clear to us now and we have to turn to provinces like Ontario, which has been very understanding right from the beginning, to make sure that the aboriginal issue does not get lost, because it is unfinished

business and will continue to be a sore point in aboriginal and government relations until it is resolved. That is all I have to say at this time. I would be happy to try to answer some questions.

**0940**

**Mr. Chairman:** Thank you very much for your presentation. I add that we are grateful you were able to come this morning. I know we were scurrying back and forth, but we really appreciate the fact that you were here and could join us this morning. We will begin our questioning with Mr. McGuinty, and then Mr. Breaugh.

**Mr. McGuinty:** A number of people have made the point that one of the reasons for the accord is to placate Quebec, if you will, or to satisfy the legitimate aspirations of Quebec. I think yours is the first statement I have heard to the effect that the western provinces have a kind of vested interest in the accord. I had never heard before that Premier Getty made that kind of extreme statement about separatism on the basis of the possibility of not ratifying the accord. Could you elaborate for me what the motive is of the western provinces, notably Alberta, for being so opposed to the aboriginal rights implications of the accord?

**Mr. Amagoalik:** I cannot explain how Donald Getty thinks, but as I see it, the western provinces, Alberta and British Columbia in particular, have very large aboriginal populations. Some of those bands in the west do not have treaties and for this reason Alberta and British Columbia tend to be very—how shall I put it?—nervous about dealing with their aboriginal peoples. What may be a relatively small issue in a province such as Nova Scotia can be a very big issue in British Columbia because of the different status the Indian people have.

As far as my reference to Getty goes, I believe it was the Toronto Star that quoted him as saying those things.

**Mr. McGuinty:** What aspirations of the aboriginal people in Alberta could be construed as detracting from the wellbeing of the province of Alberta?

**Mr. Amagoalik:** I cannot really speak on behalf of the Indian people of Alberta. As I said earlier, I represent the Inuit of the Northwest Territories, northern Quebec and Labrador. Aboriginal politics in the west is much more controversial than it is in other parts of Canada, so I guess that is why the premiers from that region tend to be a bit more nervous.

**Mr. Breaugh:** I would like to pursue basically just a couple of things. One of the observations



many have made is that we are more than a little disappointed with the follow-up; if Meech Lake did not do all that many of us wanted it to do, we would have at least anticipated that the federal government, as perhaps the government agency in Canada with the lead responsibility, if you want to put it that way, should have been very active in pursuing how we bring the aboriginal groups in.

If we failed to do that during the Meech Lake agreement, it seemed obvious that this ought to be the next step. I heard the Prime Minister talk about the next round. Many of us had anticipated that we were, just prior to Meech Lake, at a point where some settlement, or at least some agreement on a process for settlement, in fact was near. That conference was a major disappointment to many of us.

I am more than disappointed to hear that things like meetings with ministers have not happened and that funding has not been extended. I would like to pursue that a bit. You seem to leave us with the impression this morning that they are basically drying up the funding and not participating in any kind of meaningful meeting process at all, hoping you will go away until after the next election. I cannot conceive of that happening, but how serious is the funding problem?

**Mr. Amagoalik:** To the Inuit, funding is a big problem. It is a problem to us in particular because we are a much smaller organization. The Assembly of First Nations which represents the status Indians of Canada, the Native Council of Canada which represents nonstatus and Metis, and also the Métis National Council are, compared to us, relatively large, have larger budgets and can absorb this loss, but we cannot. When we lost our constitutional funding, we could not absorb the loss and continue operating using other funds. We just could not do that, so the funding problem is a very serious one to us.

Another thing I want to make very clear to the committee is that the Inuit are not opposing Quebec's participation in the constitutional life of this country, but at the same time we do not want that to be done at our expense. If the Premier of Quebec wants to prove that what he has been saying in public—everybody keeps telling us that once Quebec is in, things will be much easier, that it will be easier to deal with the aboriginal issue. They keep telling us that, but they should prove it by doing something.

There are a number of ways the situation could be dealt with. First of all, the Meech Lake accord could be amended to include the aboriginal issue as one of the agenda items. If that is too risky, as

a lot of people are suggesting, the government of Canada can show some leadership by introducing another resolution re-establishing the process, with a first ministers' conference at the end of that process.

Another suggestion is that the Senate of Canada might introduce what they call a companion resolution or a stand-alone resolution dealing with aboriginal constitutional issues. That could be done, but as I indicated earlier, there does not seem to be any desire, or the will, on behalf of the government of Canada to do this. As far as we are concerned, we are filed away and they are not going to pull us out until after the next election.

**Mr. Breaugh:** One of the things I want to talk to you about a little bit is that the native council has put before us three of what it refers to as companion resolutions, which many of us find very attractive mechanisms for bringing the aboriginal people back on the agenda without threatening the Meech Lake accord itself. I take it that you have seen those and that you are generally in agreement with both the technique and the companion resolutions they have put forward.

**Mr. Amagoalik:** We have not dismissed that approach. We are willing to consider any and all efforts to re-establish the process and get us back to the table. The companion-resolution route is an interesting one and something that merits further study.

**Mr. Breaugh:** Without going on at any great length, there are many of us who really feel very strongly that it is the great shame of the nation that these original debts have never been met. We seem to have constantly abandoned aboriginal people. Every time we get close to an agreement, there always seems to be a good reason to back away from it. I think a number of people on this committee are searching for some mechanism that will get that agenda back in place. I do not think anybody who is even a casual observer would think there is a simple answer to this or that it is going to come quickly, but if there is not a determination to work at it consistently over a substantial period of time, we will not meet those obligations.

I am disturbed about the funding aspect because it strikes me that you are right, that there are some native groups who are in the happy economic position that they can exercise some measure of independence. Many of them are just geographically close to places where meetings like this will occur. Asking them to come to a meeting in Ottawa from a reserve near Montreal or Cornwall is not a big deal. Asking somebody

to come to Ottawa from the far reaches of the Northwest Territories is a big deal, and the fact that there is no plane ticket available simply deprives that group of people from any kind of representation.

I thank you for coming in this morning. I would like to leave you with the notion that I am attracted to this concept of companion resolutions. It seems, to some of us at least, that—without dumping all over the Meech Lake accord, which is very difficult to do—it seems to solve many people's problems: a stand-alone set of resolutions that deals with a problem we think is important and must be dealt with. It does not jeopardize the Meech Lake accord, so that proposal by the native council is gathering some support in the committee. I ask you to spend a little time looking at that to see whether there is potential there to resolve some of your problems.

**Mr. Amagoalik:** It is true that the aboriginal issue could be dealt with in that way, but at the same time it is also important to remember that the aboriginal element is not the only problem. The relegation of the NWT, the Yukon and the people living in them to the hinterlands of national politics is a serious problem. In effect, we have been relegated to different classes of citizens of this country, so that issue has to be dealt with as well.

**Mr. Breaugh:** Finally, I tend to agree with your assessment of the current federal government. I think many of us are going to have to simply say: "To hell with you. If you do not want to pick up your obligations, there are others in the nation who do." Although it is not going to happen as quickly as we would like, and maybe not even in the way we would like, a way must be found to deal with it. I think there is considerable determination. No matter what the current federal government or any of the individual premiers might think about the matter, there are others in the country who are not prepared to let it drop.

0950

**Mr. Allen:** I would like, first off, to put the question as to whether the problem that you have is with the Meech Lake accord itself in terms of what is in it or whether the major problem is what is not in it. You have mostly stressed what is not in it to this point. Is there anything in the Meech Lake accord per se, in the clauses there, that creates a problem for you?

**Mr. Amagoalik:** You are quite correct that as far as the aboriginal issue is concerned, the problem is that there is something missing from

the Meech Lake accord. We are not on the agenda. But there is also a problem in the accord, something in the accord that requires unanimity for the creation of new provinces. That is something we would prefer not be in it. So it is a problem both ways.

**Mr. Allen:** In that respect, is it your preference to return to the original entry-of-new-provinces arrangement under the British North America Act of 1867, whereby it was a matter between the federal government and the territory in question?

**Mr. Amagoalik:** Yes. I think the people of the territory should have the same right as all other Canadians have. I do not see any reason that creation of new provinces should be treated differently than it was in the past 100 years, unless perhaps there is a hidden agenda among some of the provinces. We all know that Quebec, perhaps Ontario and maybe Manitoba, are always interested in Hudson Bay, perhaps extending their borders. Alberta is certainly looking at the Mackenzie Valley and that sort of thing. Perhaps there is a hidden agenda. Perhaps that is why that part of the accord was written in that particular way. I do not know.

**Mr. Allen:** One sometimes gets the impression that the politics of these matters is like the dance of the seven veils. You remove one and there is still another veil to go, then another and still another.

**Mr. Chairman:** This is a family committee.

**Mr. Allen:** I am sorry about that, Mr. Chairman. I will try to restrain my remarks and not pursue that analogy to its ultimate conclusion.

**Mr. Harris:** All of us understand, though.

**Mr. Allen:** You understand? All right, as long as the main point has been made.

Not being politically desirous of creating excuses for any level of government, least of all the federal government at the moment, but you have suggested that there may be hidden agendas hidden behind hidden agendas. One can certainly, from the perspective you have put it, see what may be the scenario with the federal government cutting funding, not really being willing to go ahead with meetings and so on. If, at the moment, the principal political objective is to secure Meech Lake, and one of the oppositions to moving ahead on the aboriginal front lies in some of the parties the federal government is trying to bring around, one could imagine that part of the game for the time being is not to be seen to be doing business on that front, even though there



may be, in many quarters, a desire to do that, to pick it up very actively in the aftermath of what is accomplished at Meech Lake.

Do you see any signs on that side of the interpretation of those events that gives you any hope? Are there any indications at all that there is that hidden agenda behind the hidden agenda that might be at work and would come into play once Meech, in fact, was accomplished?

**Mr. Amagoalik:** At the moment, I do not see anything that encourages me or convinces me that something is going to be done soon. As I stated earlier, people tell us that once Quebec is in, they will help this process along. I do not happen to have much faith in the provincial government in Quebec and the Premier to deal with this in the way we would like to see it. We have been requesting a meeting with the Premier for—I do not know—ever since he came into office. He never even acknowledges our letters. McKnight at least acknowledges that he received my letter, but Bourassa will not even acknowledge. So I do not have much faith in the current situation in Quebec to really help us along.

**Miss Roberts:** If I might just pick up on what Mr. Allen has been dealing with. Can you indicate to me what stage your negotiations are at with the federal government right now? Do you expect it will take 10 more meetings? Exactly where are you in your negotiations, other than that they have not talked to you for a year?

**Mr. Amagoalik:** There is absolutely nothing happening. There are no negotiations, so we are nowhere.

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**Miss Roberts:** I believe you indicated you had a meeting in July or August. Just where were you in that? Was it just sort of a get-acquainted meeting of some type?

**Mr. Amagoalik:** No. We did not need to get acquainted. We knew those gentlemen quite well by the time we met with them. We were trying to get some sort of indication from the government of Canada as to where it stood on this issue, what it was willing to do and what was necessary to get that process back on track. They said they would respond to us but they have not. There are no negotiations. The situation is nowhere.

**Miss Roberts:** What you are saying is that the negotiations are in their park. You have asked them to respond to you. Is that correct?

**Mr. Amagoalik:** Yes. We have, but we do not expect any response in the foreseeable future.

**Miss Roberts:** You have indicated that funding from the federal side has been cut off. Do

you have any other source of funding, either through the Northwest Territories, northern Quebec or Labrador?

**Mr. Amagoalik:** No, none at all.

**Miss Roberts:** Then your funding is just strictly through your people?

**Mr. Amagoalik:** The Secretary of State and some from Indian Affairs.

**Mr. Chairman:** Your association represents the Inuit in the territories, northern Quebec and Labrador, and you have tried to be in direct contact with not only the federal government but also Quebec and presumably Newfoundland. In terms of those three areas, what about the relationship with Newfoundland? Do you deal with them as well or do both provinces in a sense say, "Look, you are supposed to deal with the federal government, not with us"? Do you try to have ongoing discussions with Newfoundland as well as you have tried with Quebec?

**Mr. Amagoalik:** We at the national level do not have that much contact with the provincial governments but we do have regional organizations. We have regional organizations in Quebec and Labrador that are in more direct contact with their provincial government than we are. I suppose there are some ongoing negotiations. Long-time negotiations in Newfoundland and Labrador have been tentatively started in that province, although the issue of self-government is not really on the table. There are ongoing efforts by our people in Quebec to try to deal with Quebec, but they are not having much success.

**Mr. Chairman:** So that really your route, in the main, has to be through the federal government, and without the agreement on funding you are simply not going to be in a position to really engage in much research and discussion on any of these issues, at least not easily?

**Mr. Amagoalik:** That is very true. I wish we could afford to go to see Frank McKenna in New Brunswick so we can talk to him about our concerns, but we cannot. We do not have the resources. We have always said that the government of Canada has this trust relationship with the aboriginal peoples and it has to provide the leadership. The leadership simply is not there.

**Mr. Chairman:** On behalf of the committee, I want to thank you both for joining us this morning. I think you have underlined a number of concerns that other aboriginal groups have presented to us and I think there is certainly a clear picture in terms of a number of those concerns. In addition, you may be aware that we did meet with government leaders from the

Northwest Territories, as well as from the Yukon, so that other aspect that you have referred to has certainly been made very clear to us as well, I suppose, with respect to what is not in the accord and what is.

We do thank you for coming and joining with us this morning and for responding to our questions. Thank you very much.

**Mr. Amagoalik:** Thank you very much. I am sure you will be hearing from us again.

**Mr. Chairman:** If I might, I will now call upon our next witness, the Honourable J. W. Pickersgill, if he would be good enough to come forward. I know we are making some photocopies of your statement. If that was the only copy that was taken upstairs, we will pause for a few minutes before it comes down; but if not, sir, if you have a copy, we can begin and we will catch up. Oh, here we are.

**Hon. Mr. Pickersgill:** I think perhaps I should remove some misunderstanding. I have no copy of a statement. I have a kind of table of contents to keep me on the rails. I hope it will.

**Mr. Chairman:** That is fine. We want to thank you very much for coming here this morning. If you would like to begin your comments then we will jump in after with questions, if that is all right.

**Hon. Mr. Pickersgill:** That will be fine.

**Mr. Chairman:** Please go ahead.

HONOURABLE J. W. PICKERSGILL

**Hon. Mr. Pickersgill:** I should like to say, first of all, that my presumption in coming here is really based upon the fact that, probably with the exception of Paul Martin, there is nobody in this country who has had as long experience as I have of the constitutional process. My first introduction to it was 50 years ago when I first went into Mackenzie King's office. One of my first tasks there was to follow the proceedings of the Royal Commission on Dominion-Provincial Relations, headed first by Chief Justice Rowell and later by Dr. Sirois.

The first task of any importance I was given was to draft answers to letters from the premiers when Mr. King had asked them in November 1937 to agree to an amendment to the Constitution to permit federal unemployment insurance. That process started in November 1937 and it was not completed until 1941.

It was the first time ever that there had been agreement by all the premiers and the Prime Minister on an amendment to the Constitution which would change the distribution of powers

between the federal and provincial governments. It was the only one that took powers away from the provincial legislatures completely and gave them to the Parliament of Canada. There has been no occasion when that has been done since.

The only occasion on which the powers of the provincial legislatures have been diminished without the consent of the legislatures was when the Constitution was repatriated in 1981-82. At that time, the powers of the Legislature of Quebec were diminished without the consent of the provincial authorities. In other words, something that belonged historically, since Confederation, to that provincial Legislature was taken away from it without its consent. That created a grievance which it is now, through the Meech Lake-Langevin accord, possible to remove.

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I say possible to remove because Meech Lake-Langevin has not yet been fully accepted; but it has been accepted and confirmed by the Legislature of Quebec, so we know that if the rest of the authorities in the country accept this accord that grievance will have disappeared, and instead of submitting to the judgements of the Supreme Court as, to the great credit of both Mr. Lévesque and Mr. Bourassa, the authorities in Quebec have, they will be willingly accepting them.

It seems to me that is really the crux of this whole problem and the purpose was exclusively to deal with that. I think a lot of people misunderstand, particularly a lot of people who would like to see other changes made in the Constitution. They do not seem to realize that the Constitution is not a legislature, that if people have grievances, if they do not like the Constitution, the proper way to try to redress those grievances is through the legislatures or through parliament.

The Constitution is not a legislature, it is simply a kind of skeletal structure of our federal form of government. It is certainly not a Christmas tree on which every discontented person should expect to get a present. It seems to me some of the objections that have been made convey this idea. There are one or two objections that have been put forward which suggest that there are impediments in the Meech Lake accord—I will say Meech Lake for brevity—that Meech Lake would prevent.

If anyone has any questions when I am finished on those points, I would be very happy to give you my views on them.

You may say Mr. Stanfield and Senator Murray both thought it was a mistake to



repatriate the Constitution without the consent of all the provincial governments. Mr. Stanfield said what was done in 1982 was a mess and Senator Murray voted against it. I, of course, had no position at all—I was just a retired old man viewing the thing from the sidelines—but I asked myself, “Would I have approved patriation?” My answer is that I would have done it very reluctantly, because I thought that doing it without the consent of the elected representatives and in the face of the unanimous opposition of almost a third of the Canadian population was not a very good method.

Why then would I have supported patriation? Because I thought we had reached the point where we could no longer have to depend upon the British Parliament to do it for us. There were beginning to be signs that the British Parliament might not do it willingly and might try to interfere with it, and I thought it was so important that I would have supported it, even though I thought it was very imperfect in the way it was done.

It seems to me that the big compelling objection to it is now within our capacity as Canadians to remove. After all, I was born in Ontario 82 odd years ago and I have lived more than half my life in Ontario, but I have never really been an Ontarian. I went to Manitoba in 1907, before any of you were born, and I represented a constituency in Newfoundland, so perhaps I might claim, in my usual modest way, to be a Canadian.

The government of Quebec, as I have already said, has submitted to the enlarged jurisdiction of the Supreme Court of Canada. It has not contested in any way, or even protested in any way, the decisions of the court which affect people in Quebec; which shows a very profound respect, in my opinion, for the rule of law, and we should not forget that. On the other hand, we should not forget that Quebec has refused to participate in any conference on further constitutional changes until the Constitution is amended in a way acceptable to its government and Legislature, so anyone anywhere in this country who wants other changes in the Constitution is never going to get them as long as Quebec continues its boycott. That is the stark fact.

It was done once by Mr. Trudeau's government, but no Prime Minister again is ever going to agree to an amendment of substance affecting Quebec unless the Quebec authorities accept it. That means that the way of any further constitutional change affecting the whole country is blocked until this Quebec grievance is removed. We have a way to remove it now in Meech Lake,

and it is a way that the Quebec government took the initiative in. The government of Quebec, under the present Premier, made its proposals, the proposals that would make the Constitution acceptable to it, at an interprovincial conference at Edmonton. The other nine premiers agreed to discuss these demands as a priority at a first ministers' meeting.

The present Prime Minister, for whom I have never expressed total support or admiration, did have the wit and the good judgement on this occasion to seize this opening and invited the first ministers to Meech Lake for the sole purpose—and I really think it needs to be emphasized that this was not a conference on every aspect of the Constitution—of seeking to amend the Constitution of 1982 to make it acceptable to the government and Legislature of Quebec. That was done at Meech Lake and in the Langevin follow-up.

Moreover, that accord was accepted unanimously by all the 11 governments that share the sovereignty of Canada. When people talk about its being done secretly or in a corner, who is better qualified to speak for the people of Canada than the heads of the governments responsible to the elected representatives of the people? All the other people who are making objections were never elected. They are either making them on their own account, as I am, or making them on behalf of a special group.

We should try to remember that in the parliamentary system of government we have, the elected representatives of the people—perhaps I do not need to say this to you—are those elected to represent all the people, not any special interest. Maybe they do not always do it well, but that is what their purpose is and they certainly have more right to do it than anybody else, and more title to do it.

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I do not need to tell you, because you have been listening to a lot of people, that notwithstanding the fact that the Meech Lake meeting was called for the sole purpose of dealing with the Quebec grievance and achieved this goal unanimously, various proposals for changes have been made by unelected persons or groups.

The accord, if approved, will provide for annual meetings of first ministers to consider future constitutional changes. Approval of Meech Lake will not set the Constitution in concrete. Failure to approve it will prevent any other change, as long as the government of Quebec continues its boycott.

I think that is a realistic statement of the situation. We know that the House of Commons has already approved the accord, with the support, not only of the government but also of the leaders of the Liberal and New Democratic parties and the great majority of their supporters in Parliament.

I now come to deal with a few of the objections. The provision of the accord which seems to have aroused considerable misgiving and opposition is the formal recognition of Quebec as a "distinct society," although the Premier of Ontario, in his realistic fashion, said that every grade 4 student in Ontario knew it was. I must say that I think even some of the ancients know it is.

My own view is that every province is a distinct society and that is why Canada is a federation and not a unitary state, although Quebec perhaps is more conspicuously distinct than any of the others except possibly Newfoundland. Quebec was recognized as a distinct society by George III when he gave royal assent to the Quebec Act in 1774, so this is not any last minute, secret deal. It was done openly by George III in 1774.

I will just say briefly how the Quebec Act made Quebec distinct. It recognized the right of Quebecers to communicate with their government in the French language. It recognized the right of Catholics to hold public office more than half a century before Catholic emancipation in Britain and Ireland. No Catholic could hold public office in Ireland but he could in the province of Quebec. The act maintained the civil law of France. It did not provide for an elected assembly, although an assembly existed in all the other American colonies, thus making it very distinct from the other American colonies.

The recognition by Quebec in the Quebec Act of its distinct character was one of the causes of the American Revolution. A lot of the American dissidents, as they were then—they had not actually started the revolution, although they did the next year—thought that, since the British Parliament had not given Quebec an assembly, the next step would be to take it away from them. That created one of the additional grievances of the Americans that led to the revolution.

Shortly after, the United Empire Loyalists migrated to the western part of the province of Quebec. When my ancestors crossed the Niagara River, they crossed into the province of Quebec. I used to say that often on the public platform and people would think, "This poor fellow doesn't know any history." But it was true, of course,

until 1791. In 1791 the Loyalists and the other residents of the western half of the province of Quebec insisted on having a separate society.

The result was that the British Parliament passed a constitutional act, divided Quebec into two provinces, Lower Canada and Upper Canada, and in Lower Canada confirmed all the distinctive characteristics that had been given to the province of Quebec by the Quebec Act and, in addition, gave that province an assembly in which the French language could be used and to which Catholics could be elected.

That was really the most clear evidence that Quebec was a distinct society. But it did not remain unchallenged. After the rebellions of 1837 and 1838, the British Parliament in the Act of Union of 1841 united the two provinces into the single province of Canada. The act provided that English only should be the language of the Canadian Parliament and alone have official status.

That situation did not last very long. In my opinion, it is one of the great glories of Canadian history that the Parliament of the province of Canada, in which a majority of members were English speaking, insisted on the restoration of French as an official language. I do not think we should ever forget that act of statesmanship.

The "nationalists" of Quebec—and I use the word "nationalist" with quotation marks—think Quebec is a nation. I do not. The "nationalists" of Quebec have never forgotten 1841 and they say, "Well, if it was done once, it could be done again." But it was never tried until the repatriation of the Constitution in 1981-82 which took away powers that had always belonged to the Legislature of Quebec. It took them away from it. It did not give them to the Parliament of Canada in the Charter of Rights; it just limited the power of that Legislature without the consent of any of its members.

### 1030

The section of the accord on the distinct society enjoins the government of Quebec to preserve and promote the distinct character of Quebec society, and that has worried a lot of people. I would just like to remind you that under the British North America Act, which is in this respect still part of the Constitution, part of the distinct character of Quebec is that there is constitutional guarantee for the rights of the English-speaking minority, and in no province except New Brunswick is there any constitutional recognition of the rights of the French minority. The English minority in Quebec has greater protection than the French-speaking



minority in any other province, with the dubious exception of Manitoba since the Supreme Court decision.

A lot of point has been made of the fact that the Legislature and government of Quebec are encouraged to promote their distinctive character, and all the federal government and the other provinces are enjoined to do is to preserve, not to promote. I think the reason it does not say "promote" is that you would not have got the premiers of several provinces to agree to promote the interests of the French Canadian minorities. Therefore, they agreed to preserve what they had, but I think two or three of the premiers would not have agreed to Meech Lake if they had been asked to say they would promote those interests. I think Mr. Peterson probably would have, because he is doing it anyway, but there are several provinces where there is even reluctance to preserve what rights there are, as some of you know.

I have said before that submission by the Quebec authorities is not good enough, in my opinion. What Canada needs is willing acceptance of the Constitution by Quebec, and the present government and Legislature of Quebec have offered that acceptance on very reasonable terms. It is true that one or two sections were included in Meech Lake to secure the acceptance by other premiers of the modest proposals of Quebec. One of them, of course, was that all the provinces should be treated equally, and a lot of people have objected to that provision. But there would have been no Meech Lake without it, because particularly some of the western premiers said they would be put in an inferior position. If Quebec had to approve changes in the Constitution, so did they. This was not something that Quebec was asking for; it was something that some of the other premiers imposed as a condition of their acceptance.

I have also—I do not need to labour it again—pointed out that there will be no constitutional changes of any consequence as long as Quebec continues to boycott change, until it is willing to accept the Constitution.

I come to another point that I did not make before either of the committees in Parliament because things have happened since that make it relevant. The most serious result of the rejection of Meech Lake by even one provincial Legislature would be a gift of an issue to the Parti québécois, as Mr. Parizeau himself pointed out the other day. I ask myself, does any Premier or any sane Canadian really want to try to breathe

new life into a political party now, happily, almost dead.

It has been alleged that Meech Lake would weaken the spending power of the Parliament of Canada. My opinion is that the spending power of Parliament would be strengthened by Meech Lake because it would be, for the first time, set out clearly in the Constitution. At the present time, the spending power of Parliament in areas of provincial jurisdiction is based upon a decision of the British Privy Council, which could presumably some day be changed by our Supreme Court; but if the spending power is put into the Constitution, it means there is no limit to the spending power of Parliament. I think that is one of the big gains of Meech Lake.

Under Meech Lake, a new shared-cost program, which is what concerns a lot of people, would not get started unless nearly all the provincial governments agreed to participate. It would not be any different from what it was before. No shared-cost program was ever started until the federal government had been practically sure that nearly all the provinces would participate. If one or two provinces opted out, the conditions—and this is really important—for compensation would have to be approved by Parliament.

They could not ask for an equivalent amount of money and use it for any purpose they like, unless Parliament was crazy enough to appropriate it unconditionally. There would be no automatic and unconditional payment. Parliament would have the final word on the terms of any shared-cost program and on the terms of any compensation to a province which opted out. So these great fears, that this was some way some province could get a bonanza by opting out, are really, if you read the accord, totally unfounded.

It is my opinion and the opinion of several of my friends—like the Honourable Gordon Robertson, who has nearly as much experience of this business as I have, and much more recent experience—that if Meech Lake is not approved, there will be no chance to reconcile Quebec for another generation. If they are rebuffed with these very modest terms, this grievance is going to fester, and if it is allowed to fester, my prediction is that reconciliation will never again be possible on such moderate and reasonable terms as are set out in the Meech Lake-Langevin accord.

There is one other point that troubles a lot of people, and that is the power which Meech Lake would give to the premiers to recommend appointments of Supreme Court judges and

senators. To whom do they recommend them? To the Prime Minister. It is argued that this would reduce the unrestricted scope of the Prime Minister's patronage. That is quite true; it would. But it would not reduce the federal power since the final word on such appointments would rest with the Prime Minister of Canada. He could not any longer choose anybody he liked, but he could turn down anyone he did not like.

Therefore, it does not seem to me the federal power is reduced, it involves only what I have regarded as a rather unrestricted prerogative of the Prime Minister—not even of the government of Canada but of the Prime Minister.

#### 1040

Sometimes it has not been used too well, though not in the case of judges. I think the record of appointment of Supreme Court judges is excellent, but I would not like to endorse the appointment of every senator who has been appointed.

It is my opinion, finally, that the incorporation of the Meech Lake-Langevin accord would strengthen, not weaken, national unity; and strengthen, not weaken, the national government. But it is not the Constitution that determines whether we will have a strong or weak national government. Whether Canada has strong national governments in the future will depend, just as it has in the past, not on the Constitution but on the voters, and that is as it should be.

**Mr. Chairman:** Thank you very much for both a historical and a present look at the accord. I think you have touched on probably just about every issue that at some point or another has been brought before us over the past number of weeks.

**Mr. Morin:** I am happy again to say that I have another good constituent of mine.

**Mr. Breaugh:** Is there anybody left out there?

**Mr. Chairman:** You must have sent letters out, Mr. Morin.

**Mr. Morin:** Mr. Pickersgill, I have two questions for you. The first one is, how do you respond to critics who state that the recognition of Quebec's distinctness creates inequality among provinces and among Canadians?

**Hon. Mr. Pickersgill:** I respond, as I think I did in my opening statement, by saying that it recognizes a fact that apparently the government and the Legislature of Quebec would like to have recognized, but it does not give to the Legislature or the government of Quebec any jurisdiction that it does not have already. Therefore, it does

not seem to me that it in any way increases any power of the Quebec society.

In any event, a lot of people, including the former Prime Minister, did not say "the character of the Quebec society." He said it was "special status." With due respect to Mr. Trudeau, that is a distortion of Meech Lake—not his only distortion, incidentally.

**Mr. Morin:** The second question would be that the granting of rights to all provinces so as to allow Quebec to defend its culture will balkanize the country; how do you respond to that?

**Hon. Mr. Pickersgill:** I am afraid you had better repeat your question.

**Mr. Morin:** How do you respond to critics who state that the granting of rights to all provinces so as to allow Quebec to defend its culture will balkanize the country?

**Hon. Mr. Pickersgill:** I had not seen that criticism before. The criticism I saw was that the immigration section would balkanize the country. The immigration section was essentially in the British North America Act in 1867. There is nothing new about it except in a formal sense. The government of Ontario under George Drew started an immigration policy, bringing people over by air and so on. The government of Quebec was given by Mr. Trudeau's government some additional scope within its powers to select immigrants. But the final word has always been with the Parliament of Canada.

I know this pretty well. I was the Minister of Citizenship and Immigration for three and a half years. Perhaps I did more to balkanize the country than anyone else, because there were more immigrants admitted during that period than in any period since 1913. I did not do it to balkanize the country, nor do I think it has. I think our immigration during that period has added a good deal to the life and vitality of the country. My experience is that nearly all of these immigrants who came in my day have become citizens, and very good citizens too.

**Mr. Allen:** I can see why Mr. Morin has such a composed countenance and relaxed style in the Legislature. He simply has to sit back and let all his eminently able constituents run the country and he can just watch. It is nice to be introduced to them one by one at these hearings.

May I first thank you, sir, for both the history and the home truths you have conveyed to us from your long experience in Canadian politics.

I would like to go back to the first presentation we had before this committee, by Professor Behiels from the University of Ottawa history



department. On looking over that paper again, I was struck by the assertion in that document that during the period from 1982 to 1987, the Quebec government had in fact held the country up to blackmail. Is that your opinion of that period of our history and Quebec's posture, or is there another way of looking at that which is rather more positive and hopeful?

**Hon. Mr. Pickersgill:** I just think it is totally untrue. Particularly while Mr. Lévesque was Premier, they could have done a lot of things that would have made government of the country very difficult; but Mr. Lévesque, to his great credit—and I was certainly no supporter of his—had a great respect for the law, unlike some of the people in his party. He accepted the verdict of his referendum sadly, but he accepted it.

It seemed to me that when he came to Ottawa for the conference after the referendum, the conference that ended with patriation, he was really trying to find some kind of solution. He even went to the point, which no Premier of Quebec has ever done before or since, of saying that if certain other changes were made, he would not require a veto.

I used the word "sleazy," but I think that is pretty strong. I thought the performance at that conference, the way the other premiers, excluding the premiers of Ontario and New Brunswick, doublecrossed Mr. Lévesque, was done in a pretty nasty fashion. At the same time, I say that in politics and in life you have to decide which is the more important and which is more in the real interest. I think patriation was more in the real interest than objections to the way it was done.

Since the present Premier has been head of the government of Quebec, he has gone out of his way to set out the conditions under which the province would accept the thing totally. They were so modest that I could hardly believe that he would get approval for them. Of course, the opposition in the National Assembly did not approve, but it was approved promptly by the great majority.

**Mr. Allen:** Thank you for the answer. I think that helps us very much in our review of that period of background to the Meech Lake document.

Just a last quick question, and I want only a brief answer. I do not want a whole review of all the Trudeau years, but you were very close to all that period of federal politics.

**Hon. Mr. Pickersgill:** I was a public servant when Mr. Trudeau became Prime Minister.

**Mr. Allen:** I really mean to say that you were a very close observer, because you were very close on hand.

**Hon. Mr. Pickersgill:** I certainly was.

**Mr. Allen:** Yes. What I would like to ask you is whether, in its overall cast, the Meech Lake agreement does not reflect much of the practice of our federal politics during those years?

**Hon. Mr. Pickersgill:** Reflect much? I did not understand.

**Mr. Allen:** Reflect much of the political practice of dominion-provincial relations and the posture of the federal government through those years.

**Hon. Mr. Pickersgill:** If by that you mean that everything in Meech Lake was in one fashion or another proposed by Mr. Trudeau and his government as a means of getting support for patriation, that is true. There is nothing whatever in Meech Lake that at one time or another was not proposed to the provinces by the Trudeau government, mostly by the Prime Minister himself. That is why I find his present posture so difficult to understand.

**Mr. Allen:** Yes, and I would say likewise.

**Mr. Offer:** Thank you very much for your presentation, Mr. Pickersgill. In your presentation and in your deputation, you spoke of Meech Lake as being a miracle, and I take it from page 2 that it is only the fourth time since Confederation that there has been this unanimous agreement on substantial amendments to the Constitution. As you are very well aware and as you have certainly touched on already, we have heard some substantial concerns from different persons dealing with particular aspects of the agreement.

**Hon. Mr. Pickersgill:** Right.

**Mr. Offer:** I do not really want to touch too much on what the concerns may be, but you then go on and say that the approval of Meech Lake will not set the Constitution in concrete. I am really directing my question to the whole unanimity type of formula with respect to changing Meech Lake.

**Hon. Mr. Pickersgill:** You mean changing the Constitution.

**Mr. Offer:** Yes. I am wondering if you could expand somewhat on how it might not set the Constitution in concrete, when you have indicated that it was only the fourth time since Confederation that we have had this type of situation.

**Hon. Mr. Pickersgill:** The fourth time includes Meech Lake, and there have been only three times since Confederation when amendments have been made affecting the jurisdiction of Parliament and the legislatures. Only three

times of any substantial character that is; I think there was one correction of an error or something.

People talk about the Meech Lake accord requiring unanimity. What it does is to increase the number of sections of the Constitution: not the whole Constitution but the number of sections that require approval of all the legislatures. They were there originally. The Queen could not be changed without the consent of all the provincial authorities. I have the document here, but you have all read it. It added a few more to those. There are still a lot of changes that can be made without unanimous approval. The main scope cannot be. I would also say that, considering our experience from 1967 to 1982, we seem to be pretty well satisfied not to be constantly changing the Constitution.

The countries that are constantly changing their constitutions nearly always have revolutions. Canada is the product of anti-revolutionaries. The French Canadians never approved the French Revolution, even though it happened. My ancestors on my mother's side were all in North America and not in what is now Canada before the American Revolution. They came here because they did not like revolutions. The fact that we have a stable Constitution and also a pretty stable society, when you look around the world today, does not fill me with alarm, but it seems to me that a lot of the people who have objected to various aspects of Meech Lake are addressing the wrong subject.

If there are additional rights that women want, the proper way to go is to the legislatures: it is not to try to put them in the Constitution without the approval of the legislatures. If there are any other additional rights or additional conditions that have enough support behind them—and that surely is essential if you believe in democratic government at all—the proper way is to get enough public steam behind these things to get the Constitution changed.

One thing about Meech Lake I think perhaps was a little silly, but it has opened the door wide because there is going to be a constitutional conference every year to consider new things. It even prescribes a couple of things that have to be considered. Whether they will be successful I do not know. I can tell you that I certainly hope that at the first conference after Meech Lake everybody forgets about the silly suggestion that the federal jurisdiction over fisheries should be diminished in any way. The Senate is another matter.

**Mr. Cordiano:** I will try to be brief with my question. I want to ask you about some of the comments you made in your submission to the special joint committee, when you expressed the view with respect to the whole question of sexual equality rights in the charter and the fact that a reference to the courts on the issue to uphold the charter—and there is some question as to whether the charter has been—

**Hon. Mr. Pickersgill:** I am not hearing you very well. I am sorry.

1100

**Mr. Cordiano:** I am talking about the comments you made before the special joint committee with respect to the charter and the view some groups, particularly women's groups, hold that the charter may have somehow been invalidated by the "distinct society" clause or the whole Meech Lake accord. You put it this way, that you did not believe a court reference was necessary. Is that because you feel the charter is still upheld as far as Meech Lake is concerned?

**Hon. Mr. Pickersgill:** The charter says categorically, in the most express language, that—I cannot remember the words; I could dig them out—there must be no discrimination: men and women are equal. I would not have objected to putting that in again, as was done. It also says that all the aboriginal rights—

**Mr. Cordiano:** Section 16, yes.

**Hon. Mr. Pickersgill:** That is in the charter. That was put in again at the Langevin building because, for some reason or other, a lot of aboriginal leaders have expressed fears. Something was put in about multiculturalism. It is because women were not also included that this question seems to have arisen. But what we should not forget is that if there are any dangers, and I do not think there are, that any rights women have might ever be taken away, of course they could be taken away by the "notwithstanding" clause Mr. Trudeau put in, but there is nothing in Meech Lake that could take them away—absolutely nothing.

**Mr. Chairman:** Thank you very much, Mr. Pickersgill, for joining us this morning, and not only for your presentation but also for answering questions which have covered a good number of topics. We appreciate having someone with the experience and the overview that you are able to bring to these issues.

We did also meet, as you mentioned, Gordon Robertson, the former Clerk of the Privy Council, who was with us for some time yesterday. I think between the two of you you



have probably given us the broadest sweep in terms of constitutional discussions that we have had to date. We thank you again for coming.

**Hon. Mr. Pickersgill:** It has been a great satisfaction to me, as it is to all people who are retired politicians, to get a chance to shoot off my face again.

**Mr. Chairman:** We enjoy it too.

**Mr. Breaugh:** We know what you are talking about.

**Hon. Mr. Pickersgill:** I am very grateful to you for listening to me, I think almost too politely.

**Mr. Chairman:** I now call upon the representatives of the Freedom of Choice Movement, Dr. R. A. Forse, the president, and Dr. R. Fletcher, the first vice-president. Gentlemen, if you would be good enough to come forward, we have a copy of the submission you have provided to us. At the outset, I would like to thank you for coming and welcome you here this morning. I will simply turn the microphone over to you, and if you would like to go ahead with your presentation, we will then follow up with questions.

#### FREEDOM OF CHOICE MOVEMENT

**Dr. Forse:** Mr. Chairman, members of the select committee and those who are left, I should first introduce myself. I am Dr. Armour Forse, a physician and surgeon practising in Montreal West and president of the Freedom of Choice Movement. With me is Dr. Ronald Fletcher, a dentist practising in Montreal and vice-president of the Freedom of Choice Movement.

You have been given copies of the constitution of the movement, founded and incorporated on January 2, 1979, in Quebec. You will note that we are a nonpolitical movement which affirms the following principles.

Canada is one nation and therefore we reject the concept that the abrogation of English-language rights in Quebec is necessary to preserve unity.

Rights, privileges and powers guaranteed under the British North America Act cannot be abrogated by any provincial legislature or executive.

All individuals have equal rights before the law, irrespective of their language, race, colour, gender, religion or national origin.

Canada is a multicultural society where English and French language rights should be advanced and never repressed by law.

We strongly uphold and support the Canada envisaged by the Fathers of Confederation. Read

their debates and the British North America Act and it is absolutely clear that they intended Quebec and the federal government to have equal English and French language rights. Of course, they hoped that these rights would spread across the country.

There is confusion about the meaning of "distinct society" and the different interpretations of its meaning by almost everyone, including Premier Bourassa of Quebec and Jacques-Yvan Morin, a former cabinet minister with the Parti québécois and a professor of constitutional law.

We must consider the constitutional process that gave us the accord. Eleven individuals met and agreed to change the Constitution. Constitutions are not something that should be treated as normal legislation. Where is the constitutional process? Where is the consultation? By what mandate do these 11 decide our future and, more important, who speaks for the English-speaking people of Quebec during these meetings? Not the government of Quebec, not the federal government and certainly not the other nine premiers.

We are ignored. We represent five or six seats in the National Assembly and the same in Ottawa. We are obviously unimportant; but remember that the nonfrancophone minority in Quebec is larger in number than the population of six of the 10 provinces of Canada. That is why we are here, to speak on behalf of the English-speaking minority in Quebec. A recent *La Presse* poll in April 1987 revealed that 88 per cent of the English-speaking Montrealers oppose article 1 of Bill 101, that is that French is the official language of Quebec. When I talk to people, I would say it is closer to 100 per cent.

I would like to read to you from the foreword to a book written by past Senator Forsey in 1980. I feel this holds today. I would like you to listen very carefully:

"Two features of the present situation of the Quebec English-speaking minority appal me.

"The first is the degree to which many of its 'leaders' (what are sometimes called its 'natural' or 'traditional' leaders) and some of its 'intellectuals' seem ready to accept a status of second-class citizens." That is what we are, or even third and fourth. Fellow Canadians, this is not right, not just, not fair and a challenge to you all.

He says: "I am tired of these Dukes of Plaza Toro, who lead their regiment from behind...I am tired of 'these gentle warblers of the grove, these moderate Whigs and temperate statesmen,' as Lord Chatham called the Rockingham Whigs.

I am frightened by their willingness to lie down on their backs with all four feet in the air."

He goes on: "Second"—and important to all of you—"I am even more dismayed by the apparent growing willingness of English-speaking Canada outside Quebec to leave the Quebec English-speaking minority to its fate; to offer it as a reasonable, acceptable and living sacrifice to the preservation of a 'Canada' which would be hardly more than a splash on the map with a six-letter label, a pale ghost of the deceased Canadian nation. (One has only to look at the numerous proposals to leave each province to settle its language question as the majority in that province sees fit.)

"These people need to be told that there is in Quebec a large, active and deep-rooted English-speaking community. It is close to 900,000 souls." It is fewer now.

### 1110

The background of the present legal cases against Bill 101: you will note, and I say note, that the previous speaker gave an excellent historical background way back. I am going to try to give you an historical background to the present, and you will note that probably none of them, certainly while I was here, mentioned Bill 22 or Bill 101.

The Freedom of Choice Movement is presently assisting in the Allan Singer Ltd. case now before the Supreme Court of Canada. The court hearing was held in November and involves a fundamental right that was part of the Confederation agreement, the right to use the English language anywhere in Canada. This fundamental right has been under attack in Quebec—Bill 22 and Bill 101—but a Court of Appeal opinion, the decision against, with dissenting judges Montgomery and Paré, challenged Quebec's claim that language is *intra vires* or that it now comes under section 92 of the British North America Act.

I would like to read to you what Mr. Justice Montgomery said at that time. It is submitted that Mr. Justice Montgomery was correct in stating to the court: "I would look at the presumed intention of the Parliament of the United Kingdom in enacting the British North America Act. I find it utterly inconceivable that Parliament, sitting in England, had the slightest intention of giving to any province the right to ban under penalty, the use of the English language, now one of the two official languages of Canada."

This attack has met a major challenge in the Allan Singer Ltd. case, as for the first time Quebec's legislative competence to proscribe

English in the public domain was heard by the Supreme Court of Canada. We do not have a decision as yet.

I think we should look back at what Macdonald said at the time of Confederation and during the debates, and he spoke for the government of Canada.

"We have given the general legislatures all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the general government and legislatures.... We make the Confederation, one government and one people, instead of five governments and five peoples; one united province, with the local governments and legislatures subordinate to the general government and legislature."

As a previous speaker said, with this Constitution, we have built an outstanding country.

This court case relates directly to the Meech Lake agreement in that a number of the proposed changes are ambiguous and, if not modified, will adversely affect the basic human rights, including language rights of the nonfrancophone community concentrated mostly in the south-western sectors of Quebec.

The Freedom of Choice Movement supported the case of Duncan Cross Macdonald and the city of Montreal appeal heard in 1984, with judgement delivered in 1986. I would like to forcefully point out to the select committee that it took us from 1981 to 1986 to get a judgement on the Macdonald case from the Supreme Court of Canada, and justice delayed is justice denied.

I must next stress the judgement that English-speaking litigants are no longer entitled to reply in English in a Quebec court.

I wish to emphasize here the dissenting reasons by the Hon. Mme. Justice Wilson, who wrote: "In summary, because of the entrenched status of the section 133 rights, the aspect of due process which is contained in my delineation of their content, and the fact that their denial in this instance was inherent in and a result of the very process to which the appellant was subject, I would conclude that any court proceedings in which a litigant is deprived of his or her linguistic rights under section 133 is a proceeding conducted without jurisdiction."

If you read the judgement in the Macdonald case, you will be impressed with her presentation. I submit to you that, unquestionably,



although not a lawyer, it is certainly to a citizen superior.

The choice of language in Quebec courts was said to have been reserved for judges and was the narrowest decision that you could hope to come out of the court; but in 1975, when the federal government was making Canada bilingual, and rightly so, it was a very broad interpretation. When it applied to the English-speaking people in Quebec, it was very narrow.

The Freedom of Choice Movement used the *Mercure* intervention to question the conclusion of the *Macdonald* case. Having intervened in the *Manitoba* case for French-language rights under section 23 of the *Manitoba Act*, we instructed our lawyer to stand in the Supreme Court of Canada in the *Mercure* case supporting French-language rights, but to state that in no way can this court give French-language rights outside of Quebec without giving English-language rights in Quebec.

I personally became involved, as a physician, when I started to see patients. The first one to hit me was a man of 43 who lost his job because he could not speak French, when his job did not require that he speak French. He had two young children. He came to my office with a huge duodenal ulcer, extremely depressed and out of work. It is a continuing sad story. I saw many of them. I spoke out quietly about this. I am still shocked and surprised that many more have not.

Successive Quebec governments, both federalist and separatist, have tried to eliminate English as an equal and official language and, for this reason, we must question the inclusion of amendment 2(b), "the recognition that Quebec constitutes within Canada a distinct society."

On the definition of "a distinct society," the meaning of a distinct—that is, separate—society must be spelled out, as the Quebec government has enacted legislation, Bill 22 and Bill 101, declaring that French is the official language of Quebec. This eliminated language rights that had existed for over 200 years since the royal proclamation of 1763, and assigned penalties under the Criminal Code for anyone defying this provincial statute by insisting upon the right to use English. One of the boys who started out with me for bilingualism, to have the Canada that the Fathers of Confederation decided upon, went to jail for asking to be served in his own language, English.

The conferring of the status of a distinct linguistic society upon one national group in Quebec to try to satisfy alleged grievances, secessionist threats and a political objective to

the detriment of the other large linguistic community is unacceptable and a violation of the rights guaranteed Quebec's English-speaking community in the original Confederation agreement.

Lord Durham referred to Lower Canada as "two nations warring in the bosom of a single state." The previous speaker stated how considerate the Canadian Parliament was to give the French, and rightly so, their language rights. I sat on the banks of the St. Lawrence River and talked Premier Hatfield into making New Brunswick bilingual. I said, "You have 40 per cent French Canadians, sir, and they need their language rights." I have the first copy of the bill. He sent it to me.

The aftermath of the rebellion of 1837 and the 1849 annexation manifesto by English-speaking Quebecers was resolved by an agreement in Confederation to guarantee and respect the rights of both linguistic communities in Quebec.

Remember, this was the only part of the country where the two groups coexisted in any large number, and still do. For this reason, the suggestion that Quebec is only for the Québécois cannot be considered until the two major cases before the Supreme Court questioning the constitutionality of unilingual provincial French-language statutes are resolved.

We are very concerned that the interpretation of a "distinct society" could result in the Quebec provincial government passing unjust laws further restricting rights—language, educational and professional rights to practice and the right to work—of the English-speaking minority of approximately one million Canadians. I hope you will comprehend that it takes many years to get constitutional changes into the Supreme Court and then probably, as we have had in every case, a dissenting decision, as in the *Mercure* case which was just passed; I think this is very important and I hope to speak to it later. These facts make it imperative that any constitutional changes in the British North America Act of 1867, which has served Canada well, must be absolutely and unquestionably clear to everyone. It is not necessary that we press to have changes.

## 1120

The powers of Parliament, section 91 of the BNA Act of 1949: the federal government itself does not seem to have the legislative competence to adversely affect rights or privileges of any class of persons with respect to schools or as regards the uses of the English or French language that form part of the original Confederation agreement. The late Chief Justice Laskin

said, "Rights can be increased but never decreased." Remember, it was an agreement.

A subordinate provincial legislature in a federal union has enacted legislation that restricts Canadian citizens from enjoying their civil rights by imposing anti-English language restrictions that it claims are *intra vires* or come under section 92 of the BNA Act. This clearly must be resolved as it compromises the Canadian Citizenship Act by denying naturalized Canadian citizens the same rights as native-born.

The changes to Canada's duality—I will try to be brief with some of the rest of it: the original duality concept was for two equal and official languages in Quebec, where there was the presence of two large linguistic communities. This is why French was granted official equality in Quebec and within the federal legislature and courts. Meech Lake seeks to abrogate the duality of Quebec and instead replace it with a duality between a French-language zone and an English-language zone outside of Quebec. There is no historical justification for this new duality as it will deny the language rights of almost one million people in the metropolitan area of Montreal alone.

The federal government's support of Bill 101: the federal government—and this may surprise you—has not opposed Quebec's unilingual claims and has accepted its narrow, restrictive definition that English has a very limited application within Quebec. Contrary to popular myth, the federal government acceded to Quebec's demands over the charter by exempting the provincial government from compliance with the minority education rights clause.

I went to the Supreme Court with the Allan Singer Ltd. case and we—myself and a few of our friends—paid for it out of our own pockets with dollars we had paid taxes on. We had to take the language issue to the Supreme Court of Canada, Canadians. I hope you feel the shame that I felt having to do it. We were denied financial assistance by the language panel. Look up the constitution of the language panel; we have no just or fair representation. They have turned down all the groups in Quebec, including the school group, who are trying to take language rights to the Supreme Court, and we have had to fund them ourselves.

For the large anglo-ethnic community that voted 95 per cent for Canada, the result is a disaster. The federal government also accepted Quebec's five constitutional demands, so the "distinct society" clause would seem to be a *de facto* recognition of Quebec's status as a

unilingual, French-speaking nation-state. This will never be accepted by the large English-speaking linguistic community of southwestern Quebec.

Article 1 of Bill 101, that French is the official language of Quebec, has yet to be heard in the Supreme Court of Canada. This highly contentious provincial statute has yet to be given a full hearing by the Supreme Court of Canada. Several articles of Bill 101 have been struck down by the Supreme Court, but the main article declaring French alone the official language of Quebec has yet to be heard by the Supreme Court.

As this denial of fundamental language rights has had such an adverse effect upon the large nonfrancophone community of southwestern Quebec and caused an exodus of 300,000 people between 1976 and 1981, and 200,000 more between 1981 and 1986, the matter of the legislative competence of either the federal government or a provincial government to proscribe the use of English or to demand, under penalty, the concurrent use of French has yet to be resolved by the Supreme Court of Canada.

This section defining the linguistic jurisdiction of a "distinct society" should be referred by Parliament to the Supreme Court of Canada for a prior ruling. All the Prime Minister would have to do would be to walk down the street, give it to the Supreme Court and ask for a judgement on it, as Trudeau did when he wanted to bring the Constitution back. It is a very simple procedure. When I presented this to the subcommittee of the Senate, one of the senators said, "Yes, but he would not like what he would hear," and I agree. I think that is probably true.

The federal Department of Justice prepared a full legal opinion, under the then Minister of Justice, Ron Basford, on Bill 101. He put it away. We cannot get our hands on it. I think this committee should request to know that judgement.

The primordial claims of Quebec: on the basis of our experience in Quebec, I wrote several letters and you have copies of them. One, I think, was sent to all the premiers and certainly one to all the members of Parliament. I wrote several letters to all the premiers and to every member of Parliament informing them of the danger to Canada—they are informed—of giving Quebec all its demands. They are the same demands that the Parti québécois wanted as a first step to separation of Quebec from Canada.

Quebec became part of Canada in 1867; it still is and should always remain part of Canada. I do



not believe for one minute it will be thinking of leaving Canada. First and foremost, 35 per cent of its income comes from transferred money. We have something like the Department of Regional Industrial Expansion finances, and Quebec gets 40 per cent while Newfoundland gets two per cent. I doubt that it will leave.

However, if Quebec should entertain separation, it should be made absolutely clear that Quebec leaves Confederation with exactly what Quebec brought to Confederation and no more. The issue of the primordial claim of the Quebec government to the original territory of the province, including the two large tracts of land placed under its administration by Canada in 1898 and 1912, should be spelled out in the event of a dispute between Canada and Quebec that could lead to a secession from the present Confederation.

As Quebec did not recognize the Canadian Charter of Rights and Freedoms—although it had been exempted by then Minister of Justice Chrétien from compliance with the minority language rights and still does not recognize the Canada clause, although the Supreme Court has ruled that it is bound and the previous speaker said it always follows it; it certainly follows the ones that it favours but certainly does not follow the ones it does not like—we think it is unreasonable to ask that the large nonfrancophone community, approximately one million people, must live from provincial election to provincial election without any specific guarantees of their rights as Canadian citizens.

The present difficulties over broken promises on bilingual signs and over the access to schools and social services in English do not bode well for the future and make it incumbent that this committee establish the parameters of what constitutes a “distinct society” in the linguistic, sociological and geographic sense.

The bilingualism and biculturalism concept goes out the window with Meech Lake. The Meech Lake agreement and the prospect of a nation-state within Canada—and I include this because we do have to realize that of the four original dominions only Canada, linguistic—and I tell you, that is racial—and South Africa, racial, have attempted to establish pure zones within which certain nationality groups enjoy more rights than others.

Alexander Brady, in his book *The Democracy of the Dominions*, makes mention of the possibility of this at the time of his writing by noting that thus small groups of ardent nationalists in South Africa and Quebec believe that the

state must be coterminous with the nation and the nation with the state, and for them the nation means their own exclusive language group, with its solidarity of culture. Clearly, a concept as ambiguous as a “distinct society” embracing one nationality group within a specific territory must be clarified by a prior ruling by the Supreme Court of Canada.

### 1130

Senate vacancies: I can skip that, except for saying appointments should carry with them guarantees. We have no guarantees.

Agreement on immigration and aliens: the notion of linguistic zones for Canadian immigration policy, with the incorporation of the Cullen-Couture agreement into a national framework, is disturbing for citizens wanting to bring in immigrants who complement their own community. In the Quebec zone, for example, this will preclude people of British Isles origin from consideration, despite the fact their forefathers, mine and many others', cleared and developed much of the present territory of the province.

The present exodus out of Quebec is another disturbing factor. The Quebec government's own investigation of this phenomenon in 1985 claimed, in its report to the Legislature, it did not know why.

Supreme Court of Canada: this, I submit to you, is very important. The stipulation that three judges of the Supreme Court of Canada will be appointed from Quebec on the recommendation of the government of Quebec is not consistent with the democratic principle of proportional representation. French-speaking Quebecers make up 22 per cent of the total population and yet they would be entitled to 33 per cent of the judges. Not that they are not excellent judges—I submit they are—but you must realize that the one million English-speaking Quebecers do not have any.

There are three excellent judges, but all from the French-Canadian side, representing Quebec at the present time. If you wish to look up the judgements on the Macdonald case and on the Mercure case, you will find them enlightening. Even though they are excellent judges, they certainly favour the judgement that favours what you would expect them to.

Shared-cost programs: you know about that. The provision of reasonable compensation to provinces not participating in a national shared-cost program would further diminish accountability for federal taxes paid by nonfrancophones in Quebec.

We concluded that a Supreme Court test was mandatory. Because the proposed changes are so far-reaching and will have such an adverse effect upon the large English-speaking community situated in southwestern Quebec, we feel it is essential that the "distinct society" clause and the duality concept be referred to the Supreme Court of Canada for a judicial ruling on the implications for Canadians of all nationalities. The alleged threat of secession does not provide the government with any moral or legal justification for abrogating the civil rights of an innocent third party, like the English-speaking community in Quebec.

The introduction of what is known as the Belgian syndrome—we have said this for a long time—into Canada will create the same kind of divisions between the two major linguistic communities, while the parallel of pure language zones is a policy of segregation similar to the malaise that has torn apart one of the original four dominions, the Union of South Africa. I submit that we have members of our federal Parliament trying to tell others who are desperately struggling with their problems how to solve them when we have the same problems right here in our own country.

As a private, nonprofit, voluntary organization that has fought to restore bilingualism in Quebec, a right that had endured for over 200 years, we can attest to the economic devastation that has plagued Montreal since the passage of racist language regulations. The federal government has been forced to pour billions of dollars in support funds into the region to try to offset these losses, but this in turn has deprived many other deserving regions from receiving their fair share of national revenues.

I have given you copies of some of my letters to the premiers and members of Parliament. We were shocked at the total lack of understanding by the parliamentary committee of the deprivation of human rights to the English-speaking Canadians living in Quebec by Bill 101 and to the effects of the Meech Lake accord on Bill 101.

Your Premier (Mr. Peterson) wrote to me on July 18, 1987, emphasizing Quebec as a distinct society and linguistic duality, as a fundamental characteristic of Canada. He also emphasized the role of the Legislature and the government of Quebec to preserve and promote Quebec as a "distinct society." I sincerely hope the premiers signed the Meech Lake accord with incorrect knowledge, false assumptions and misguided trust rather than for personal power, as expressed to us by the senators. Since passing the Meech

Lake accord, the Quebec government has continued a constant harassment of the English-speaking Canadians living in Quebec.

Austria is now reviewing its collaboration with the type of nationalism that asserts the dominance of one national group over all others and is suffering from its shameful guilt. Our Prime Minister, our premiers and our members of Parliament have been informed about the persecution of over one million English-speaking Canadians living in Quebec, including the area of the two large tracts of land placed under Quebec's administration. To date, not one has mentioned Bill 101 and how it has driven approximately 500,000 Canadians from their homes in Quebec. Even an animal will leave an environment where it is being harassed daily and also deprived of the means of earning its livelihood.

History is recording this ugly collaboration with nationalism by the leaders of the three parties in Parliament. A future Canadian government will some day have to acknowledge its complicity with racist language laws aimed at asserting the dominance of one language group over all others in Quebec.

In closing, I would like to refer you to many clippings we have here from columnists and here is one of the most recent, March 23: "PM Must Face the Meech Accord Weaknesses."

"D'Iberville Fortier spoke clearly, strongly, yesterday against the repression of English in Quebec and against the weak minority language guarantees contained in the Meech Lake accord.

"The salvation of French, in Quebec or elsewhere, must surely lie in positively asserting its own demographic weight, cultural vigour and innate attractiveness, and not in humbling the competition."

Take that, Bill 101. Now why has Prime Minister Brian Mulroney, the leading English-speaking politician from Quebec, never made a similar strong statement?

"The commissioner, while calling the Meech Lake constitutional accord 'a major step in the right direction,' still expressed serious reservations....

"He was concerned that the accord recognizes the role of Quebec 'to preserve and promote the distinct identity of Quebec,' but that the federal government was not given a similar mandate to 'promote' the official languages across the country."

Here is another one that says Mulroney echoes Groulx. As you all know, he was a nationalist. He says many of Mulroney's speechwriters



emphasize the same nationalism and I believe this to be true.

He states this: "Mulroney Slippery and False. With the glib charm of a toothpaste salesman, Brian Mulroney Wednesday gave his great speech in the Commons on the Meech Lake constitutional amendment. The speech was slick all right and it was shallow, tricky and false."

He says, "Those were the words of betrayal."

Past Senator Forsey, who humbles me in any discussion on the Constitution as he is so learned and so informed, says that the Meech Lake accord has a cornucopia of absurdities.

All I can say is that we have a pile of clippings confirming exactly what I have been saying to you and we would be glad to answer any questions you have.

**Mr. Chairman:** Thank you for a most forceful presentation and one which I think has very effectively underlined the concerns you have. You may be aware that we have had several presentations from English-speaking organizations from Quebec and will have another one later this afternoon. They have touched upon some of those same issues, perhaps not quite from the context you have put forward. I suppose, as an Ontario committee, we have been focusing particularly on minority language issues with respect to the official language minority within our province, which has been of course the francophone group, but I think we are very much aware of the importance of the protection of the official language minorities. Obviously, what we would like to see for the francophone minority in Ontario, New Brunswick or wherever and the anglophone minority in Quebec is equal justice. I think we appreciate the strength of your statement and we will start the questions with Mr. Allen.

1140

**Dr. Forse:** Can I answer that by saying I feel you have been very reasonable and very considerate in your approach to the language issue, as you have an increasing number of French-speaking Canadians, many of them leaving Quebec because of the circumstances there. I submit that there would be a terrible, terrible outcry if French Canadians anywhere in Canada were subjected to Bill 101.

English-speaking Canadians living in Quebec like the French Canadians and, for the most part, as individuals, get along well with the French Canadians. Of course, the people who are there, if you talk to them, can be divided quite literally now into three groups: those who are planning on getting out, those who would like very much to

get out and those who cannot get out but are very distressed by the situation there.

I understand your concern about the French Canadians in Ontario, but as I say, they can certainly put a sign up in their own language. They can certainly get a job. They do not have anybody coming around telling them what language they have to speak. There are no language police spying on them. They are very fortunate compared with the English-speaking Canadians living in Quebec.

**Mr. Chairman:** I appreciate the point.

**Mr. Allen:** First of all, I want to acknowledge the very generous attitude that the many representatives of the English-language minority in Quebec have taken toward the question of bilingualism across the country. I know that Alliance Québec has taken out ads, for example, in the *Globe and Mail* at critical times in Ontario when the rights of francophones were somewhat endangered or were in question or where there was some possibility of them adding force to the argument for additional services for the French community in Ontario. Likewise, you referred to your own intervention in the Manitoba case. I really do appreciate that. I also want to say, before I get into my question, that I accept that there are some rather troubling aspects of the present situation you find yourselves in in the province.

When I come to the question of Meech Lake per se, however, I really find it difficult to understand the proposition that it undermines in any respect the bilingual thrust of the nation under the Royal Commission on Bilingualism and Biculturalism, under federal initiatives.

For example, if one takes a very close reading of section 2 under Meech Lake, first it is quite clear that there is an emphasis upon the propriety of there being an English-speaking minority in Quebec that is an extension of the larger language majority of the nation. Second, the role of the Parliament of Canada and of the provincial legislatures, and that must include the Legislature of Quebec, is to preserve the fundamental dualism of language referred to in paragraph 2(1)(a). The government of Quebec is to "preserve and promote the distinct identity of Quebec," which is the way of saying the "distinct society" of Quebec. French minority groups that have come before us tell us that their legal advisers tell them this includes the promotion of the English-language minority in Quebec and that it is not something they have accorded to them as a benefit under subsection 2(2), where

the language is "preserve" the minority language group in the other provinces.

When I look at the immigration section, I also note that for the first time in Canadian history, the province of Quebec has accepted the overriding force of federal standards in the immigration field. That was never stated under the previous Constitution and never accepted. Notwithstanding the entrenchment of the Cullen-Couture agreement, it nevertheless sits underneath that overriding emphasis on the propriety of the federal government insisting on national standards in immigration.

What I come back to is whether the essential problem you are up against is not the constitutional one that resides in these statements in Meech Lake, but the ongoing political problem of maintaining yourselves in the context of Quebec. Notwithstanding delays in courts, which is a political question, you still have section 133 and certainly some precedence of broad interpretation. You still have access to the courts. You still do have a constitutional entrenchment as a minority that no other minority language group of French background has in any other province.

Those things being so, I would like your response to the proposition that the problem is not Meech Lake, that the problem is essentially the ongoing political struggle you have, which I understand and sympathize with, but that is a horse of a different colour.

**Dr. Forse:** As I tried to point out in my brief, we must first get these language cases before the Supreme Court of Canada for decision. I would submit to you that, going back to the British North America Act, language comes under the jurisdiction of the federal government. St. Laurent said that, Diefenbaker said that and this certainly was my understanding. You cannot have 10 provinces, or 11 provinces if we get a new one, all deciding what language they are going to speak. We have one country and the federal government has decided we have two official languages.

How can they allow one province to ban one language and not take it to the Supreme Court and find a ruling? Why do citizens have to take it there and pay for it out of their own pockets? It is unthinkable, I submit to you. All of Canada should have screamed long ago and said, "Solve this problem." I do not think for a second that Quebec has the right to ban the English language, nor do I think any province has the right to ban any language.

I also believe in bilingualism and I certainly uphold that French Canadians anywhere in Canada should be treated equally. This should be done on a very intelligent—mind you, it is so simple; it is purely administrative. A French Canadian in Saskatchewan who goes to court should have a judge who speaks French and lawyers speaking his own language. It is not a big expense at all; it is purely administrative. These things to me, as I said to Premier Hatfield, are so simple. We are not arguing over that.

But Meech Lake is so ambiguous. I will never, and I submit that I do not think any of us will ever see the end of this. There are so many people and there is so much fog over Meech Lake. Meech Lake is a matter of interpretation. There are so many ambiguities there. When such a person as Senator Forsey says it is filled with them, I think we should listen. Why change our Constitution and fill it with more ambiguities? The lawyers will have a heyday.

If you are going to change our Constitution, let us make loud and clear exactly what we have. It does not protect minorities and it should protect minorities. Thank God we have McKenna who realized it; bang. He was not originally there. McKenna has spoken out and what he is saying is absolutely true. It is just common sense that they protect the minorities and he is not going to be pushed around, thank God. I hope that your Premier will come to and realize that McKenna does not buy Bourassa's blackmail.

The previous speaker did not think we have had blackmail. We have had nothing but blackmail. I submit, coming to my office the other day was, "Racism Is Rampant in Ottawa." I understand those people who are thinking and saying that. All they have to do is look. Who, until Fortier spoke out, actually said one word in defence of English-speaking Canadians living in Quebec? I am sorry. That is the answer. We need protection and the Constitution should protect us as well as you should protect others.

**1150**

Oh, yes. This says, "Quebec Language Laws Humiliate Anglophones." It does not humiliate them; it persecutes them. Talk to any person living in Quebec. I am a Rotarian. Our Rotary Club had 496 members when they passed Bill 22, and was taking on tremendous projects. We are 180 now. A lot of those come in, like I do, with aches and pains. All our young people have gone. This is not fair, it is not just, and it should not be. If Meech Lake does not do something to correct it, it should. It is not right and not fair.



I am surprised, actually, that really intelligent, educated Canadians are spending so much time thrashing over an accord like Meech Lake when it obviously is ridiculous.

**Mr. Allen:** Do you think that if the premiers—Mr. Vander Zalm, Mr. Getty, Mr. Devine, etc.—other than Mr. Bourassa, had thought that anything in section 2 or the rest of the accord would establish official unilingualism in Quebec they would have agreed to it?

**Dr. Forse:** I sincerely hope the premiers signed the Meech Lake accord with incorrect knowledge, and I believe it, false assumptions, and I believe it, and misguided trust, and I believe it. In Nova Scotia right now, they are saying that Premier Buchanan—and I wrote him several letters—was asleep. It is quite possible they were all asleep to have signed this. It is quite possible. Certainly, it was in the middle of the night. There is so much that is ridiculous in it. Some outstanding constitutional lawyers in Canada have said this.

Ramsay Cook said: "But your columnist is at his absolute best in describing the utter obscurity of the 'distinct society' clause. Only 'fuzzy brains' could possibly accept such calculated ambiguity, one on which the future of the country will rest if this accord is ever ratified." Men saying that sort of thing should stop you right cold.

**Mr. Allen:** That may be true. Mr. Cook was before us and we asked him for some alternative language that would say it better, about what the nature of Quebec was, and he did not have anything to tell us. With due respect, I can only say that those people sometimes can be rather excessive in their own language.

**Dr. Forse:** You can call Quebec a "distinct society." As Senator Leblanc said, the Acadians were here before the Quebecers: 1603. They are a distinct society. We have a lot of distinct societies in Canada. We want Quebec to thrive and prosper and there is no reason in the world that it cannot.

Canada started out, as I said, with a federal government, one central government, and look how well it has served us. The United States started out with a confederacy and they ended up in a war. Now they have a central government. It is just as obvious, as straightforward, as that. It is not confusing; it is simple. Now we are giving more powers to the provinces and we are breaking up the federal government.

**Mr. Allen:** Mr. Chairman, I think my interchange with the witness is becoming more of

an argument than question and answer. I regret that, because I do sincerely say that I understand there are substantial political problems you are faced with and I do appreciate the interventions that you have made on behalf of minority groups across the country. Thank you very much.

**Miss Roberts:** I just have a brief question and that is with respect to some clarification on the Supreme Court of Canada. What you are suggesting is that there be two judges from within Quebec.

**Dr. Forse:** There are three.

**Miss Roberts:** What are you suggesting?

**Dr. Forse:** That we have a representative from the English-speaking community of one million people.

**Miss Roberts:** All I am asking is if you are suggesting that the judges be appointed on the basis of linguistic reasons, not necessarily on provincial—

**Dr. Forse:** Exactly, and it used to be that way until Trudeau changed it—fair and square; reasonable, decent consideration. Hatfield appointed La Forest from New Brunswick, and I hope they will alternate the next time and appoint an anglophone or English-speaking Canadian. Most of these problems can be solved in a reasonable, fair way.

**Miss Roberts:** I am just asking: the three from Quebec who now are there, or maybe as a result of this, have to be francophones?

**Dr. Forse:** They are.

**Miss Roberts:** But it does not have to be that way. A government in Quebec could appoint—

**Dr. Forse:** They could, but they are less likely to with "distinct society."

**Miss Roberts:** I understand your argument, I am just indicating that there is nothing to stop them. It has to be political will.

**Dr. Forse:** That is right. "Distinct society" will override it.

**Mr. Chairman:** On behalf of the committee, I regret we are almost at 12 noon and we have another deputation to hear. I think, as I mentioned earlier, we have to be concerned about minority rights and the place of minority rights, not only within our Constitution but also within our political process. I think the concerns you have brought, which have been echoed by other groups—in the case of Ontario, francophone groups that want to see clearer protections for the official language minorities—are a message we have to receive and try to find ways to ensure that people are treated fairly wherever in the country.

It is in that respect that we thank you for your brief and for the material that you have also submitted along with it, and I think this has been a very useful exchange for us. We thank you for coming today.

**Dr. Forse:** Thank you for hearing it.

**Mr. Chairman:** I now call upon the representative of the Canadian Council on Social Development, Terrance Hunsley, the executive director. If there is anyone else, please come forward and be good enough to introduce yourself.

**Mr. Weiler:** I am Richard Weiler, policy associate with the council.

**Mr. Chairman:** Thank you. Welcome to you both. I realize we are a bit behind time, but that will not cut into the time we will spend with you, because we do want to make sure that you can go over all the issues you wish to present and I know we will have a number of questions afterwards.

#### CANADIAN COUNCIL ON SOCIAL DEVELOPMENT

**Mr. Hunsley:** Thank you very much. It is not often that our organization has presented before a provincial legislative committee. It is a pattern that has begun fairly recently in our history and one that we enjoy and hope to be able to pursue more in the future.

I will say just a word or two about our organization, if I can. We are a national voluntary organization and we focus on social policy, the broad range of social programs in Canada. We were formed originally in 1919, then as the Canadian Welfare Council, and have been involved in almost all of the major national programs as well as a great many of the provincial social programs over the years since.

We tend to work very much with a focus on research, on policy design, but with a unique aspect to it, and that is that as we do our research as we do our policy development, we carry out extensive consultations with people in organizations throughout the country who are involved in social issues and have something to say about it. Our research and our recommendations are usually tempered by having been run before groups of people who may be justifiably sceptical as well as making real contributions to it.

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Richard Weiler, who is with me and who is an associate of the council, has a specific responsibility for what we refer to as our law and social development program. This program has been operating with one break since about 1975, but

more or less consistently since 1980. Our interest in this subject began certainly in the early 1980s with a volunteer task force of experts from various parts of the country who became interested in the whole area of repatriation of the Constitution, the development of the Charter of Rights and subsequent programs coming out of that, as well as the constitutional accord itself.

What I want to talk about today, though, represents only one very specific part of a broad range of interests that we have. Consequently, we have brought along with us three separate documents but have requested that only one of those documents be circulated at this point, because we feel it would be impossible, obviously, in this situation for you to be dealing with three of them.

One of them is our journal, which happens at this point to have a section within it dealing with one portion of the Meech Lake accord, specifically that referring to cost-shared programs. The second document is a more extensive brief, which we would like to present for your review, on the accord. Within that brief we do raise a number of concerns with the accord that we think need to be addressed, not least of which is a concern about the role of what could be considered a new institution of government, I suppose; that is, the formalizing of the first ministers' conferences and a concern about what relationship that will have to the role of Parliament and of provincial legislatures. You will have an opportunity to see that in your review later on.

I do want, though, to narrow down towards the subject we would like to spend as much of today's time on as possible, and that is a concern with social programs, particularly those which are cost-shared.

In our earlier brief, which we presented to the special joint committee of the Senate and the House of Commons, as well as to a separate Senate committee, we made a recommendation that the accord, if it were to be ratified, should only be so done in conjunction with an interpretation of that section dealing with national objectives and national shared-cost programs. We were concerned that there were assumptions being made which we felt were not valid.

One of those assumptions was that the courts would be able to carry out in the future the role of interpreting what are justifiable objectives, what are justifiable definitions of a term such as "compatibility" and so on, and that they would be able to sort out the ambiguity in the wording. We do not agree with that as an interpretation. We do



not think, first, that the courts are the appropriate body to be doing that. We really think that in their role of interpretation, the meaning and the intent behind the term should be clearly expressed so that their role can be more effective in the future.

The second problem we had was reflected at the time of the Meech Lake accord itself but then was subsequently reinforced by the report of the parliamentary committee when it tried to deal with the issue of definitions of terms. The parliamentary committee, in its own report, presents two quite different interpretations of the concept of national objectives.

If you will read the report, which I know you have, I am sure you will notice that in one clause within that they say they have looked at programs such as the Canada Health Act and the requirement for universality, comprehensiveness, portability and so on and they conclude that those kinds of requirements are really too specific to be considered as national objectives. So they say national objectives are really something quite different from that; they are more general, they are more broad.

Then, in the subsequent clause in their own report, they say, "However, all this is open to negotiation;" and then "national objectives" may well include in the future not only such broad requirements as comprehensiveness, universality, etc., but specific standards of service and so on. If you read that carefully, I think you will find there is really quite a break in logic there, which I think reflects a real inconsistency in the way people are dealing with those terms.

The final assumption which we feel is made, not only in the accord but again spelled out in the parliamentary committee report, is a kind of assumption that Canada's social system is more or less fully developed. There may be some need for refinement in the future, but we are not going to see any more major national social programs.

We would like to differ quite clearly with that assumption or conclusion. In fact, it is our view that even during the next decade, we will see major changes in Canadian social programs. The seeds for those changes are sown even now. Even now, over the past two or three years, there are continuing federal-provincial negotiations going on for major national programs. Day care or child care is just the one that is most obvious and in some ways most recent.

There is another process that is going on, which is referred to in some cases as four-cornered agreements, where the departments of Employment and Immigration and Health and Welfare and provincial ministries of Community

and Social Services, as well as advanced education and labour departments, which vary according to province are involved in negotiating new and different ways of cost-sharing in programs that bring together social assistance and labour market programs.

In the field of legal aid, there are negotiations going on that are looking at some kind of reshuffling of not only civil but criminal legal aid. Young offenders' legislation is up for some substantial changes and may well be in the future. There is a variety of other programs that are up for some substantial changes as well. The vocational rehabilitation of disabled persons agreement is being substantially adjusted as well.

We think that as the Charter of Rights and Freedoms matures and is challenged in a number of new areas, large existing programs may be subject to major changes. Right now the extension of the spouse's allowance to widows and widowers under the age of 60 is being challenged in the courts. If that challenge is successful, it will mean a major rethinking of the way the old age security system works. There is another challenge that may well come to the age of 65 as an arbitrary age where the benefits that people receive change.

This whole range of programs may very well be open to substantial changes. It is our view that they will be and that there will be a need for major new national programs in the future.

We recommended earlier that ratification of the accord be subject to a shared interpretation of that clause, of that section, dealing with shared-cost social programs. Within that, we felt that the concept of national objectives was vital. We thought it was vital, not only to make it clear and to clarify the intent of the accord, but we thought it was vital because it holds the germ of important ideas for the future in the way people will look at and interpret their social programs. Because of that, we think it is necessary that the federal and provincial governments and the first ministers, before their signing, spell out entirely and clearly what is meant by "national objectives."

As a contribution to that process, our organization put together a month and a half ago a volunteer task force of people who have expertise in a broad range of social programs and tried to draft what we thought would be a reasonable interpretation of the concept of national objectives that could be taken within the context of the present accord, but could spell out an understanding which would be useful and of value to both provincial and federal governments in the future, as well as facilitating the role of voluntary

organizations throughout the country and the role of private individuals in understanding their own entitlements to social benefits.

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The document we have asked to be distributed is the document which was developed by that task force, subsequently reviewed by our executive board and adopted as representing a policy approach of the council.

If you look at that document, you will see that it mentions a bit about the background and history of social programs. It suggests that the history of cost-shared social programs in Canada has been more or less co-operative. It does not say that in a naïve sense. Obviously, there have been battles over the years, among provinces, between provinces and the federal government and so on, in the development of specific programs, but we think, all told, it can be seen as having generally been a co-operative process.

Our view is that cost-sharing, in the context of the federal spending power, is a situation which requires co-operation, yes, but if you turn that around, co-operation in the future between federal and provincial governments will require the federal spending power to be available and not to be unduly constrained by this agreement. The reason we suggest that is we do not think the jurisdictional issues on social programs are as clear as we might assume if we looked at the Constitution, sections 91 and 92, and said, "Well, yes, if it's social services and health-related programs, then that is provincial jurisdiction."

As you know, I am sure, while it may be fairly easy to separate out federal and provincial jurisdiction in specific program areas, that jurisdiction does not correspond to the separation of taxing powers. In fact, it has been necessary to have federal spending power in order to respond to the need for major programs. The provinces do not have the taxing powers that really correspond to their jurisdiction in various social program areas, so we make the point that cost-sharing is related not only to jurisdiction for programs but also to the distribution of taxing powers.

We further point out that there is a very small gap between that issue, that concept, and the concept of equalization. Indeed, there are people throughout the country who receive programs and benefits through a provincial government, but who are paying taxes supporting those programs through the federal government, and they have legitimate expectations of both of those governments in the area of co-operation in the use of the spending power.

Finally, it is not entirely clear whether some programs are in federal or provincial jurisdiction because many issues around social programs transcend either a federal or a provincial issue. I just point out the issue of mobility. We are a very mobile society. I do not have recent figures, but several years ago we had a figure of something like 400,000 families who would move from one province to another in Canada every year. That figure is probably at least that number now and perhaps even more. The issue of portability of benefits is very important to Canadians. It is very important that we can go from New Brunswick to Ontario, or from Ontario to another province, and have a continuity of our health coverage as we go. That is an issue which is not entirely a provincial issue, even though it may be a jurisdictional one.

Our points here then are that we see in the future a need for new and refined social programs, that we see a need for continuation of co-operation and that we think this co-operation has to be facilitated by a spending power which is not unduly constrained. We suggest that in this context, national objectives can serve a very important purpose. They can serve the purpose of tying together people's views of the benefits of social programs. As you know, people in Canada think of social programs very much in the context of their view of Canada. Medicare and nationalism are not so far apart in the way people generally view their entitlements.

We are suggesting an understanding, if you like, or perhaps a better definition would be a description of the criteria for the development of national objectives, which would then guide social programs and guide the cost-sharing function.

On page 11 of our document, you will see that we have listed four major criteria we think should be adopted by both federal and provincial governments as representing their understanding of the criteria for definition of any national objective.

First, the specific national social need that is to be addressed should be clarified in these national objectives. When we went through the history of the development of the individual shared-cost programs, we came clearly to the conclusion that there would not have been a shared-cost program in any of these areas if a national need had not been identified. We feel that there should be a statement of the desired goal and the anticipated outcome, the result, in a measurable sense, that governments intend to achieve through the social programs they establish.



This is a different approach from what we see in a number of the present cost-shared programs. If you use the Canada assistance plan as an example, you will see that federal requirements in that area tend to be administrative. Standards tend to be administrative. We are suggesting that we shift our focus from an emphasis on how we will deliver particular programs to what those programs achieve.

Staying with the Canada assistance plan, if the objective of the Canada assistance plan is to reduce poverty, then perhaps that should be the measure of compatibility for a program within that. The federal government might very well be able to open up to a broader range of administrative options as long as one were tied to a measure of the purpose of the outcome of the program. So that is the nature of that shift we are suggesting.

Second, we are suggesting that beyond that there are fundamental principles, or in some cases considered social rights or benefits, that are intended when there is the development of a national social program. Here, as examples of fundamental principles, we have used the example of the Canada Health Act, and the issues of comprehensiveness, accessibility, universality and so on. If those are the intended basic principles to guide a program that are going to be agreed on at the beginning of a program, then those fundamental principles should be spelled out in the national objectives.

Third are the recognition of the rights and the social entitlements of those people to whom a national objective is directed. We are suggesting here that if social programs, cost-shared programs, are in the future to have constitutional status, which is what we are giving them, then by the very definition of "constitution" itself the rights of individual citizens through the country to those programs should have equality, should have equal status, and that by including that in the definition of national objectives one would do that. It is the idea that the intended rights and social entitlements to those programs of people in the country will be spelled out.

We make mention here of the fact that Canada, as well, is signatory to a broad range of international covenants. In most of these cases, when we have signed an international agreement or an international covenant in a social program area, that covenant has been ratified not only by the federal Parliament but by all of the provincial legislatures as well. I take as an example the 1964 international convention on full employment, which was ratified not only by the Canadian Parliament but by all the provincial legislatures.

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We think where a national shared-cost program is to be put in place and where that reflects or mirrors an international covenant which has been ratified by Canada, then that covenant should be clearly identified within the context of the national objective and that the shared-cost program should be made to be consistent with what we have done internationally. Canadian foreign policy states that we will be consistent domestically with stands that we take internationally. We think that should be written in.

Finally, we believe that any stated commitment for a national social program should be balanced and clarified by a commitment to monitor and to assess progress in meeting those clearly identified social needs, and that we should maintain a publicly available standardized database which reflects the status of those needs and that we should have a commitment to monitoring and to publicly reporting and evaluating the country's progress in realizing that national objective.

Now this may seem rather obvious, I suppose, but you may well be aware that there is a history in Canada of many social programs which are receiving funding from both federal and provincial levels where there is absolutely no accounting, either nationally or otherwise, of the progress that is being made on those programs: the results and the outcomes. There is no way that Canadians can judge right now, for example, the effectiveness of the \$87 million or so a year that is spent federally and then matched provincially for the rehabilitation of disabled persons. That is not right; so we are saying we need a way to ensure accountability.

Within the context of national objectives, there is an opportunity to tie together federal and provincial interests within a context that allows maximum provincial flexibility, a maximum range of co-operation, and yet can result in much-improved social programs in the future. We think if that is taken as a shared understanding, then some of the other terms that are indistinct in the accord can more easily be dealt with; terms such as "compatibility," for example. We do not have to argue about whether "compatibility" means not repugnant to, consistent with or whatever; we can say "compatibility" can be determined by the degree to which provincial initiative clearly is working towards those defined national objectives, and so, therefore, can compensation.

I think I have gone on longer than I intended. I thank you for your tolerance of that, but I am

open to any questions or concerns that you might like to raise.

**Mr. Chairman:** Thank you very much; and not at all, I think you have done something that we have been searching for for some while, which has been how to come to grips with national objectives. We have entered into a number of discussions with different individuals and groups around the whole question of standards and objectives and how that all might come together. I think what you have put before us here is extremely useful and we really appreciate that. I think that is going to be of great help to us as we struggle through some of these different issues. We will begin the questioning with Mr. Breagh.

**Mr. Breagh:** You have done something that a number of groups have tried to do and I have personally struggled with. It seems to me in this document you are getting a little closer to something that would be useful. I do not think it would do anybody any good in this country if we changed the word from "objectives" to "standards" or anything like that.

It is hard, I guess, for many groups to kind of understand why somebody like me in particular does not want to play this game. But I think every one of us spends a whole lot of time in our constituency office dealing with somebody who is hurt, who is poor, who is injured or who is sick, and we play the game of trying to find out: "Which box does this one fit into? Which set of standards? Which criteria?"

I think all of us would tell the world that we have gone through situations where governments at many levels spent more money administering than they did in delivering a benefit. We have all been to a compensation board hearing where the workers' compensation fund in Ontario spent untold thousands of dollars to assess someone's injuries. The guy cannot walk and the board says, "But our expert advice is you don't fit the criteria, you don't meet the standards and you don't get the money." It is an aggravation to no end to find out that governments are willing to spend \$100,000 to assess their standards and will not give a guy a nickel.

We have all had it. I represent an industrial riding and it is common practice, for example, that when a worker is 45 or 50 and is injured on the job, he will take whatever box he fits in, whether it is the compensation board or a disability pension or whatever, and move back to the Maritimes or eastern Ontario where he could actually live on that kind of money. He could not

continue to live in an urban, industrialized riding.

I think for many of us, if we are expressing, or if I am expressing a little frustration here, it is just that this is the game we play on a daily basis and it is not a nice game. I cannot justify why a woman who fell in her house does not get anything for her injury at her place of work and a worker who falls off a scaffold at a building site does qualify. I am really angry that all the programs we have set up for almost all these things result in something which, at the very best, leaves them just below the poverty line and probably means they cannot continue to reside.

Every time we get into this standards stuff—we have a thing in Ontario called the spouse-in-the-house rule now, which was designed essentially to allow, the other designated spouse I guess you have to say these days, to be able to walk in the front door as opposed to crawling in the back window. The purpose of this exercise was to recognize a modern reality of how people live and cohabit.

The end result has been, in a number of cases, that though they qualified for X amount of dollars more per month—the government bureaucracies approved this—for many of them it meant they were disqualified for certain other things. They get 35 bucks in hand over here and lose all their medical benefits over there, and for some of them the medical benefits are the big dollar item in their lives.

What you have done, I think, is try to bump this into something which maybe makes a little bit more sense and may eventually get us to the point where it does not matter whether you are a man or a woman or whether you are injured in an industrial factory or in the kitchen, we are able to deliver a program that actually allows you to have something more than subsistence dollars in your pocket. Is that where you are headed with this thing as well?

**Mr. Hunsley:** I think the situation you describe is an excellent example of what we consider very likely to happen within the next 10 years, and that is we are going to recognize a requirement to rationalize a whole set of programs.

Sooner or later, there is going to be a challenge, whether it is a constitutional challenge or a challenge of provincial legislation or whatever, where someone is going to say it really is discriminatory that a person who suffers the same injury but at a different time of the day or in a slightly different context receives a completely different set of benefits.



I know there is a group of public officials working now at both the federal and provincial levels looking at the need to develop some sort of national disability insurance plan. They are going to look at workers' compensation programs, which vary from province to province, and at the Canada pension plan, which is the same everywhere. They are going to look at the taxation provisions, the deduction for disability that people can claim but would vary—it would be the same federal deduction no matter where they were in the country but would be a different provincial deduction depending on where they were. They are going to look at a whole range of these programs and say, "How do we rationalize these?"

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In order to rationalize them, first, there is going to have to be a lot of flexibility available in the institutional instruments that we have to deal with that. Second, there has to be a concentration on the outcome you are desiring. What is the level of income replacement, if that is it, that people should be able to expect if they are disabled? Otherwise, they must try to deal with: "Did you get the disability during work hours or after work hours? Were you employed or not at the time? Should unemployment insurance cover disability insurance if you happen to be unemployed?" There are any number of questions like that.

Yes, I think in a sense we are trying to aim at the same thing. Let us define basic outcomes that we want and then deal with the roles of federal, provincial and municipal governments in delivering on those issues. I do not mean to separate funding from delivery in terms of jurisdiction by any means. There are clear jurisdictional issues which come in there.

**Mr. Breagh:** I will not bother you too much today, but one of my long-standing arguments is that the process we use to deliver benefits to people who need them is a process which is designed in such a way as to just exclude the clientele almost totally. We offer to people who may have more difficulty filling out forms than anybody else in our society an obligation to fill out a form.

This is something I do every day and I am amazed that forms designed by people who are bright, intelligent, straightforward folks confuse me. Imagine how they confuse somebody who also has a whole lot of back pain at the moment. They cannot find the building, they cannot find the program, they do not understand the language, they cannot fill out the form, and the end

result usually is that they do not qualify for this benefit anyway.

The frustration level among those of us who practise that kind of constituency work is very high. I do not have a whole lot of time to sit around and talk about standards, objectives or criteria. If somebody wants to talk to me about the legal right to challenge whether your provincial government, your municipal government or your federal government is treating you fairly as they ought to, I am on side with that, just as I am if you want to bump this system around so that the end result is that people get the assistance they require rather than an analysis of whether the program meets everybody's criteria.

To be truthful, too, I think a lot of us spend a lot of our time saying to community groups who come in, "What is it you want to do?" We have a working knowledge of what government programs fund those kinds of things and we massage—I guess that is the nice word—the local group's desires and programs to fit the box that somebody else has designed for a delivery system. I would really rather get out of that business.

**Miss Roberts:** I hate to agree with my colleague, but he certainly has looked at a particular problem in a fairly practical way and has an understanding of the way the federal and provincial governments right now are dealing with cost-shared programs and he has some concern about how that can change and how it has changed just in the last little while. You have that background. There are just two fairly practical questions that I might put to you.

You have indicated on page 2 of your brief various things—four points, I believe—that you would like looked into to clarify national objectives. What vehicle are you going to use to get these four points or things like them dealt with, either by the legislatures or by the federal Parliament? Are you suggesting that there be a change to the Meech Lake accord or a change to the Constitution? How do we deal with that?

**Mr. Weiler:** We are concerned because we realize that, if one is to propose an amendment, one is talking about the changing of the present wording. What we are really trying to get at in this proposal is an interpretative statement, putting the particular statement that we have in the Meech Lake accord into a context that will allow for the progressive development of social programming.

Because of that, we are open to suggestions, but initially the view of the council was that if we could get at least public commitment of the

leaders, the first ministers in particular, to this understanding, to this being their understanding of a clause that they perhaps will sign or already have signed, that would be a good starting point. Hopefully, if there is a challenge in the courts, that kind of understanding would then be conveyed to the courts as a part of the evidence presented if some jurisdictional disputes in the area of shared-cost programming were to be presented in the future.

**Miss Roberts:** An interpretative statement of some type, maybe a statement in the House of Commons or somewhere that can be used by the courts somewhere down the road.

My second question with respect to that is: are you not concerned about the delineation of the term "national objectives" in that way, either through interpretative statements or in some way? At this time, it is going to put some limits on the use and the benefit of that term somewhere down the road with respect to shared-cost programs. This is what you would like to have today, but 10, 15 or 20 years from now, you may not want it to be that narrow or you may want it to be narrower.

**Mr. Hunsley:** I should clarify that. We would like to have the most formal level of ratification possible for this kind of understanding. A statement made in the House is one way, but we would be delighted if, in the accord, when the accord itself is signed, there were an asterisk alongside the words "national objectives" and a footnote that said, "As defined as follows" and this sort of definition were to be appended. We think that would be much better.

However, I think the answer to the second question is really that we do not think that this narrows the ability of federal and provincial governments in any way in the future. If we took the view that the words "national objectives" can mean whatever federal and provincial governments agree at any given time that they can mean—and I realize that is an exaggeration of what you are saying—then there would be no need for almost any document setting out relationships, because what you would say is just that relationships will be whatever we agree them to be in future.

In reality, we have the ability to deal with and amend legislation, the accord and the Constitution, as evidenced here, but for the foreseeable future, this definition, in our view, is an appropriate one. It has a wide degree of latitude for the roles of federal and provincial governments and it does not constrain either government. We do not think that it abridges either

government's legitimate jurisdiction but it guides the development of programs and maybe more important, it brings into the Constitution the individual Canadian, because this adds the element of the citizen. If there are going to be cost-shared programs in the future, they are going to be constitutionally defined. What is the right of the citizen in respect of those programs?

**Mr. McGuinty:** In my experience with the document thus far, I guess next to the phrase "distinct society," the one that has given the most problems is the phrase "national objectives." It seems to me that really opens up a can of worms for future interpretation.

A number of people to whom I have spoken have the good fortune not to be trained in law; therefore—and I do not say this in a disparaging sense—they can see into some very basic implications of the accord as presently worded. They raise a basic question and they put it this way: "The premise on which medicare is based is the assumption that every Canadian from Newfoundland to Victoria has the right as a person to basic health and a decent standard of medical care. In a civilized community, we have an obligation to respect that right."

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Is it conceivable that the federal government's power to extend a future basic necessity—the one I think of is possibly day care—which is considered to be, as society has evolved, a right and a basic need for the family, will be emasculated by virtue of the right of provinces to interpret national objectives to perhaps use the funds so allocated for highways? Is that the crux of the problem you are focusing on, sir?

**Mr. Hunsley:** I think it is, with one small adjustment. It is not necessarily the federal government's power to extend the right to an individual in a context that is clearly a provincial jurisdiction that is at issue; it is the power of the federal and provincial governments together to extend that right. That is what we are concerned may well be undermined by a vague, indistinct idea about what national objectives really are all about.

**Mr. Harris:** I will just ask one thing. At the end of your brief you state that nongovernmental participation should also be essential in assessing the efforts towards the achievement of national objectives. When we are talking about federal-provincial spending power, I would like to take it a little further. I am not a lawyer and I want to understand where you see this process is coming from. Presumably, if there is a federal-provincial



program, and it is cost-shared or whatever it is, we are going to turn to this document if there is a problem. If there is no problem, nobody is going to look at the document, presumably.

Is the problem we are talking about going to be the federal government saying to a province, "You are not delivering"? Is it going to be initiated in that way and somebody is going to have to interpret that, or is the province going to initiate it? That is my understanding of where we are coming from. Is there a vehicle now, and do you think there is a need for a vehicle, for an individual to challenge what is happening in a federal-provincial cost-sharing program?

**Mr. Hunsley:** There is a vehicle for individuals—and I do not think this is the right answer—to challenge federal legislation. There is not necessarily a vehicle for individuals to challenge provincial legislation when that is related to rights and issues.

But I want to come back to the beginning of your question, or your statement in fact. I do not think this issue is here to deal with the exception. I do not think this definition is here to deal with the problem when it arises as a disagreement. I think it is more important to deal with the everyday development of programs.

What the definition of national objectives, or the understanding of that clause will do, is determine what the process is to review existing programs and to develop new ones. One of the problems that has been floating around in the issue of child care, for example, is that people do not really know at this stage whether they are dealing with pre-Meech-Lake understandings or whether they are trying to develop child care on the assumption that the accord is in place or not, and the difficulty of that is, depending on how you interpret it different people are involved.

If you look at who gets involved in the bureaucracy, then a standard way for a piece of specific legislation like child care to be developed is for people in the health and welfare departments and the social services departments across the country to get together and talk about what is needed, to come to some sort of consensus about that, and then for all to go back and have that rise through their own systems and be ratified and so on.

In the post-Meech-Lake process, there are different actors involved. The people who negotiate these things are now the federal-provincial relations department or intergovernmental affairs department, if you like, of the various governments, and often the finance departments; because the major concerns are,

"What are our jurisdictional rights here and what happens if we opt out?" rather than the context in which one is working. So there is a bit of that as an ongoing problem in regard to how these programs are developed.

It is also a concern on our part, being a nongovernment organization, that nongovernment organizations have access to the process of policy development in the future. We are a bit concerned about that in relation to the accord.

For example, the Canada assistance plan, which has been used as an example in this cost-sharing area, was developed during the 1960s. It was developed based on a model put together by a volunteer task force of our own organization, chaired by Dr. Fred MacKinnon, who happened to be a vice-president of our council and also happened to be a deputy minister in a provincial government at the time.

The policy and the program issues which were worked on were developed, first, outside of government, outside of the federal-provincial negotiating arena, by people whose main concern was program. Then they were subjected later on to the federal-provincial process which brought in the concerns and considerations of financing and so on that go with that.

There, again, we think that depending on the definition of objectives and what is involved in that, the people who are involved in deciding the kinds of programs and rights and so on really will change. We would like to be sure that there is a role for that community which is involved in these areas to have something to say about it.

**Mr. Chairman:** On behalf of the committee, I would like to thank you again for coming today. I think the points you have brought forth really have been most helpful.

The point just at the end with respect to the nongovernmental organizations is one we really have to pay attention to. I think we have been aware of that not only in looking specifically at the development of the kinds of new shared-cost programs we are going to need but also in the development of constitutional amendments, where perhaps some issues and some matters might have been less of a problem had we had more input from nongovernmental organizations as well as individuals.

As you can appreciate, in a committee such as ours there are a number of areas where we get into, especially in this subject matter, some fairly ethereal discussion. So it really is, I stress again, helpful to have—in this case, your own organization has gone away and said: "Well, OK. If this

goes ahead, how might that work? How would we approach it?"

You have stressed the fact that when we are talking about a shared-cost program, we are talking about the federal and provincial governments and the nature of that co-operation and you have asked whether we can find somehow, whether it is by inserting in the agreement an asterisk or whatever the process, a shared

understanding of what we are going to mean by this.

I would just like to thank you very much for the submission. We have the other documents and we will read them with interest as well.

**Mr. Hunsley:** Thank you very much.

**Mr. Chairman:** We will now take a constitutional break and adjourn until 2 o'clock.

The committee recessed at 12:49 p.m.



## AFTERNOON SITTING

The committee resumed at 2:07 p.m. in the Capital Hall of the Ottawa Congress Centre.

**M. le Président:** Je souhaite la bienvenue à tout le monde à notre séance cet après-midi. Nous avons d'abord les représentants de la Fédération des caisses populaires de l'Ontario: M. Roland Gervais, membre du conseil d'administration, et M. Jean-Guy Laffèche, directeur technique de la Fédération. Nous avons devant nous la lettre de votre président, M. Jean-B. Alie. Pardon, c'est seulement moi qui ai la lettre. Je vais juste expliquer aux autres membres que M. Alie est à Toronto avec le trésorier de l'Ontario (M. Nixon) et qu'il était censé être ici, mais il n'a pas pu venir. Nous le comprenons très bien.

**M. Villeneuve:** Pour de bonnes raisons, Monsieur le Président.

**M. le Président:** Oui, absolument. Ces jours-ci, M. Nixon reçoit beaucoup de visiteurs pour parler d'autres questions.

Nous avons la présentation devant nous et je vais simplement vous passer la parole. Après la présentation, nous allons vous poser des questions.

#### FÉDÉRATION DES CAISSES POPULAIRES DE L'ONTARIO INC.

**M. Gervais:** Je vous remercie beaucoup de nous donner la chance de vous présenter notre mémoire aujourd'hui.

Monsieur le Président, mesdames et messieurs, la question que nous voulons discuter présentement est celle de permettre et de promouvoir le développement de la communauté francophone de l'Ontario par la reconnaissance officielle des institutions qui lui appartiennent. Les caisses populaires, à cause de leur philosophie coopérative, forment un regroupement totalement franco-ontarien qui existe depuis le début du XX<sup>e</sup> siècle. Notre mouvement n'a jamais perdu son identité francophone au fil des ans, même qu'il l'a plutôt accentuée.

Notre argumentation juridique est la même que celle que vous a présentée, en février, l'Association canadienne-française de l'Ontario, dont nous appuyons totalement le point de vue exprimé dans son mémoire «les Hors-la-loi». Nous avons cependant cru bon vous exposer brièvement, en complément de ce mémoire, en quoi non seulement la mission de la Fédération des caisses populaires de l'Ontario mais aussi la

survie de notre mouvement coopératif sont directement menacées par l'accord du lac Meech.

Il y a, au-delà de la culture et de la langue, des traits économiques et sociaux particuliers à la francophonie ontarienne. Les caisses populaires en sont peut-être un des meilleurs exemples. Elles ont été mises sur pied par des francophones pour des francophones afin de favoriser le développement socio-économique de leur communauté. Depuis la fondation de la première caisse en 1912, elles se sont développées pour former aujourd'hui un important regroupement financier à caractère distinct.

Les caisses sont installées dans presque toutes les communautés francophones de la province et elles totalisent des actifs supérieurs à 1,1 milliard de dollars. Elles jouent un rôle unique dans la présence et la promotion de la culture francophone et représentent beaucoup plus que les intérêts financiers. À ce titre, les caisses populaires doivent avoir les moyens non seulement de survivre mais aussi de se développer. Le nouvel accord constitutionnel est, parmi ces moyens, celui qui a probablement le plus d'impact à long terme sur leur avenir.

L'entente constitutionnelle de juin 1987 menace la croissance et la stabilité continues des caisses, étant donné le manque de garanties pour les institutions francophones. Elle menace directement l'épanouissement économique et socio-culturel des Franco-Ontariens. Puisqu'elle ne garantit que le statu quo en matière de droits linguistiques et que ce statu quo protège bien imparfaitement le caractère distinct de la communauté francophone au sein de la structure sociale et économique de l'Ontario, elle doit être révisée. Cette révision doit assurer des droits collectifs aux Canadiens d'expression française hors Québec. Elle doit inclure la nécessité pour les gouvernements de promouvoir la reconnaissance de ces droits. En d'autres mots, la constitution doit dire aux Canadiens qu'on peut avoir en Ontario autre chose qu'un milieu fait sur mesure pour anglophones seulement.

Comme toute coopérative d'épargne et de crédit, les caisses populaires ont pour but de développer un réseau de services financiers en conformité avec les principes coopératifs. Les caisses populaires affiliées à la Fédération visent cependant à quelque chose de plus qu'à offrir ces seuls services financiers. Elles se sont donné une mission spécifique, qui est de contribuer à

l'épanouissement économique et socioculturel de la communauté franco-ontarienne. Voici le texte de cette mission, et je cite:

«La Fédération des caisses populaires de l'Ontario inc., en collaboration avec ses caisses populaires affiliées, a pour mission de développer un réseau de services financiers en conformité avec les principes coopératifs, afin de contribuer à l'épanouissement économique et socioculturel des Franco-Ontariens.»

La relation étroite qui s'est développée entre les caisses populaires et les francophones de l'Ontario témoigne de son importance pour la communauté. Les caisses desservent près de la moitié des Franco-Ontariens et Franco-Ontariennes. Elles sont parmi les plus importantes institutions financières à leur service, et la seule dans plusieurs localités.

De nombreuses petites communautés francophones n'auraient même pas d'institution financière à leur disposition sans les caisses. En effet, les caisses desservent une vingtaine de localités où elles sont les seules institutions financières. Aucune banque ni aucune compagnie de fiducie n'installeraient une succursale en ces endroits, à cause du potentiel de clientèle peu élevé. D'ailleurs, la fermeture de succursales d'autres institutions financières a été à l'origine de la fondation de plusieurs caisses, dont la situation est très florissante aujourd'hui. Pour les caisses, la rentabilité demeure toujours un objectif à viser, mais ce n'est pas tout. Il existe toute une dimension sociale qui dépasse de beaucoup les critères de gestion des entreprises capitalistes.

Avec ses caisses membres, la Fédération contribue activement à la vie culturelle de la communauté franco-ontarienne en y versant plus de 200 000 \$ par année, soit près du tiers du budget alloué par l'Office des affaires francophones au Fonds de soutien à la communauté. Ce sont les caisses qui ont créé, par exemple, un centre communautaire francophone dans la région du Grand-Nord, une coopérative d'habitation à Hanmer, une résidence pour personnes âgées dans la région de Sudbury. Ce sont toujours ces caisses qui investissent des ressources humaines et financières dans la jeunesse franco-ontarienne en leur permettant de faire valoir leurs talents culturels ou en mettant sur pied des mécanismes d'éducation économique et coopérative. Des exemples de ce genre, nous en avons à profusion.

L'identité francophone du mouvement, de pair avec l'implication communautaire importante des caisses et un membership stable, a été primordial pour la croissance du mouvement des

caisses populaires en Ontario. Et elle le sera encore plus à l'avenir, alors que l'innovation basée sur l'expérience vécue au sein des communautés locales sera le meilleur gage du développement économique.

Ce court exposé de ce que sont les caisses populaires de l'Ontario m'amène au cœur de ma présentation, qui repose sur deux points fondamentaux. Nous percevons l'accord constitutionnel, tel que rédigé présentement, comme une réponse inadéquate aux besoins des Canadiens français. De plus, il est primordial que les communautés francophones hors Québec jouissent des garanties constitutionnelles nécessaires à la construction d'un cadre d'action où leurs membres pourront travailler, recevoir des services et se développer dans leur langue et leur culture propres.

Rien ne sert de s'étendre devant ce comité sur les sombres perspectives du français hors Québec. Les nombres faibles et l'éparpillement des francophones les rendent extrêmement vulnérables à l'assimilation. Les politiques des gouvernements dont qu'ils doivent toujours se battre pour les droits qui leur sont accordés comme des privilèges.

La situation des francophones est d'autant plus précaire que le Canada est à libéraliser ses échanges avec les États-Unis, ce qui rendra la communauté francophone encore plus perméable aux influences des autres. L'Ontario sera touché de plein fouet par le libre-échange. Son économie sera, dit-on, profondément modifiée et, avec elle, le monde du travail ontarien, les entreprises et les institutions. Disparaîtront vraisemblablement, à plus ou moins long terme, nombre d'activités reliées à l'exploitation directe des ressources du milieu local, activités qui avaient permis aux concentrations de francophones de l'est et du nord de se maintenir jusqu'à aujourd'hui. La migration vers Toronto aidant, c'est tout un contexte favorable à l'épanouissement de la communauté francophone qui disparaîtra.

Les efforts que devront déployer les caisses durant les années qui viennent exigeront de faire plus encore que par le passé. Si nous voulons nous insérer collectivement dans les courants modernes de l'économie, sortir du sous-développement les localités francophones particulièrement touchées par les changements technologiques récents et assurer la participation de notre jeunesse, il nous faut une reconnaissance officielle de la contribution des francophones à la société canadienne. Les garanties constitutionnelles dont bénéficie aujourd'hui la communauté francophone sont nettement insuffisantes.



Malgré des efforts marqués dans les secteurs de l'éducation et de la justice, le gouvernement de l'Ontario n'a pas su légiférer jusqu'ici de façon à pallier les insuffisances de la constitution. Même qu'au contraire, en ce qui a trait aux coopératives d'épargne et de crédit, la récente législation provinciale va jusqu'à entraver le développement des institutions francophones et des communautés qui les soutiennent.

En effet, les dernières mesures du gouvernement de l'Ontario enlèvent aux caisses populaires les droits qu'elles avaient acquis antérieurement avec la Loi de 1976 sur les caisses populaires et les «credit unions». Nous avons alors été reconnus officiellement comme des entités distinctes et obtenu un traitement en conséquence. Je me permets de vous citer un extrait du paragraphe 24(3) de cette loi de 1976: «La caisse tient ou fait tenir, en français ou en anglais seulement, les documents et registres suivants...».

Cette loi nous autorisait donc à faire affaires dans notre langue. Malheureusement, douze ans plus tard, les caisses ne peuvent toujours pas s'adresser au gouvernement en français. Les hauts fonctionnaires sont tous des anglophones qui ne comprennent ni ne lisent aucun mot de français. Pis encore, lorsque nous correspondons avec le ministère, des délais supplémentaires s'y ajoutent, puisque nos documents doivent être traduits par le gouvernement. Souvent, ces traductions ne respectent pas le sens de nos propos.

Afin de régler les difficultés financières que connaissent un certain nombre de caisses et de «credit unions» au sein du mouvement coopératif de l'épargne et du crédit populaire, le ministère des Institutions financières annonçait en 1986 son programme de changement. L'action du gouvernement contenait des mesures de stabilisation qui allaient toucher indistinctement les caisses populaires et les «credit unions», malgré la reconnaissance du rôle particulier des premières dans la Loi de 1976 sur les caisses populaires et les «credit unions». Ces mesures, qui enlèvent aux fédérations de caisses populaires leur propre fonds de stabilisation, représentent une perte importante d'autonomie pour les institutions francophones. Aussi, en réduisant sensiblement les fonds disponibles aux sociétés et à la communauté francophone en général, elles diminuent d'autant le pouvoir financier de cette dernière et ses capacités de se prendre en main économiquement et socialement.

Nous sommes d'avis que la stabilisation du mouvement des caisses populaires ontariennes

devrait être confiée à des institutions francophones. Présentement, des décisions majeures sont prises par des gens qui considèrent les caisses et les «credit unions» totalement pareilles et qui n'ont aucune implication dans la communauté francophone. Seul le point de vue affaires ou financier est analysé, et on se foute complètement du rôle social des caisses dans la francophonie.

La situation déplorable que nous vivons présentement avec le gouvernement démontre à quel point nous sommes vulnérables aux changements du parti au pouvoir. Même avec la Loi 8 sur les services en français du gouvernement actuel, les caisses populaires ontariennes ont subi un important recul quant à la reconnaissance de leur existence et de leur statut particulier.

De plus, rien dans la constitution actuelle ne permet aux francophones d'exiger que le rôle unique et les méthodes de gestion particulières aux caisses populaires soient reconnus. Rien ne leur permet de s'ériger contre une politique du ministère des Institutions financières qui leur est nettement préjudiciable. Et l'accord du lac Meech, qui ne reconnaît que des droits individuels de parler en français, qui n'exige en rien la promotion du fait français hors du Québec, n'offrira aucune amélioration en ce sens. Cette situation devient donc très inquiétante pour l'avenir de notre mouvement coopératif et francophone.

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Pour continuer à jouer leur rôle unique en Ontario français, pour jouir d'une certaine stabilité et continuer à prendre de l'expansion, les caisses populaires de l'Ontario ont besoin d'une reconnaissance officielle de leur caractère distinct dans la loi qui les régit. Elles ont besoin de la création d'un fonds de stabilisation séparé pour le mouvement francophone, étant donné les différences de philosophie, de gestion et de stabilité financière entre les mouvements francophone et anglophone. Elles ont besoin d'une gestion séparée du fonds de stabilisation francophone, ce qui leur permettra de tirer parti de leur vigueur.

Plus encore, les caisses populaires ont besoin de ne plus être soumises au bon vouloir des gouvernements en place, qui choisissent souvent de répondre à court terme aux fluctuations de l'économie provinciale. Elles ont besoin d'une pleine reconnaissance du caractère distinct de la communauté francophone et de son droit à l'usage de sa langue dans la province. Elles ont besoin du bilinguisme officiel, sans quoi elles n'auront aucune garantie de pouvoir maintenir

leur place de choix dans le développement économique, social et culturel de la communauté franco-ontarienne. Et elles ont besoin d'une entente constitutionnelle qui donne à la communauté francophone hors Québec le droit d'exister et de s'épanouir.

De notre point de vue, la question que l'on doit se poser, à la lecture du texte de l'accord du lac Meech, est fort simple: Comment les Franco-Ontariens pourraient-ils assurer leur avenir socioculturel, sans le fonder sur une base économique forte? Et comment, dans un environnement où la rentabilité financière est l'unique critère d'évaluation des entreprises, construire cette base économique sans garanties constitutionnelles suffisantes? De plus, ce critère de rentabilité devrait s'inspirer de nos fondements culturels et refléter les caractéristiques de la communauté francophone; en d'autres mots, correspondre à notre mission.

La réponse est aussi fort simple. L'incompréhension manifeste des pouvoirs publics face aux caisses populaires et à leur mission auprès des francophones nous rappelle l'importance d'une constitution qui leur reconnaisse le droit de construire un pays à leur image.

En conclusion, nous espérons que notre message aux membres de ce comité a été assez clair. L'avenir d'un Ontario français passe par l'action collective au sein d'une communauté qui a misé sur la solidarité plutôt que sur l'individualisme de ses membres. Il dépend d'institutions suffisamment souples et dans lesquelles les citoyens ne sont pas les victimes d'organisations qui leur sont culturellement étrangères. Or, ces institutions ne joueront le rôle qui leur revient qu'à la faveur de garanties constitutionnelles fortes pour les communautés francophones à l'échelle de tout le Canada.

Ce n'est pas par hasard si les caisses populaires représentent aujourd'hui une force économique de plus d'un milliard de dollars. Il s'agit d'une réussite collective qui prouve que notre système fonctionne très bien. Pourquoi le gouvernement essaie-t-il de nous en imposer un autre présentement? Nous disposons actuellement de plus de 25 millions de dollars en réserve. Cette somme appartient totalement aux francophones, membres des caisses. Mieux encore, l'existence des caisses crée présentement plus de 600 emplois pour les francophones, ce qui s'élève à environ 40 millions de dollars en salaires et dépenses diverses. Cela entraîne des retombées économiques de l'ordre de 140 millions de dollars dans nos diverses communautés.

La dimension socio-économique de notre mouvement est non seulement capitale mais aussi essentielle à la culture franco-ontarienne. Il faut donc nous donner les outils pour continuer notre action. Les caisses populaires en particulier ont besoin, pour contribuer à l'avenir socioculturel des Franco-Ontariens, d'une constitution qui reconnaisse le rôle joué par les deux communautés de langue officielle dans la construction du Canada de demain.

Merci, Monsieur le Président.

**M. le Président:** Merci beaucoup. Vous nous avez donné un très bon exemple d'une institution financière francophone qui est vraiment impliquée dans la vie socioculturelle de la francophonie de l'Ontario. C'est donc très clair comme exemple quand on parle de garanties de droits linguistiques et de droits culturels.

On passe aux questions, d'abord M. Villeneuve.

**M. Villeneuve:** Monsieur Gervais et Monsieur Laflèche, merci pour votre présentation. Je voudrais toucher à deux domaines. Pour toucher au premier domaine, qui a trait à l'accord du lac Meech, la reconnaissance du fait français, je crois que le mot est «préserver» tout simplement. Je crois que vous aimeriez peut-être avoir, comme bon nombre de gens l'ont mentionné, non seulement la préservation et la protection mais le fait de promouvoir la langue minoritaire en Ontario. Le comité va probablement faire face à cette situation-là.

La deuxième situation à laquelle il fait face est plutôt une situation provinciale. Quand on fait face à une situation, vous êtes en réalité desservis de la même façon...

**M. le Président:** Excusez-moi, Monsieur Villeneuve. Le système d'interprétation simultanée ne fonctionne pas. Cela marche? Is that OK now? Bon, alors je m'excuse. Continuez.

**M. Villeneuve:** Vous êtes desservis de la même façon que les «credit unions» en Ontario, et puis moi-même et mon collègue M. Harris de North Bay, nous avons abordé à plusieurs reprises le problème auquel M. Alie fait face actuellement avec le trésorier de la province. Mais premièrement, du côté de l'entente du lac Meech, pourriez-vous nous donner vos impressions, vos idées sur la façon dont la langue minoritaire en Ontario devrait être abordée dans l'accord?

**M. Gervais:** Le problème que nous avons, vient peut-être du fait qu'on dénote un territoire géographique, soit le Québec, comme société distincte. En fait, la façon dont nous le voyons,



nous autres, c'est que ce sont les Canadiens français, l'un des deux groupes fondateurs, qui, d'après nous, ont droit à des services égaux et équitables. Ce n'est pas le territoire géographique qui soit important à la question, c'est la communauté francophone, qui n'est pas traitée de façon égale.

**M. Villeneuve:** Nous avons eu une présentation très passionnée ce matin de la part des anglophones du Québec, qui font face un peu à la même situation que la francophonie hors Québec, et je crois que nous comprenons un peu les problèmes auxquels font face les minorités, où qu'elles soient. Je crois que vous touchez au noyau du problème.

Deuxièmement, vous avez, avec le trésorier de l'Ontario, des négociations qui ne touchent pas directement à l'entente du lac Meech; c'est probablement une situation indirecte, si vous voulez, mais vous voulez une reconnaissance spéciale. Vous avez déjà été une entreprise économique très viable, et en ce moment vous êtes obligés de négocier pour avoir une entente spéciale dans la mesure que vous êtes une entreprise spéciale, telle que dépeinte ici. Pourriez-vous donner un peu plus de détails là-dessus?

**M. Gervais:** Oui. Je suis d'accord que c'est peut-être une question indirecte à l'accord du lac Meech. Cependant, ça revient à ce que nous disions dans notre mémoire, à savoir qu'on ne nous garantit même pas le statu quo. On a vu ça quand le gouvernement a sorti son programme de changement, par lequel ils nous ont enlevé le fonds de stabilisation des caisses qu'on avait auparavant. Maintenant, on fait juste partie du «melting pot» de tous les autres groupes, les «credit unions» et autres, ce qui fait qu'on ne voit, dans le présent accord, aucune garantie même de garder le statu quo.

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**M. Villeneuve:** Cela se concrétise dans la mesure que vous êtes présents principalement en Ontario, dans les milieux où nous avons un nombre assez élevé d'Ontariens d'expression française. Je crois que ce n'est pas un accident, c'est fait tout simplement par le fait que les caisses populaires ont été un mouvement francophone en Ontario, et là où vous vous trouvez, je crois que vous vivez cette situation-là.

**M. Gervais:** Je ne suis pas sûr si je comprends le sens de votre question. Je ne comprends pas.

**M. Villeneuve:** C'est la raison pour laquelle vous voulez être distingués, séparés des «credit unions»: Vous êtes un mouvement francophone

établi dans les régions francophones de la province.

**M. Gervais:** C'est ça puisque, fondamentalement, d'après nous, nous ne pourrions jamais prendre notre destin en main si nous ne tenons pas les cordons de la bourse.

**M. Villeneuve:** Alors, vous voulez deux choses: Vous voulez votre autonomie au niveau provincial, et vous voulez la reconnaissance du fait français dans l'accord du lac Meech pour promouvoir le fait français, si je vous entends bien.

**M. Gervais:** Justement.

**M. Villeneuve:** Merci.

**M. Allen:** J'apprécie beaucoup un mémoire qui traite de l'impact, sur une seule institution, du lac Meech et des conséquences du lac Meech qu'on prévoit. Je suis d'accord qu'il faut vous donner les outils pour continuer votre action, et peut-être que les outils principaux sont la langue française et le statut de la langue en Ontario et partout dans notre pays.

Mais pour ce qui est des difficultés qu'on a à résoudre ce problème terminologique à l'égard de ce que comprennent les mots «préserver», «protéger», «promouvoir», etc., n'est-il pas possible que ce soit maintenant le moment de pousser le gouvernement de l'Ontario fortement en ce qui concerne la question du statut officiel de la langue française?

**M. Gervais:** Oui.

**M. Allen:** Oui? C'est peut-être de cette manière-là qu'il serait possible de résoudre la plupart de vos difficultés avec l'accord du lac Meech.

**M. Gervais:** Oui, c'est ça, puisque ce qui nous rend différents des «credit unions», ce sont en effet notre langue et puis notre culture. Le rôle que nous nous sommes donné dans notre mission, qui est d'améliorer la situation des Franco-Ontariens, serait d'ordre socioculturel et autre.

**M. Allen:** Oui. On a exprimé l'opinion que, dans la politique de certaines provinces – par exemple, la Colombie britannique – la préservation de la langue française est un grand pas en avant, et il serait difficile d'aller au-delà de cette position partout dans le pays.

Mais je suis un peu troublé par vos commentaires à la page huit à l'égard de vos relations avec le gouvernement de l'Ontario. Vos relations avec le gouvernement ne sont-elles pas comprises dans le projet de loi 8 concernant les services? Ou le problème est-il plutôt la qualité des services?

**M. Gervais:** Si ces problèmes vont être réglés par suite de la Loi 8, ils ne le sont pas encore. Si vous parlez de la communication, dans le deuxième ou le troisième paragraphe, il y a encore un problème de communication à cause du fait, comme on le dit, que la majorité des hauts fonctionnaires, sinon tous, sont anglophones et ne parlent ni comprennent le français.

**M. Laflèche:** Si vous me permettez de compléter la réponse, le problème se situe à deux niveaux. D'une part, il y a la question des communications avec le gouvernement, les représentants du gouvernement, à cause du fait que les hauts fonctionnaires ne sont pas bilingues; donc, il y a certains problèmes de communication. Il y a également la question de la traduction de documents; il y a des délais et tout ça. D'autre part, le gouvernement nous avait accordé un statut particulier par la reconnaissance de la Fédération des caisses populaires de l'Ontario en ce qui concerne l'administration des fonds de stabilisation.

Alors, avec le programme de changement que le ministère a présenté, et pour solutionner les problèmes du mouvement des coopératives de crédit, le gouvernement a reculé un peu sur ses positions et traite le problème d'une façon globale. Donc, c'est un peu à ce niveau-là que se situe notre problème. Vu que le gouvernement enlève leur statut particulier aux caisses populaires, on considère cela un peu comme un recul.

**M. Allen:** Oui. Merci beaucoup.

**M. Morin:** J'ai seulement une question complémentaire. Une de vos déclarations à la page huit me bouleverse, en ce sens que vous dites ceci: «Souvent, ces traductions ne respectent pas le sens de nos propos». Laissez-moi vous assurer, en tant que représentant du parti provincial, que ça n'a rien à voir avec l'accord du lac Meech. Si vous avez des difficultés comme celles-là, difficultés de communication, de compréhension, nous avons un ministre délégué aux Affaires francophones (M. Grandmaître), dont la seule responsabilité est de s'assurer que ces choses-là ne se produisent pas. Alors, ce que je vous recommande fortement, c'est d'établir des liens de communication avec le ministre et de lui faire connaître vos propos. Je peux vous assurer que des problèmes comme ceux-là seront réglés de la façon la plus efficace que vous puissiez espérer.

**M. Gervais:** Merci beaucoup.

**M. Morin:** Alors, c'est la seule chose que je voulais vous dire.

J'ai de la difficulté un peu à comprendre... et je m'excuse, Monsieur le Président, c'était une complémentaire, et là ce n'est plus une complémentaire. J'espère que je n'enlève pas de droit à mes collègues.

**M. le Président:** On est très libéral cet après-midi.

**M. Morin:** Je ne vois pas tout à fait le lien qu'il peut y avoir entre le problème auquel vous faites face, sur lequel je suis très renseigné, très informé, et l'accord du lac Meech.

**M. Laflèche:** Ce que nous disons, c'est que sans une garantie – en d'autres mots, le bilinguisme officiel – on n'a aucune garantie d'être capable même de garder le statu quo.

**M. Morin:** D'accord. Alors, ce que vous voulez dire tout simplement, c'est que le Québec a plus d'ampleur...

**M. Laflèche:** C'est ça.

**M. Morin:** ...que les Canadiens français, les Canadiens d'expression française hors du Québec, ne peuvent en avoir? C'est ça?

**M. Gervais:** Tel qu'écrit, ça pourrait être interprété de cette façon-là, oui.

**M. Morin:** Alors, quelle est la façon dont on pourrait remédier au problème, dont l'entente du lac Meech pourrait régler le problème? Pas du côté financier, ça n'a rien à voir avec l'accord du lac Meech; je parle de la question de la francophonie.

**M. Gervais:** Je ne suis certainement pas un expert dans le domaine, et j'imagine qu'il serait nécessaire que les juristes s'impliquent dans le processus à un certain point. Mais il me semble qu'il faudrait l'écrire de telle façon que ça faciliterait la tâche au gouvernement provincial de nous offrir le bilinguisme au niveau de la province.

**M. Morin:** En Ontario? C'est ça, le but de votre présentation?

**M. Gervais:** Oui.

**M. Morin:** Merci, Monsieur le Président.

**M. le Président:** Il vous serait peut-être intéressant de voir la présentation que l'Association des juristes d'expression française de l'Ontario a faite cette semaine, puisqu'ils nous ont présenté le brouillon d'un article qui protégerait les minorités. Ils ont parlé plus longuement de la question des droits collectifs que de celle des droits individuels.

**1440**

C'est intéressant: Vous avez ici, dans les caisses populaires, peut-être un des meilleurs



exemples d'une institution francophone au Canada qui est, naturellement, une institution financière mais, en même temps, très importante au point de vue de la vie sociale et de l'épanouissement de la société francophone. Sans doute qu'à l'intérieur du ministère des Institutions financières, ces gens-là ne s'occupent normalement pas d'institutions d'ordre social ou culturel. Je pense que M. Morin a raison de dire que c'est surtout là où le ministre délégué aux Affaires francophones et les gens qui travaillent dans son ministère ont vraiment la tâche d'expliquer clairement, ou au moins d'essayer d'expliquer certains aspects de ces problèmes. Mais on peut voir en même temps les raisons pour lesquelles vous cherchez quand même un statut particulier ou un changement à la constitution pour vous assurer que vos droits dans ces domaines seront vraiment protégés. Cela nous donne un bon exemple en ce sens.

**M. Gervais:** Oui, Monsieur le Président, c'est justement ce qu'on essayait de vous présenter.

**M. le Président:** Alors, nous allons en parler avec notre collègue M. Nixon.

**M. Gervais:** Merci.

**M. le Président:** Alors, je vous...

[Rires]

**M. le Président:** On rit?

**M. Villeneuve:** Cela fait longtemps qu'on n'a pas ri.

**M. le Président:** Ah oui! Alors, nous vous remercions infiniment pour votre présentation et aussi pour la lettre de M. Alie et le document de l'Association canadienne-française de l'Ontario. Je pense que ça nous donne, avec les autres présentations des associations francophones de la province, des idées très claires sur la question de l'accord du lac Meech.

**M. Gervais:** C'est nous qui vous remercions de nous avoir donné la chance de vous parler.

**M. le Président:** Merci beaucoup, bonne chance.

I would like now to call upon the representatives of the Quebec Federation of Home and School Associations—the president, Helen Koeppe, co-chairman of the rights committee, Calvin Potter, and the other co-chairman of the rights committee, Rod Wiener. Would you be good enough to come forward? We have before us your submission. I guess we have two documents.

**Mrs. Koeppe:** Yes. We sent in a brief ahead of time, plus you have copies of our comments, in beige.

**Mr. Chairman:** First of all, we want to welcome you here this afternoon. If you would like to simply go ahead and make your presentation, then we will follow up with questions afterwards.

#### QUEBEC FEDERATION OF HOME AND SCHOOL ASSOCIATIONS

**Mrs. Koeppe:** Thank you, Mr. Chairman. As Quebecers, we appreciate this opportunity to address the legislators of a sister province, particularly of a province where educational services flow from what originally was our common legislative source: the Common Schools Act of 1841 of the province of Canada.

When we were preparing our brief, QFHS adopted an assumption which we since have had to question. We assumed the first ministers had signed the Meech Lake accord as a patriotic duty, under the mistaken assumption that there was a uniformity of minimum minority official language educational rights in Canada.

That assumption was justified by a remark made by Premier David Peterson in a letter to us dated August 7, 1987, "This expresses the conviction of first ministers that Quebec's distinctiveness can be promoted without taking anything away from uniform protection of linguistic minorities across the country."

At the Senate hearing of our brief, it was gently suggested to us that possibly the Quebec federation was mistaken in its assumption. What if all the first ministers knew that section 59 of the Constitution blocked uniformity of minority official language educational rights in Canada, but they were concerned not about justice to minorities but rather about mounting a coup d'état whereby power and control were transferred from the federal government, not to the provinces per se but to the provincial premiers themselves?

We could not refute the suggestion. But if we were mistaken, as indicated, then the first ministers, in their stark pursuit of self-interest, had abandoned the balancing role in which they had been cast by the Fathers of Confederation in regard to the fundamental compromise of Confederation: the protection of education and language rights of minorities.

What if the questioner of the Senate was right? What if in Canada the motivation of patriotism and of belief in justice has atrophied to the point that it is no longer a balancing force in regard to rights? It was recognized at the time of the Confederation debates that in the absence of patriotic motivation, of a national vision of what

is essential for the nation, the self-interest of other provinces posed an immediate threat for the minority in Quebec.

Both jurisdictions in the then province of Canada had a Council of Public Instruction. But in what is now Quebec, the full council met only once between 1859 and 1885. In reality, the Protestant minority in Quebec enjoyed virtual autonomy, although subject in law to the council; whereas in Ontario the Catholic minority was subject to the constant surveillance of Egerton Ryerson as the superintendent of the council. Although the school systems in the two jurisdictions of the province of Canada had originated from common legislation, the Common Schools Act of 1841, the uniform legislation was soon replaced by separate laws, which developed the educational systems in Quebec and Ontario along separate but parallel lines.

John Rose's remarks in the Confederation debates reflected a setting wherein the educational systems in Upper Canada and Lower Canada almost mirrored each other. In Upper Canada there were nonsectarian national schools for the majority and Catholic schools for the religious minority. In Lower Canada, there were Catholic sectarian schools for the French and Irish Catholic majority and for the minority there were Protestant religious but nonsectarian schools.

John Rose in the Confederation debates was addressing the issue of the rights to be given religious minorities and the nature of the guarantees to be given by subsequent legislation. He obviously believed that such guarantees would protect the minority from crass provincial self-interest, even if a national vision was totally absent.

Thus, there were two lines of defence for minority rights in Quebec. The first line was a national vision in other provinces. The second line was the presence of constitutional guarantees. With the Meech Lake accord, both those lines of defence are breached.

In the introduction of our brief we deal with the characteristics of the educational system guaranteed at Confederation. Outside Montreal and Quebec City such dissentient schools were and still are under the control and management of locally elected school commissioners and trustees. In Montreal and Quebec City initially the board members were appointed, but they held authority similar to that of elected trustees in terms of control and management.

School commissioners and trustees were responsible for the school systems of the English Protestant communities. Where the parents

wanted schools and were willing to pay for them, the commissioners established schools, levied the taxes to build and operate them, hired the staff to animate them and regulated the course of studies. These were the rights and privileges which both Protestant and Catholic minorities in both Upper Canada and Lower Canada possessed in law as to their denominational schools at the time of Confederation. Over the years, the courts have ruled that these same rights and privileges are protected on the basis of the fundamental compromise of Confederation contained in section 93.

It is this compromise, described recently by Madam Justice Wilson in the Ontario separate schools funding case judgement of June 1987 as a fundamental compromise of Confederation in relation to denominational schools, that the Quebec government has been intent on modifying by school reorganization to facilitate imposition of its language regulations.

George-Étienne Cartier described the defence of the minority as the immediate response of all governments in the event of a violation of the rights of a local minority. Quebec's Bill 101 was passed in 1977. Its provisions, in the opinion of our legal counsel, violate section 93 of the Constitution, 1867, and section 23 of the Charter of Rights and Freedoms, 1982.

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The Quebec Association of Protestant School Boards, QAPSB, whose members were confronted with the dilemma of either disobeying a provincial law or denying entry to English schools to Canadian children who qualified under the charter, sought and won a declaratory judgement in the Superior Court of Quebec. That judgement was subsequently upheld unanimously in the Quebec Court of Appeal and in the Supreme Court of Canada. This successful action, defending the rights of Canadians from other provinces, which cost hundreds of thousands of dollars, was totally paid for by the financially hard-pressed Protestant school boards of Quebec and their parent taxpayers.

In 1979, the federal government established a court challenges program under the jurisdiction of the Secretary of State of Canada. It was intended to provide financial assistance to organizations initiating court actions relating to educational or linguistic rights or appealing lower court decisions in regard to such rights.

In 1985, responsibility for the program was transferred to the Canadian Council of Social Development and its funds were to be dispensed by a language panel. Both the Secretary of



State's office and its successor, the language panel, have been generous in their support of minority rights in other provinces. Yet, although QAPSB was defending the Canadian Constitution, no federal financial assistance has been forthcoming.

The experience of our federation, QFHSA, in regard to the court challenges program and the performance of the language panel, has not been greatly different from that of QAPSB. We, along with five parental co-plaintiffs, initiated an action in the Superior Court of Quebec in Montreal in 1978 against Bill 101. A year later, we received a financial grant of \$15,000 towards the cost of our factum.

When we applied for additional assistance to update our factum in the light of new legislation and a flood of court decisions, we ran up against criteria of the language panel that we are outside its terms of reference. They refused to support our contestation of section 72, language of instruction, on the grounds that the matter had already been decided. That judgement was a lower court judgement that the Quebec Court of Appeal refused to hear on the grounds that it had been superseded by Bill 101.

Thus, although its terms of reference included the provision of financial assistance to cases involving constitutional claims to official language rights that are arguable but have never been determined by the highest courts, the language panel has used the decision of a lower court as justification to deny financial assistance. In effect, instead of helping us, the language panel has immunized Quebec's Bill 101 against our challenge.

George-Etienne Cartier described the protection of a local minority as all governments coming to its assistance. What is happening now is that all governments ostracize the victimized minority. The forces of provincial self-interest and political expediency have become so strong they blur the national vision. The occasion of the Meech Lake accord should have been an opportunity for at least a partial restoration of the national vision. It was totally muffled. Instead of ensuring that uniform protection of linguistic minorities across the country were enshrined in the Constitution, it provides the possibility for a further gutting of minority rights.

We do not subscribe to the theory that because Quebec did not sign the 1982 accord it was not a full member of the Canadian family. Quebec was and is a province of Canada and is still subject to the laws of Canada. The Meech Lake accord would modify the base of those laws by placing

alongside the fundamental compromise of Confederation, reflected in sections 93 and 133, the notion of Quebec as a distinct society, thereby undermining the guarantees provided the minority in Quebec.

The only safeguard against that prospect for a minority already circumscribed and diminished by repressive provincial language laws and regulations is a vague exhortation to preserve linguistic duality. The Supreme Court in June 1987 ruled that the charter does not apply to section 93 of the Constitution. The latter is above the former. Does placing "distinct society" alongside "fundamental compromise" also elevate it above the charter? Even if the answer is no, what about the right of the English-speaking to flourish and prosper as communities, including the right to renewal through equal access to immigration?

What safeguards are there in the Meech Lake accord to deter and discourage conflict between provincial laws to promote a distinct French identity and the rights of individuals under the charter and under the Constitution? Each time there is a conflict, are we to endure 10 years of litigation, political intrigue and community decline, as we have with Quebec's Bill 101?

We do not want to be preserved in a cage of linguistic restrictions. We want equality of minority language, educational rights under the laws of Canada and the right as a community to develop and flourish. A prerequisite for that, as we demonstrate in our brief, is the abrogation of section 59 of the Constitution Act, 1982.

In the absence of abrogation of section 59 there will not be equality of minority language educational rights in Canada after the Meech Lake accord. When you raise legitimate objections to the accord, "Don't touch the fragile seamless web" is the response. "Your concerns will be dealt with at the next round of amendments."

Premier Bourassa of Quebec has already indicated his government's strategy for the next round of constitutional amendments. It is a further whittling of the protection of the linguistic minority in Quebec. An interview of the Premier published in *Le Devoir*, December 5, 1987, ends with the phrase, "Il s'agit de corriger les échappatoires."

The loophole, *échappatoires*, he refers to is the constitutional right of a Canadian family with schoolchildren to move from one province to another without the children being subjected to the traumatic experience of an involuntary change of the language of their instruction. It is

clear that the Quebec government has no intention of unilaterally rescinding subsections 59(1) and (2) of the Constitution and thereby allowing for provisions of clause 23(1)(a), mother tongue, to come into effect in Quebec.

The rescinding of section 59 is the prerequisite condition for uniform protection of the linguistic minorities across Canada, a state which, according to the Premier, the first ministers believe already prevails. In a letter we quoted from at the beginning of our remarks, he stated, referring to the "distinct identity" clause, "This expresses the conviction of first ministers that Quebec's distinctiveness can be promoted without taking anything away from the uniform protection of linguistic minorities across the country."

In our brief, we also quote the testimony of Prime Minister Mulroney that minority educational rights are more limited in Quebec than elsewhere. We quoted from an interview given by Premier Bourassa, who is intent on whittling further the already more limited protection of the English minority in Quebec, not on raising their rights to a uniform national level. Obviously then, premising that they signed the accord in good faith, the conviction of the first ministers is based on an illusion of equality of rights across the country that in fact does not exist.

We support the, as yet, illusory conviction of the first ministers that there be a uniform protection of linguistic minorities across the country, to be achieved by rescinding section 59. It should be a prerequisite to ratification of a modified Meech Lake accord, one that ensures that section 23 of the charter is elevated above "distinct society." Failure to achieve these two conditions will not only deny the vision of our forefathers, it will also confirm that one of the intents of the Meech Lake accord is not to bring Quebec into the Constitution, where it has always been, but rather to take the English minority in Quebec out of the Constitution, a potential which we have demonstrated exists.

I thank you.

**Mr. Chairman:** Thank you very much for the outline of your position as well as the other submission that we have. I wonder if I could just ask you one question of fact, because it came up this morning and I know I was not as aware as I probably should be of how it works. When I first heard about the language panel, I assumed it was a Quebec body, but I gather it is a federal body. The irony is that we had the Canadian Council on Social Development here just before lunch. I wish they had come later; we could have explored it. Could you just briefly tell us how that

works? How do they get their money and how does that all sort of fall together? I take it that it is for minorities throughout the country who wish to take cases through to the Supreme Court. Is that it?

**1500**

**Mrs. Koeppé:** I would refer the question to Dr. Potter.

**Dr. Potter:** The language panel itself was set up by the Secretary of State's office to remove the issue of supporting court actions that might possibly involve the federal government itself since frequently the Minister of Justice is mis en cause in the case. There was an understandable desire to establish an arm's-length relationship between such court actions and the federal government itself, so they set up the language panel under the jurisdiction of the Canadian Council on Social Development, and a budget was provided for the operation of the language panel.

The language panel itself consists of five members. Three are francophones: one from Nova Scotia—this was the composition last year anyway—one from Ontario and one from Saskatchewan. The chairman is an anglophone from Ontario without a vote except in the instance of a tie, and the other member is an anglophone from Quebec.

Our experience with the language panel has been that they have a double standard; they openly admitted that they had one standard that they applied for cases outside of Quebec and another standard for cases coming from Quebec. We have had great difficulty with them. They refused to supply us with the curriculum vitae. They told us the anglophone from Quebec was a representative of the community, so we asked for his curriculum vitae. In 18 months, we have not received that curriculum vitae, although we have asked about 10 times. So there has been some difficulty.

We have no objection whatsoever to three francophones on the panel. We say that is very appropriate indeed when they are dealing with cases coming from outside of Quebec. We argue that for equal justice surely they could find some mechanism whereby when they are dealing with cases coming from Quebec the minority should have a majority on the panel just as was the instance when cases were coming from outside of Quebec.

There have been instances where we have been very dissatisfied with the operation of the language panel, but we have not been able to get anyone at the political level to respond. The



minister says it is outside his hands, because he understandably wants to keep an arm's-length relationship. So it has been a difficult time, and it reflects one of the problems, I guess, of administrative bodies.

**Mr. Chairman:** Thank you. As I say, perhaps I should have been more informed about the nature of that panel, but I was not, and when it came up again I wanted to determine exactly what it was because clearly it could play a very important role to minorities.

**Dr. Potter:** It could play a very vital role. It is really very unfair that a small community should have to carry the full burden of defending the rights of the total community; it has a very vital role to play.

**Mr. Chairman:** One question flows in reading your brief, and I just want to be clear on this as well. I appreciate that in a legal sense Quebec is a province of Canada and 1982 did not change that, but it seems to me that none the less there was a problem there. You say you do not agree that it was left outside, but does one not have to be a little more nuanced than that? Surely there was a sense there among a pretty large number of people that something happened in 1982 which they did not subscribe to, and as we try to work our way through this and establish equality of linguistic rights, do we not none the less have to accept that as a reality?

I guess the testimony that is always brought before us is the testimony that Mme Chaput-Rolland gave before the joint committee, that that April day in 1982 was not a day of rejoicing but rather a day of great sadness and that while legally Quebec was part of the Constitution, none the less there was something very significant and major that was lacking and that the intent at least of the 11 as they approached the Meech Lake agreement was to bring Quebec willingly in. I am not saying that therefore justifies not treating minorities well, but I just think we have to try to establish some basis on which to build.

I find it difficult to fully accept your view that everything was hunky-dory and there was no problem, because it seems to me there was and is until we have Quebec willingly, if you like, accepting the Constitution.

**Dr. Potter:** We are not opposed to Meech Lake per se. We fully subscribe to bringing Quebec into the Constitution, as they phrase it, but not at any price and particularly not at the price of the rights of the minority exclusively. Our brief does not call for the total rejection of Meech Lake; it calls for an amendment to Meech Lake to recognize where the weaknesses are and

where the vulnerability is, but we are not opposed to the principle.

**Mr. Allen:** If I could just take it on from that point, we have had representations from French-language minority groups outside Quebec—the Acadians in New Brunswick, l'Association canadienne-française de l'Ontario, the federation of French organizations outside Quebec nationally—to the effect that their legal advisers tell them that the language of subsection 2(3) in the Meech Lake accord, where it speaks about promoting the "distinct society" of Quebec, is language they should strive for for themselves in other parts of that section, in order to enhance the word "preservation" and escalate it to "promotion."

Their argument is that the language that pertains to the action of the government of Quebec and the power it has implies quite clearly that since the "distinct society" includes a long, historic and well-founded English minority in the province, its rights are being promoted, not just preserved, or could be under that clause, whereas theirs are simply being preserved.

That seems to run counter to your reading of the overall impact of the Meech Lake accord. I wonder if I could have your commentary on that because that is a striking contradiction, at least in legal advice, if your advisers tell you differently.

**Dr. Potter:** You are quite right, but it reflects the ambiguity of the phrases. If you followed the discussions closely, you would find that there was entirely an opposite interpretation of the meaning of "distinct society" when the matter was discussed in the National Assembly of Quebec. One of our concerns and one of the reasons we are focusing on this issue is that, although we recognize the accord recognizes the duality in Quebec and says that should be preserved, in the discussions in Quebec we have not seen any evidence of that interpretation. The interpretation in the National Assembly is basically a nationalist society in Quebec; so there are two contradictory interpretations that are existing side by side, one used in Quebec and the other used nationally, and we are seeking clarification of that.

**Mr. Allen:** I understand your concern and I have some sympathy with that. I wonder whether we do not have to bear in mind the political context in which words are used by political leaders. Obviously, there is a dramatic contradiction between what Mr. Bourassa says section 2, as an interpretative section, means and what Mr. Mulroney says it means. I appreciate the problem.

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At the same time, I think if one works with some sophistication in the political arena, one quickly learns that Mr. Bourassa, for example, having to defend a very minimum demand from the point of view of historic demands Quebec has placed before the nation, is going to have to escalate the language around how much he accomplished. There are many people in Quebec, among reasonably moderate nationalists even, who say that he did not get all he could have got and should have gone for more, and that if they will be there in the future they will go for more; whereas Mr. Mulroney has a problem, outside Quebec, of having to defend having done anything at all that appears to lean in the direction of Quebec, so he has to put the language in a totally opposite direction.

That confuses your life, and mine, endlessly, but it is not their interpretations we have to rely on; it is of course whether the courts will take that language, use it with some sense of balance and respect the general force of the charter, section 23 and those things, as they lay them side by side when they are confronted with individual cases. Is there not some problem in using the language of the political leadership as your base of interpretation for a section like section 2?

**Dr. Potter:** It is the rights of our children we are talking about, right? We feel those rights should be as clearly stated as possible, not in legalese but in language that their parents can understand and that they themselves can understand when they grow up, when they read.

I point out to you that I agree with you. The provincial accords are matters of political negotiation and give and take, but in the matter of the 1982 accord, which you said Quebec was essentially excluded from, the sweetener in that accord intended to bring Quebec in was really at the expense of the minority in Quebec. I am talking about section 59 and how section 59 got into the accord in 1982. It was not there initially when the original draft was distributed on November 5. What was there was an equality of minimum linguistic educational rights across Canada, but then there was negotiation in the back rooms and section 59 emerged.

I was at a meeting when the accord was announced publicly and distributed, and when we told people about section 59 they would not believe it. They insisted that there was equality of minority educational rights. My colleagues here can testify because there was a board meeting of this organization. Indeed, we had to go get a copy of the *Globe and Mail* to find out about section 59

because it was not even reported in our local press. That is how swift and sudden was the change.

The members of the minority community have borne the burden of that sacrifice, because what section 59 does is exclude from the right of choice the children of naturalized parents whose mother tongue is English but who did not do their schooling in Canada. That is different from section 23. Section 23 puts constraints in terms of mother tongue, sufficient numbers and nationality; but when it comes to Quebec, section 59 expands the constraints by excluding from the rights of section 23, naturalized Canadians whose mother tongue is English.

I suggest to you that was imposing a total sacrifice on the minority community in an attempt, by the Canadian community as a whole, to bring Quebec into the agreement. I agree it is a political process and there has to be give and take, but there is no provision for the minority to participate in the negotiations of give and take. I feel that is what the basic deficiency is. When the Canadian Constitution was formulated, we had strong representation in the body that made those concessions and found the *modus vivendi*. We have no participation now in that process and so we, in effect, become the pawns in the negotiation process.

**Mr. Allen:** I take it that by section 59 you are referring to the provision whereby equal educational rights under paragraph 23(1)(a) of the Constitution would come into effect by proclamation issued by the Queen and the Governor General of Canada under the Great Seal of Canada, but that this would only happen, under subsection 2(2), when it was authorized by the Legislative Assembly of Quebec.

**Dr. Potter:** That is right.

**Mr. Allen:** Therefore, the implementation of this appears to await a resolution of the status of Quebec following the 1982 constitutional settlement.

**Dr. Potter:** That is precisely it.

**Mr. Allen:** Thank you.

**Mr. Chairman:** I just want to explore a little bit more the problem, I guess, of the protection of the minorities, the collective rights, if you like. I suppose we should look at that question in the context of Ontario and of the francophone community here.

I guess it was 20 years ago that former Premier John Robarts brought in the first language legislation in terms of education. For the first time French was recognized as a language of



instruction. During the last 20 years, while no one would claim that we have done everything we ought to have done, none the less, I think Conservatives, Liberals and New Democrats have certainly worked together to enhance various French-language services and so on.

None the less, for the Franco-Ontarian, there are certain sociological realities, I suppose, of living in Ontario which mean that, even with a tremendous effort by the provincial government—the creation of institutions such as hospitals and universities, all that kind of infrastructure—it is far from where they would like it. It is always difficult. Our witnesses this afternoon, talking about the *caisses populaire*, gave, I think, a beautiful, clear example of some of the problems that arise. So there have been good intentions, people wanting to do things and many things happening, and yet still a society, a collective, a Franco-Ontarian collective, still senses a great deal of danger.

Then we look at the anglophone community in Quebec, and there we look at it in an historical context going back to, I guess, MacLennan's two solitudes. None the less, the anglophone community for many, many years had really created its own institutions. In effect, by itself it was able to really live independently, if you like, of the majority community. In a sense, it is in the last 20 years where, outside Quebec, at least in some provinces—New Brunswick and Ontario in particular—there has been an attempt to aid the minority. Suddenly, there was a real sense on the part of the anglophone minority in Quebec that it was under attack. Indeed, it was, and in certain circles, is. That has been a factor, and I suppose Bill 101 has been a particular instrument that has caused tremendous concern and harm.

In trying to deal with that, whether through Meech Lake or in some other sense, really being able to establish equality for the two linguistic groups is, perhaps at first sight, simple. One just says, "Look, we make sure that right across the country, in every province, it is the same." I suppose it comes back to the distinctiveness of the Quebec society, that it is the only province where there is a French-language majority and where there are various French-language institutions and so on. We talk of the *foyer principal* and so on: how to reconcile the collective rights of what I will call the official language minorities and, I suppose, the collective rights of the Quebec majority, which is none the less a minority in terms of Canada and North America. I guess that is where we all, at times, are struggling, because I think no one here likes to

see legislation which is punitive in nature in terms of a language. One can understand legislation which is affirming and helping.

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In that context, we had the association of French-language jurists before us and they were recommending a change that, either in terms of Meech or perhaps a new clause, rather than dealing with what is stated to be the existence of French-speaking Canadians and English-speaking Canadians, to put in a clause that would deal with the minority, identifying the collective minorities—the French-speaking minority group which is outside of Quebec and the English-speaking minority group inside Quebec—and thereby providing certain rights.

Do you see that as a route that you think might be useful to follow in trying to establish more clearly a sense of the collective rights of those minorities in some fashion in the Constitution, whether it is part of Meech or simply as a separate amendment, another part of the Constitution, not dealing with French-speaking and English-speaking persons but recognizable collective groups? I am just interested in your thoughts on that.

**Dr. Potter:** My first response is that I suspect the francophone communities outside of Quebec are more homogeneous than the anglophone community in Quebec because that community in Quebec has a variety of elements in it. There are the old Quebecers who have lived in Quebec for generations and there are the new Quebecers who have come from a variety of countries and only share in common the language but not necessarily the culture; they have come from other cultures. So I suspect there is more diversity in the minority in Quebec than is the case outside of Quebec.

If you are just talking in terms of community rights, I think it would be very difficult to define that community other than its linguistic interest because, culturally, they are very diverse. But we have not thought of it in terms of community rights. We have thought of it more in terms of the rights of individuals and the rights of parents, particularly the right of the parents to have some control over the education of the child.

**Mr. Chairman:** I appreciate that and I think that is an interesting observation you make about the nature of the anglophone community in Quebec.

**Mr. Harris:** I understand your problem. I want to ask you a question outside of your presentation. Does your association, or any of

the minority language associations in Quebec, have any liaison with other minority language associations outside of Quebec, like the Association canadienne-française de l'Ontario in Ontario?

**Dr. Potter:** Speaking of our association, our liaison is with the Ontario Federation of Home and School Associations and we are members of the Canadian Home and School and Parent-Teacher Federation. We do not think essentially in terms of a parallel between the minority in Quebec and the minority outside of Quebec because, although we appreciate the problems of the francophones outside Quebec and fully subscribe to an improvement of their position, we feel that what we had and what we are entitled to was an equality of rights in Quebec.

We feel the real issue is what the nature of the compact was at Confederation. We were part of the province of Canada and Confederation was more than just a political pact, it was a social compact between the French and the English in what was then the province of Canada. We argue that there should be equality of rights in Quebec. That is our concern, that there should be equality of rights.

**Mr. Harris:** Do you know if the Quebec public school board association has any liaison with any—

**Dr. Potter:** I cannot speak for the Quebec Association of Protestant School Boards. I do not think they have any. I think Alliance Quebec, which is basically a lobby group for the anglophone community, has maintained association with the Association canadienne-française de l'Ontario and with the Fédération des francophones hors Québec.

**Mrs. Koeppe:** If I might just add, the Quebec Association of Protestant School Boards does have liaison with other groups of trustees across Canada through the Canadian School Trustees' Association, the CSTA.

**Mr. Harris:** Do you get any support from them?

**Mrs. Koeppe:** Last June, before the Meech Lake accord, we passed a brief at our own convention in May and then the Canadian Home and School and Parent-Teacher Federation ratified it. That means representatives from every province in Canada sent letters supporting our position to Prime Minister Mulroney and the appropriate officials. The QAPSB, the Quebec Association of Protestant School Boards, brought a resolution to the CSTA conference in

Prince Edward Island last summer, where it was also ratified. There is community support.

**Mr. Wiener:** It was unanimously supported by all the boards across the country.

**Mr. Harris:** Did anybody pay any attention to it?

**Mr. Wiener:** I do not know. It was very carefully explained.

**Mr. Harris:** There have been other minority groups who have found strength in numbers when they had a common cause, and it strikes me that you do have a common cause. I am not saying the historical situation is the same, but there surely are causes that are common with other groups. I am talking about minority language. I am not so concerned about your other mandates but with your minority language mandate. That is why you are here.

When I bring up your situation in Ontario, the answer I get, from whatever vehicle, is: "Yes, it does not seem fair, but that is no reason for us to—you know. We are Ontario. We are going to try to be fair." There is no collective assistance, it does not strike me, from any groups outside of Quebec to help fight your cause.

**Dr. Potter:** That is why we are here today.

**Mr. Wiener:** A very personal comment: I believe the residents of Ontario have been Canadians first, possibly more than those any other province, possibly because of its geography. You have a special history and a special obligation, I feel.

**Mr. Harris:** Let me put it this way, I think it would be in the interest of the Association canadienne-française de l'Ontario to finance your court case. I might as well be blunt about it.

**Dr. Potter:** Certainly, we will pursue that point.

**Mr. Villeneuve:** May I also thank you for making your presentation. We had a very impassioned presentation this morning, from the Freedom of Choice Movement from Quebec. I represent an area which is very close to Quebec in southeastern Ontario. We have many disgruntled former Québécois who have moved to my riding. I get different messages from them. However, given the fact that I think you have a common problem, maybe even more so than the francophone community outside of Quebec, I agree with my colleague Mr. Harris that possibly you would have common interest in preparing a brief.

Your problems are not that dissimilar, except that you have to deal with a Bill 101 which I, coming from Ontario, had not quite realized the ramifications of. I guess when you live in that



particular atmosphere it becomes even more so. I think your presentation here today, along with that of some of your colleagues who basically gave us the same message, has triggered something in this committee that says we must address this. Whether we can correct it, I think it should be on the record that there is a pretty major problem there.

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**Dr. Potter:** It is encouraging to hear you say that. We have been struggling for 10 years to get the issue addressed, to get people to recognize there is a problem.

**Mr. Villeneuve:** The English-speaking people in Canada as a whole have never been considered to be suffering too much, thank you very much, but I think you bring up a very particular case that has to be addressed somehow, somewhere, and probably this is the best vehicle.

Many of your people who come to the riding I represent affiliate themselves with the Alliance for the Preservation of English in Canada. What happens there is that one would almost think they are trying to create a situation for the minority language in Ontario that you have living in Quebec. That is not going to solve anything; it certainly tends to polarize. I certainly understand what you are saying.

**Dr. Potter:** We think it would be a good and equitable Canadian solution to establish at least a minimum level of equality of minority rights. Provinces could improve upon that minimum level, but at least there should be a minimum level of equality of linguistic rights so that parents have an acknowledged right to have some influence over the language of instruction of their children.

**Mr. Villeneuve:** I think you bring a very valid argument. Thank you.

**Mr. Chairman:** On behalf of the committee, I thank you for coming here this afternoon and sharing your thoughts with us. As Mr. Villeneuve says, part of this trip along the road to Meech Lake has been one of looking at minority rights in some detail. I think, as should happen in a committee such as this, we have been learning a great deal. What we are going to have to do in the weeks and months ahead is try to focus on some possible solutions, or at least beginnings of solutions that will provide some real protection to official language minorities in this country. We thank you very much for coming today and sharing your ideas with us.

**Dr. Potter:** Thank you. Our appearance here has lifted our expectations.

**Mr. Chairman:** I call upon the representatives of the Women Teachers' Association of Ottawa, the president, Janet Castle, and a member of the executive, Nancy Douglas. If you would be good enough to take a seat, we have circulated a copy of your submission, and I will simply turn the microphone over to you. Following your presentation, we will follow up with questions.

#### WOMEN TEACHERS' ASSOCIATION OF OTTAWA

**Ms. Castle:** Thank you. I think you will be pleased to hear that our brief is mercifully brief and that I read very quickly.

The Women Teachers' Association of Ottawa is a branch affiliate of the Federation of Women Teachers' Associations of Ontario. Our affiliate represents over 900 elementary women teachers in Ottawa. We recognize the need to make sure that our concerns are expressed even in the face of the adamant refusal of our Prime Minister to listen to the opinions of the population he represents. We find it discouraging to be appearing before a legislative committee after hearing and reading reports that the Premier of Ontario (Mr. Peterson) is unwilling to make any amendments to the accord no matter what we say.

The women teachers' association makes this presentation because we are vitally concerned about the rights of women and matters which will affect those rights. We have a stated commitment to be a visible, strong example to the children we teach and feel that silence in this matter would violate that commitment. Not the least of our responsibilities is a dedication to the principles of democracy which we feel have been overlooked in this case.

We acknowledge and support the concerns presented by other groups and individuals. We too have grave misgivings regarding the fate of national programs under an opting-out clause and about the effectiveness of the proposed constitutional amending formula. However, we have chosen to focus our presentation on two areas of serious concerns: the process followed and equality rights.

It is difficult to accept that major constitutional change is being made in Canada in a manner which makes a mockery of Canadian democracy as it was established. The Meech Lake accord was concluded by 11 first ministers without consultation or opportunities for discussion with

the House of Commons, the provincial legislatures, political parties, interested groups and major organizations before it was signed. After the accord had been signed by 11 men in a closed room, our Prime Minister and our Premier tell us that there will be no tampering with the accord. The public will be heard, but there will be no amendments.

In our opinion, this is a sham. Now that we have been told what will be, we are free to discuss to our hearts' content with no hope of influence offered. It is difficult not to ask, "Is there a point?"

The process of executive federalism—that is, executive decision without consultation—is demoralizing to Canadians who want to believe in their governments. We do not believe that it is the wish of the Canadian population to have executive federalism entrenched. The accord requires two annual conferences of the 11 first ministers. It appears that decisions made on the Constitution and the economy each year in the Meech Lake style are to be given to the Canadian public without discussion and without support.

While we endorse the concept of having meetings to discuss and listen to each other, we deplore the entrenchment of the process. Surely this defeats the intent of the section.

We cannot accept willingly an entrenchment which will, in effect, render the House of Commons and the provincial legislatures ineffectual, leaving them capable of dealing with only the trivial matters of government. In our understanding, the provincial legislatures and the House of Commons could become little more than electoral colleges which will go no further than to choose those who will represent the government in the arena of Meech Lake. The removal of the day-to-day control of the legislatures on the delegates is a dangerous, unacceptable precedent.

The struggle for women's rights has been long and difficult. It is only now that the applications of sections 15 and 28 are becoming apparent since the charter—

**Mr. Chairman:** Excuse me.

**Ms. Castle:** I am going too quickly.

**Mr. Chairman:** I appreciate your reading quickly, but it is a little difficult for the interpreter. Could you slow down a tad?

**Ms. Castle:** You are asking a lot.

**Mr. Chairman:** We are not rushed.

**Ms. Castle:** Where would you like me to back up to?

**Mr. Chairman:** Just continue, but a bit more slowly would help them a bit.

**Mr. Villeneuve:** Sounds like an auctioneer.

**Ms. Castle:** You should see me at full clip.

Section 16 of the accord introduces uncertainty and ambiguity which we are not prepared to allow. By specifically exempting multicultural and native rights from being affected by the proposed section 2, doors are opened for judicial interpretation that other individual rights are affected. To argue that ambiguity is the price of the agreement and that the courts will be able to work out the interplays of concepts is ludicrous. Anyone who has had experience with bargaining clearly recognizes the necessity of clarity of language. Is it possible that we are given constitutional change whose purpose it is to provide more work for the courts?

We agree with the Canadian Teachers' Federation analysis: "Clearly, all rights and freedoms guaranteed under the charter should supersede any group-based rights.... It is unacceptable for governments to get together and opt out of fundamental rights whenever it is politically expedient for them to do so."

Women were not included in the original drafting of the accord, and the omission of their views and protections is blatant in its absence. We urge you most strongly to listen and to act now on behalf of more than 50 per cent of the population. Remove the risks to women's rights which are brought with ambiguous language. Do not force reliance on judicial interpretation which may undermine rights already agreed in the charter.

Conclusion: we have to believe that there is meaning to the process in which we are participating now. We must believe that our Premier will listen and will consider proposed amendments to such an important agreement. We need to believe that the strength of our government rests in its ability to grapple with difficult problems and to face the fact that reliance on a controversial and ambiguous agreement is irresponsible government.

For those reasons, we have two recommendations:

1. Take public hearings seriously and urge amendments to the accord before it is entrenched in the Constitution.

2. Delete section 16 and add a provision that the Charter of Rights prevails over the accord. Alternatively, add women's equality rights, sections 15 and 28 of the charter, to section 16 of the accord.



**Mr. Chairman:** Thank you. You said it was short, but it was also clear and to the point, which is often one of the nice things about short submissions. We do appreciate it. As you will understand, we have had a number of submissions from womens' organizations and from other groups from the women teachers' associations in the province, in most cases going after those two areas in particular. We appreciate that continuing thread and support. We will start the questions with Mr. Breagh.

1540

**Mr. Breagh:** One of the things you have suggested, I believe, is going to happen come hell or high water; that is, there will never again be a proposal put together, such as Meech Lake, that is not subject to amendment and that has a whole series of public hearings after the fact. I know of at least one joint committee that is going to be fervent about that and I know of at least one legislative committee from Ontario that is not going to put itself through this kind of exercise again. Whatever shape or form it might take, the process in the future will be completely different from what we are enduring under this one. I think members of this committee will attest to the fact that it is an untenable position to be handed a deal of this kind with their hands tied behind their backs.

Accepting the restrictions we have on us, one of the things we are trying to do is to search about for things that can be done that do not involve reopening the whole deal and do not involve amendments. Oddly enough, a number of very bright people who are concerned about particular aspects of it have been very forthcoming with suggestions about what we might do if amendments are not in order.

One concept has been the matter of a court referral that would clarify precisely what is the impact or the relationship on the Charter of Rights under this accord, so you would get a definitive court answer on that. Others have suggested companion resolutions that would go through the legislative process at the same time as the ratification process, but would stand apart from it.

Can you tell us whether you are aware of the court referral option, for example on the Charter of Rights question, and whether your organization supports that idea if amendments are not possible?

Before you answer: as a practising politician, the easiest thing for me to do would be to say: "I like your amendment and I will put it. It will not carry here, and even if it did I have to take it

through the Legislative Assembly of Ontario and a dozen other chambers, so it might take me into the next century to get that one amendment put."

The amendment process is not quite as practical as many people think it is, so we are searching for other options. It has been suggested by Beverley Baines, for example, among others, that it would be possible to make a court referral on the matter of the Charter of Rights question and whether or not it is impacted by Meech Lake. Instead of having to take Brian Mulroney's word for that, we might be able to get one of the courts, either the Court of Appeal in Ontario or the Supreme Court of Canada, to finalize that question for us. Would that be an acceptable way to proceed?

**Ms. Castle:** Are you asking whether we are in favour of having the courts look at it?

**Mr. Breagh:** It is a little more specific than that. One of the things is that the courts will look at this whether we do anything or not.

**Ms. Castle:** Regardless, exactly.

**Mr. Breagh:** The only advantage of the court referral is that it expedites the process. It is a technique that Ontario used, for example, last year on a particular bill. If you are not sure the bill will stand up in court, you can put a question in front of the court which essentially says, in this instance, "Is the Charter of Rights in some way affected by the Meech Lake agreement?" The Prime Minister says no, it is not. All we need is for some legitimate person to say the same thing and we will be happy.

**Ms. Castle:** I would have to agree with that one. Yes, we would be in favour of that. I think Ms. Douglas would like to add to this.

**Ms. Douglas:** I know the option has been talked about, but I guess I have a question for you. Are you telling me that this can be done before the Ontario Legislature would vote to ratify it?

**Mr. Breagh:** That is possible, yes.

**Ms. Douglas:** Because if it is not done until after it is ratified, it does not matter anyway.

**Mr. Breagh:** I disagree with that. I think it does matter, but in my view it would be preferable to try to do that, if you could, before the ratification process took place. We do have another couple of years. It is conceivable such a question could be drafted and put to the courts and you would get your response back before that occurred.

**Ms. Douglas:** It is only good to anybody if it is done before it is voted on, though.

**Mr. Breagh:** No, I disagree.

**Ms. Douglas:** What we are saying in all this is that it is ambiguous language. We do not want it interpreted by the courts after it has already been agreed to—that is what this is saying—because it is risky. If you are saying, “Could we put it to the courts before we agree to it and then we will know what we are agreeing to?” then obviously we think that is an improvement over agreeing to something when we do not know what it is. But if you are saying, “Let’s agree to it and then find out what we are agreeing to,” then I would say that is no improvement. That makes no difference whatsoever.

**Mr. Breagh:** I would argue a little bit in the sense that my preferred option would be to get the court referral done and the answer back before it is ratified, but even if it were not back I am most concerned that the precedents that are set in front of the courts be clear and on the grounds that we want. The advantage of referring a question to the courts is that you can put the question to the courts in a clear form so that you get the kind of answer you are looking for. If you do not do that, then it will be individual court cases that may not have a whole lot to do with what your problem is.

**Ms. Douglas:** So after it is agreed to, we will get the bad news clearly instead of vaguely.

The question you asked us was whether that would be acceptable. I think it would be fair to say it would be acceptable. It would be a good thing for us to know what we are agreeing to before we decide whether to agree to it or not. Otherwise, I would say it makes no difference. It is still a sham to agree to it, put it through the Legislature and then say: “OK, now let’s see. We’ll set up the court session as soon as we can.”

**Mr. Breagh:** I am not trying to argue a lot with you here today, but the “sham” stuff bothers me a little bit. You and I have both negotiated agreements with school boards. We do not call it a sham when somebody challenges that and goes to court; that is part of the process. When somebody puts in a grievance a year later, that is part of the process. We understand that, and we do not say that the agreement is a sham either. I can use hyperbole too and have done so on occasion.

Let me just ask one other question of you. As I said, we are very concerned about the process itself, which to many of us is inexplicable, intolerable, undemocratic and a whole lot of other things. Now we are looking at trying to make some suggestions in a positive way about what we might do that would make it more legitimate, more recognizable, more democratic

to people. It does not take very long until you get into problems. For example, a number of people have suggested amendments. The mechanics of that are a little death defying unless you have some technique whereby we are not arguing over which word gets inserted as the third word in the sentence.

In other words, one of the suggestions that has been made to the committee is the companion resolution concept, whereby you would put in front of all the legislatures in Canada the same companion resolution—the wording is the same, so they all vote for or against the same set of words.

Do you have any difficulty with things like that, that we would set up a process whereby, for example, there would be public hearings across the country, maybe done by a legislative committee such as this? We would take ideas from groups like yours. We would try to get concurrent wordings, I guess, put together in front of the legislatures, and at the end of the process there would be the ratification, maybe by formal votes in the legislatures and by some agreement struck by the first ministers at their conference. People would be able to see that there is a public hearing part to it, that there is a part to it where common sets of words are attempted to be found to word it the best way we can, and at the end of the process is the ratification.

Would your group, for example, which would be one of the interest groups that would logically be putting forward suggestions such as that, really be in a position to participate in that kind of stuff?

**Ms. Douglas:** We are participating. I guess what you are saying is, suppose we let this one go, so to speak. We will all just let the accord go through the way it is and then we will start again and we will see if, from the ground up, we can have hearings across the country and come up with something else that can go through all the legislatures.

I think the chances of that are zero. There have been so many hearings on the accord, federally and provincially, that surely through this there come up again and again the same two or three fears, dangers, ambiguities and risks that large groups are worried about. On some of them, like the one we have, we say there is a threat to women’s rights. Quebec says “No, there isn’t.” The federal government says, “Oh, no, there isn’t, and we don’t intend that there will be.”

Now, as to something, alternatively, that adds women’s equality rights in the part that says



native rights and multicultural rights, adding "and women's rights" or adding "and sections 15 and 28" as well in there, if that is what they intended in the first place and there was an oversight and it did not get in, surely it is possible now to come up with something, if you want to call it a companion resolution, that would go through the Ontario Legislature at the same time. Ontario would say, "These go together and we tell you to take both or none;" and Quebec, if that is what it intended in the first place anyway, can put that companion resolution through too, and that is the end of it. Then everybody is happy, because that is what they said they wanted in the first place.

We are saying, "OK, then say what you mean;" and the Ontario Legislature would say, "Yes, that is what we intend." We want you to say what you mean, so we want you now to go back. You have passed the accord; now pass this companion amendment which simply says what you said all along you meant to say, and that is it.

I know you cannot go back and get into negotiating in all the provinces and so on, just as in our teacher negotiations we cannot negotiate individually with each teacher. I realize there are those difficulties, but you have surely had the same serious problems again and again. They are simple, they are clear and some of them could surely be gone back to and done.

1550

**Mr. Breaugh:** You have answered my question. I think you can. The thing I have to point out to you, to be fair, is that it is not quite as simple as we would like it to be. I wish we could tell you that we could draft a law and the Supreme Court of Canada would give us exactly the interpretation we as legislators want. The problem is they do not do that. I wish they did, but they do not. We would like to assure you that whatever law we might draw up in Ontario is never going to be challenged in front of a court. Unfortunately, that is not true. People have a right to do that.

A number of native groups have, for example, actually drawn up resolutions themselves, simply because, I guess, they have dealt with governments a lot and know how to draft amendments. But the drafting of a Constitution is something that none of us in this country has really done. We do not have a great deal of working experience with that. If, for example, your group and interest groups like yours would be reasonably part of the process and feel included in the process by saying, "What we want to do is tell you what we think is right or wrong about the Canadian Constitution," then

we will get people—we have them employed at the Legislature—who draft our own bills, and they would draft the actual words, part of which is choosing words that have been in front of the courts many times so we are reasonably sure how the courts will deal with those.

If that is an acceptable process, we may be able to put together something which is at least more palatable to many of us than this Meech Lake process, of which I think many of us would say this is the last time this should ever happen.

**Ms. Douglas:** But would it ever get anywhere? Right now we are looking at the accord and the Premier is saying it is going to go, whether you like it or not. Actually, I am glad to hear—I was thinking this morning that we come with heavy hearts, thinking what is the point in this. There was a quote on the radio—it was Mr. Harris who I see is not here—that perhaps if the Premier found a glaring error he might consider amendment. That is not very encouraging. I thought, this is discouraging for us to come here, it is discouraging for our whole group, all the 900 women teachers saying, "What is the point if they will not listen anyway?" I am glad to hear you find it discouraging too, frankly, because I thought if I had to sit here for three days, the way you have, and wonder whether—

**Mr. Breaugh:** I wish it was three days. Three days I can handle on my left ear. It is the other six weeks that are getting me.

**Ms. Douglas:** What you are saying is, if we start again, would that be all right?

**Mr. Breaugh:** I am saying a little bit more. I am saying that to me, as a member of the Ontario Legislature, the process is intolerable. I will not go through this again. I am going to play a part in designing a different kind of process for the future. I want to make sure there are a number of groups that will participate. Obviously, I am not interested in setting out on a long—

**Mr. Chairman:** Mr. Breaugh, can I interrupt? I think there are two separate things here. I am not sure if it is clear. One of them is in terms of process. Let us forget about Meech Lake for the moment because we know that whether it is next year or two years from now, there will undoubtedly be other amendments about different sorts of things. So let us pretend they have not even done Meech Lake and it is simply not there.

One of the things we are looking at, as Mr. Breaugh has said, is that we are not going to go through this individually again; groups out there are not. That is in no way questioning the motives of those who are involved in what was an

18-month or two-year process of people who were negotiating the accord. But what was missing in all of that and what has hurt it in all of that have been two things: the lack of any kind of clear public participatory aspect to what was being discussed, and also the fact that something is signed and then people are asked their opinion or asked to approve it.

One of the things we are looking at is saying: "OK. As it would appear that there are going to be other amendments from time to time and that we will be asked as a Legislature to be involved in it, we had better get down on paper a process that would ensure an organization such as yours would be able to participate long before anybody was supposed to get to signing."

I think that is one of aspect of it. I am not discussing there the problems that relate specifically to Meech Lake. But whatever else we have learned out of this, one thing is that the process, which in a sense has been used for some time—for the last 10 to 15 years or so, since the early 1970s—will not work any more, that there has to be a public credibility in the process in the sense that you participated. You might still be angry—anybody might still be angry—at the end with the result, but at least if you have been able to participate it is a bit different than looking at it after the fact. That is one part.

The second part is looking at what are the options that are open. Clearly, trying to amend it right there and now is certainly an option. Are there others that we might be able to look at, such as the ones that he mentioned and perhaps some others, which taken together might provide other routes that could also bring about change?

I think there are those two aspects, which do not detract at all from what you have said or what is in here, but I think we realize as a committee that we have to address some things that are going to be occurring again or later down the road. I just offer that as a slight clarification perhaps.

**Ms. Castle:** I was just going to ask how it is that you are going to guarantee in the future that this will not occur again. How do we know that we will not be here next year, the year after that and the year after that, if this goes through, as it looks like it will?

**Mr. Chairman:** I can give you an answer.

**Ms. Castle:** You have one; I know that. But what kind of possibility for change is there if we have to get the unanimous agreement of 11 people in one room?

**Mr. Chairman:** I think what we are saying, and if you sat down with each member of the

Senate-House of Commons joint committee you would hear the same thing. I know you suggested there have been a lot of committees, but there actually have not been a lot of committees. One of the problems is that we are really the first legislative committee since the accord was actually signed, because Quebec looked at it before; we are really into new ground here.

What has hit us right between the eyes, as we finish our stay in Ottawa—this is the end of our fifth week and we still have a number of weeks to go—is that as legislators we will go through this process this time because there is a situation and a problem, and I think we now realize there are some things we think we can do that will bring us forward. We know we are not going to answer everybody's concern, but we hope we can at least move the debate forward.

We are not at the end of the process; there is New Brunswick and Manitoba, and there are other things that are going on. But as legislators, I do not think there is anybody here who would sit on this committee again if it was put to us in this way. I think you would find the same thing on Parliament Hill. Because of that, we are going to be making recommendations about how we are going to open up that process and start to set some steps. We are a provincial legislative committee, so we cannot set that out for the whole of the country, but we sure can do that in Ontario.

I feel very confident in saying that we will no longer have a constitutional amendment arrived at in that way. I am not saying there will not be first ministers' meetings or at times private meetings, but we are looking at a process which will ensure public participation; there are a number of options that can be selected. We are going to have to try to think that through and put those forward as recommendations to our colleagues in the Ontario Legislature.

1600

As I say, that is a separate issue from specific immediate changes to Meech Lake, but one of the critical things that has really come out of looking at this after the fact is that we have a terrible problem with process. As politicians, as people who are going around and listening to people, if we do not bring that back to our colleagues and insist that this is a reality out there, then we will not have done at least part of our job. We feel very strongly about that, and I just want to make sure that message gets through.

**Ms. Castle:** I am glad that you feel very strongly about it. Can I ask you if this furor is coming as a surprise to you? Was this reaction not completely predictable?



**Mr. Allen:** Mr. Chairman, may I intervene on a point of order?

**Mr. Chairman:** Yes.

**Mr. Allen:** I do not think the chair engaging in lengthy discussion with the witness is appropriate.

**Mr. Chairman:** I am sorry. I know; it is the end of the week and I am getting carried away. Mr. Allen, then Miss Roberts.

**Mr. Allen:** I am sorry; I did not realize I was next. I would not have mentioned it.

Interjections.

**Mr. Allen:** That is right. I just want to assure the chairman that I think his interventions are very helpful. I was not in any sense implying there was a problem in that.

You are teachers. We have had numerous presentations to us that have used language like "coup d'état" and "something going on that is analogous to South Africa," language that appears to import into the whole discussion an extremity of situation which from my perspective, and I think also from the committee's perspective, does not really pertain. I think it is important, as we express our concern about what is happening, that we do not at the same time fail to recognize that in fact the process of constitutional revision and reform in Canada in the last six years is far more open than it certainly was in the first 115 years of our existence as a country.

As we tackle this particular aspect of constitutional change—namely, focusing on the problem of Quebec and its place in Confederation, especially since 1982, and the isolation of the province after 1982—one should not think that everything else has to be solved now or it will not get solved or that everything has to be solved within the rubric of Meech Lake or it will not get solved.

It is quite clear there are major problems out there, not least of all the processes that my friend Mr. Breaugh was talking about and on which the chairman was elaborating, that have to be addressed in order to improve the process. We are trying to wrestle with all that but we do not want it to be seen in the context of an undue anxiety that somehow things are much worse now than they were a decade or two decades ago in terms of constitutional change.

**Ms. Castle:** I do not think that is our feeling. One of our points is that if we are going through this process, and surely there is a better way and surely there is time before it is finalized, then let us take a look at what the concerns are; let us take a look and listen to what the public is saying. If it

is as simple as putting in a word here which will resolve things, then do it before it is a fait accompli. No one was implying that things are better now than they were 10 or 15 years ago.

**Mr. Allen:** Worse now?

**Ms. Castle:** Or that either. I do not think much has changed.

**Mr. Allen:** They are better, they are not worse.

Second, I am not sure how I come out of these discussions in terms of this question of ambiguity and clarity and adding a few words here and a few words there. I have a feeling that if you actually sat people down to compose something they would elaborate as the meaning of "distinct society," they would probably create some major, egregious blunder that would trap somebody seriously and desperately down the road.

That would be more difficult to resolve in the courts than leaving it the way it is. It frequently is better to take the barebone structure of a constitutional statement such as we have and let the courts apply it to specific situations and to clarify it that way, step by step. I know it leaves a lot of down-the-road speculation up in the air for us. It is difficult sometimes to cope with the anxiety that engenders, but I really wonder whether, in the long run, given the fact that we do have legislatures, we do have courts, we do have lobby processes and we do have access, it would not be better to leave it that way. I just say that to you as a caution.

The other item I want to question you about is your comment that you agree with the Canadian Teachers' Federation that, clearly, all rights and freedoms guaranteed under the charter should supersede any group-based rights. Can you relate that to your last recommendation, which has to do with the question of charter rights prevailing over the accord? I am not quite sure that many of the groups who have made this point recognize exactly what they are saying in some detail.

First of all, let me just refer you to a number of sections of the charter. For example, one can begin with reference to sections 25 and 27 which deal with the group rights of aboriginal peoples and multicultural heritage rights. One can deal with section 29 which talks about denominational school rights, which are group rights. One can refer also, outside of the charter of course, to English and French language rights in the Confederation document of 1867.

There are a number of basic group rights that are right here in the charter so that when you ask that the charter somehow prevail over some other group rights in the interests of individual rights,

you are really caught in a circular argument because this document defends group rights as well as individual rights.

Then you get into section 1, where it says, "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." That makes it possible for legislatures, even if you say that the charter is dominant, to still move in such a way as to act to balance some apparently rational—but when rational process is applied, unjust—legislation affecting individuals in an adverse way.

**Miss Roberts:** Like affirmative action.

**Mr. Allen:** Yes. You go to subsection 15(2). It does not really clearly and absolutely state a rational application of equality rights, because it says that affirmative action may be necessary for handicapped groups and individuals—but groups as well. Then you get to the very end of the charter, you get to section 33 and you find that all of it may be ditched by any legislature at any point, if it is prepared to take the political consequences and do it every five years, ratify it every five years before it is public.

If I can just ask you to be frank about it, in your brief, where you have asked for this kind of prevailing dominance of the accord, was it your intention or did you understand that there were, in fact, all those options for group rights to be set in tension with individual rights and that there would always be some dialectic, disagreement and ambiguity around all that?

**Ms. Douglas:** You are right. There are ambiguities in our brief, too, and you see what ambiguities lead to: all kinds of confusion. That is our very worry. Concerning the ambiguities in the accord, you are right that sometimes it is better to couch a phrase in an open way. As events evolve, it will be interpreted in what is probably the best way.

But I think this is the worst of all because it talks about inserting a section 2 which talks about Quebec's "distinct society." If it were left at that, then that would be exactly what you are talking about. "Leave it. It is a little ambiguous. What is a distinct society and so on? But maybe it will all work out."

If it had been left at that, maybe. But it is the worst of both worlds here. It is not exact. It is like saying, "We are going to have this right;" and then saying further down: "But what we said up there does not apply to people with brown hair. What it says up there does not apply to aboriginal peoples or multicultural rights."

All of a sudden, what does that mean? What about everything else? If we made an agreement and we couched it fairly broadly and we said, "We are going to leave it like this," we could agree. But let us not tack in something that says, "Ah, but what we said doesn't apply to left-handed people."

We are looking at this now and we are asking what it means. I think that is serious because it is beyond ambiguity. If you had left it in the first place, fine. But do not tack in two groups and say, "But these two groups somehow are not affected." Well, what about everything else? That is what we are saying is the bad part about this agreement.

**Mr. Allen:** Yes, I am sympathetic with the impression that leaves. I think that attempt to respond to political pressure in the midst of the process, to deal with two groups, is unfortunate. It might better have been left; and it still might well better be said, just as Lowell Murray did, that one should include section 28 for greater certainty that there is no adverse reaction upon that provision of the charter. I think that would be reasonable. I just wanted to be sure that you were aware of what asking that the charter prevail implied in reality. It is not as clear an action as it would seem at first glance, I think, as many people think it is.

**1610**

**Miss Roberts:** To take up from what Mr. Allen has just said, what you are suggesting may not achieve what you think it will achieve. That is a difficulty. Many people agree that it may achieve it and many people say it will not achieve what you think you are going to achieve by your recommendation 2.

What I would like to share with you, and the comments that my colleagues have made, is that we do take these public hearings seriously. We do take each suggestion and the amendment process very seriously as well. It is very clear that we as a committee are not going to go through this process again. We are looking at Meech Lake from all angles, and we are dealing with all the criticisms. Maybe the hue and cry that you have with respect to one particular part has to be balanced against the hue and cry that the women in Quebec have to say, "No, it is OK." We have to look at each presentation that is made to us, and I can assure you each presentation is taken seriously and looked at.

I hope you understand that your coming here today is very helpful to us, extremely helpful to us. Your brief, as well, indicates that you have thought through a very difficult process and have



attempted to deal with it on behalf of yourselves and your members. Constitution-building is something that is very new in Canada. It is a process we are not familiar with. We have many, various constitutions to look at throughout the world. We have a very definite type of Confederation here in Canada. We are trying to work out a system that will develop a Canada that we are used to, that we want to continue.

I know from some of your comments that you think the Meech Lake accord may put women's rights at risk or there is a possibility of that. If you look at the charter itself, that possibility is already there. That is frightening for me. That charter exists; it is there. This accord may be helpful, as well as it may not be helpful. Ambiguities come and go. They will have to be dealt with in particular situations each time. It is difficult at this time for us to say what political process can be put in place, but we have to look at that political process.

I would just like to ask you to comment on your concern, not just your concern for women and your particular indication, but your concern for—this is known as the Quebec round—for trying to get the province that did not join in 1982; it was not a part. You can say, "Oh, yes, legally it was, da da da," and we know all those arguments. But they did not have the political will to join on the basis of the 1982 Constitution, the accord at that time. Now one Prime Minister and 10 premiers have got together and said: "This is a new way. This can get Quebec in."

Also, Quebec was not holding everyone to ransom. I think there were a couple of western premiers who might have indicated from time to time that they had some concerns as well. I would like to speculate on how important it is that we complete this accord now, because if it does not happen now for us to continue as a nation, it has to happen some time. How do you do that? Those are the things we are trying to determine. I would like to hear your general comments.

**Ms. Douglas:** There is nobody who will say he does not have sympathy with bringing Quebec into an agreement. There is no question about that. Most people will say: "Yes, we probably have to give. We are probably going to have to agree to some things where we would prefer to have it our way but it is not going to necessarily work out that way."

This is a bad agreement, and one of the reasons it is a bad agreement is because of the way it was reached. It was virtually, "Let us lock everybody in the room and keep at it until something comes up." I am sure there must be people here who

have done collective bargaining and know that is a standard technique. Our Prime Minister has done collective bargaining, and he used exactly that on them.

I do not think it is a very good accord; but having looked at that, and we have said in our brief that there are lots of things we do not particularly like about it, let us be realistic. Let us look at what is most important to us. We have tried to keep it simple because we know all these things you are telling us. We are saying we do not want that risk to women's rights. Why are we taking this risk? No, that risk is not worth bringing Quebec into the accord, if you want to get down to the bottom line.

For us, not having that clause in there is not worth it. That is not to say we do not want to negotiate next month or next year. Let us start it all over again; let us take it again. But no, it is not worth the risk.

**Mr. Chairman:** Thank you both for coming this afternoon and making your presentation. Whether it is because we are at the end of our hearings here this week or we got terribly loquacious or what, I am not sure—

**Miss Roberts:** Even I spoke longer than usual.

**Mr. Chairman:** One of the things that happens in this process, and as we mentioned this is the end of our fifth week of hearings, is that you start thinking out loud. I suppose it is partly because you are searching, trying to figure out how we can take certain problems. There is no question there are probably three or four very key, critical ones, where you are trying to say, "Is there some way we can come forward with recommendations while at the same time holding on to the good part of the accord?"

That perhaps leads us into longer statements than we would otherwise have wanted to make, but we do appreciate your answers. There is no question that the conviction of your feelings and the arguments that are here are very clear. I hope that, finally, when our report is done and presented to the Legislature, it will have gone, if not totally, at least some way along the road of meeting the needs that you have set out. We thank you very much for being with us this afternoon.

Just before closing our sessions here, I would like to thank the interpreters upstairs and also the staff from Queen's Park. We know we have had to run you around from hotel to congress centre. I also say to Mr. McGuinty, we thank you for the hospitality of Ottawa, and it has been a pleasure having you with us this week—and Mr. Morin.

Sorry. I am thinking of Mr. McGuinty in his role as the chairman of the eastern regional caucus.

**Mr. Allen:** You gave him the whole of eastern Ontario, did you?

**Mr. Chairman:** He took it. Thank you. We will adjourn this meeting. We begin at 1:30 on Monday back at Queen's Park.

**Clerk of the Committee:** That is a possible 1:30. I will call your offices on Monday morning.

**Mr. Chairman:** It may be two o'clock, but we will assume it is 1:30.

The committee adjourned at 4:19 p.m.



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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Monday, March 28, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Monday, March 28, 1988**

The committee met at 1:35 p.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good afternoon, ladies and gentlemen, and welcome as we begin our sixth week of sittings. I would like to invite Timothy Danson to take his seat. Mr. Danson, we welcome you here today. We have a copy of your brief, and to give you as much time as you would like to have, I will turn the mike over to you to make your presentation. Then we will follow up with questions from the committee members.

**TIMOTHY S. B. DANSON**

**Mr. Danson:** I do not know whether you have had an opportunity to read my brief. I would like to think that it is a reasonably intelligent and legible document covering, in essence, the fundamental opinions I have on the Meech Lake constitutional accord.

**Mr. Chairman:** Just for the record, we were in Ottawa last week. I believe this came in at the end of the week, and I do not think everyone would have had a chance to have read it. If there are certain things you want to really stress, perhaps you can underline then as you go through your opening remarks.

**Mr. Danson:** Thank you. For the most part, if you do get a chance at some subsequent time to read the brief in its entirety, it deals with most of the issues in a rather concrete way, both from my perspective as a private citizen and my perspective as a constitutional lawyer. However, apart from my brief, the views I have on the Meech Lake constitutional accord are also quite emotional, and while in my brief I speak from the head, I would like to spend perhaps two minutes, and not more than two minutes, dealing with the issue on an emotional level.

I think that to understand how I feel and how other people like myself feel about this issue from an emotional point of view may assist you in what I have to say subsequently in terms of the merits of the accord. To look at the Meech Lake constitutional accord strictly from an academic perspective would be a grave error, so if I may, I will speak to you on the different level for just a couple of minutes.

I believe there was a dream. It was a most precious dream. It was a dream of hope and a dream of prosperity. It was a dream of a great nation and a great people. In this dream, we saw a people who transcended geographical boundaries and cultural diversities. It was a dream that inspired all dreamers, because diversity was not made an excuse for division but rather an opportunity for enlightenment and growth. In this dream, people set out determined to defy history and then remake it. Where there were tensions, the tensions were creative. These creative tensions challenged us to keep dreaming and to be imaginative.

This dream, in fact, began in 1867. Over the past century and more, the dream matured. It is a dream about Canada. It is a dream of hope.

However, on October 26, 1987, the House of Commons ratified the 1987 constitutional accord, telling us in no uncertain terms that this dream was just a dream, that Canada as a nation was incapable of achieving the grandeur which lay within its grasp, that in fact we are two nations with two languages and two cultures rather than one nation with two languages and many cultures.

Not only has the Meech Lake constitutional accord challenged the Canadian dream and turned it upside down, it has for ever handcuffed the ability of our children to make decisions for themselves in the future and to shape their own destiny, because we have entrenched an amending formula which requires, in material respects, unanimity. In the fullness of time, this will create political and intellectual paralysis.

When I refer to "the fullness of time," not only in my opening submissions but as you see them in my brief, I do not mean tomorrow. I do not even necessarily mean next year. The fullness of time may be five years or 10 years, because a Constitution must withstand the process of time.

It appears that the Ontario government, like the federal government, is interested only in drafting errors. However, that puts the discussion into a straitjacket, because the first question is not about drafting errors but rather about coming to grips with what our vision of Canada is. There is simply no point in discussing the language of the accord without knowing the vision it is to reflect. Is the government of

Canada now one among equals or is it to remain the paramount political authority in Canada representing national interests?

If it is one among equals, then the accord may be a step in the right direction. I have no criticisms of the accord if that is your vision of Canada; but if the government of Canada is to remain strong, then it is the wrong step in the wrong direction. If we want a community of communities where Canada becomes a loose federation of strong provinces with a federal government that merely referees among competing provincial interests, then the accord is no doubt a smashing success. There is no point discussing the ambiguities in the accord because they are merely a reflection of this vision.

If, on the other hand, we want a strong, national government but respectful of provincial interest, then the accord is a dismal failure. There is no point in analysing the terminology of the accord because the battle was lost at its inception before the drafters even sat down to draw up the document.

The context is not that the accord lacks vision. The context is that it was not motivated by vision. There is no denying that Quebec is different from any other province, but it is also undeniable that every province of Canada is different from the next. Many Canadians find the Canadian experiment exciting because it does attempt to transcend geographical boundaries and cultural diversities. There is simply no cosmic necessity for Canada to exist. Greater nations have disappeared. That is why we must have a strong national identity and a strong central government to face a world that seems to be smaller and smaller every day. We simply are not a community of communities. We are one nation with a dream.

Young Canadians are not prepared to say goodbye to this dream, and I submit that ratifying this accord, in the context of time, in the fullness of time—and as I say, it may be five, 10 or 15 years—will unleash a response of incalculable dimensions. In an effort to satisfy Quebec and promote its distinct identity, we forgot to protect and promote Canada's. The accord will attempt to hold Canada together through a mechanism which will eventually tear the country apart.

On the substantive side of things, I would like to address the issue of Senate reform. It would appear that even the strongest supporters of this accord agree that the changes the accord has with respect to the Canadian Senate are incomplete and inadequate. They argue that it is simply the first meaningful step towards Senate reform. The

direction, though, is unmistakable, and that is to strengthen the authority of regional provincial interests in Ottawa.

This is what the supporters of the Meech Lake constitutional accord tell us, and if the supporters of the accord tell us that this new Senate is to be a more activist Senate, I suggest we must take their word for it. We must assume they mean what they say.

Then we must ask ourselves: If we are going to have this more activist Senate representing regional interests in Ottawa, what constitutional and what legal powers does this Senate have in law? The answer is that the Senate of Canada has the same powers as the elected House of Commons, except that money bills must originate in the House of Commons and the Senate can hold up constitutional amendments for only six months. In all other respects dealing with the day-to-day business of the government of Canada, the Senate has identical powers to the House of Commons.

Under the Meech Lake constitutional accord, we will have in Canada, over time, a provincially selected Senate that will have absolute veto power over matters of exclusive federal jurisdiction. That is a fact. I invite any of you, if you disagree with me, to challenge me on that in your questions as a matter of law, because it is, in my submission, an indisputable fact.

We will have an appointed provincial body which will have concurrent jurisdiction with an elected House of Commons. It is perhaps a bit unbelievable for anybody to speak of a strong Canada while at the same time allowing for an appointed provincial body which will have veto power over an elected federal body in areas of exclusive federal jurisdiction.

It was Harry Truman who said, "The only thing new in the world is the history we don't know." In 1976, the Australian Senate, which has essentially the same constitutional powers as the Canadian Senate, brought down the government of the day. So I am not being hypothetical.

A Constitution must be pure, in and of itself. It is rarely tested in good times. It is in how it responds to bad times and difficult times that the test of the substance of a country's Constitution is seen.

It is an affront to common sense, in my respectful submission, to concede, on the one hand, that the treatment of Senate reform in the Meech Lake constitutional accord is merely transitional and a stopgap and inadequate in and of itself, and then on the other hand to include a



requirement of unanimity for further Senate reform.

Even the Ontario government's own adviser—I think he was the government's adviser, Professor Peter Hogg; I am sure you have seen his book on Meech Lake—as I read that, he is a supporter of the Meech Lake constitutional accord. He was my constitutional law professor. I have not talked to him since I have seen that book, but even he says on page 20 on Senate reform:

"There is obviously a real possibility that in future rounds of constitutional discussions the first ministers will fail to reach agreement on Senate reform. If that happened, then the new section 25 would become permanent. As senators retired or died, the Senate might gradually evolve into a 'House of the provinces' with its members feeling themselves primarily beholden to their province of origin rather than to any federal political party. This would probably change the character of the institution, making it more assertive in representing provincial or regional interests."

As I have already indicated, this is over matters of exclusive federal jurisdiction. So you even have Professor Peter Hogg, who supports the agreement, conceding that when it comes to the Senate we could potentially have a very serious problem, because, of course, of unanimity. To suggest that this is not a serious threat to federal sovereignty is to lose oneself in political deception.

I have a compromise solution, and I say "compromise" because it is not the solution I would advocate in the first instance, but if anything is going to be changed in this accord—on which I have my doubts—one can do it only by way of compromise. I would submit that this committee consider this recommendation with respect to Senate reform.

Until the first ministers and the Prime Minister agree on full Senate reform, the powers of the Senate must be restricted to an upper chamber of second thought with power to stall legislative change in the House of Commons for only six months. Put another way, I submit to you that the power of the Senate in total must be identical to the present power the Senate enjoys as it relates to constitutional amendments. In a nutshell, if you accept this proposition, it means that an elected body must have unequivocal authority over an appointed body and that the federal government must be sovereign over matters of exclusive federal jurisdiction.

I ask perhaps a rhetorical question: Who could possibly disagree with this proposal? We know it is not Quebec; Quebec will not disagree with that. They were not the ones who came up with the brilliant idea on Senate reform to begin with. Perhaps the only people who might oppose it are some of the western premiers, but I submit that it is worth putting to them until there is full Senate reform.

If you do not have it, as Professor Hogg even suggests, because of unanimity you may have for eternity a provincially selected Senate which will have absolute veto power over matters of exclusive federal jurisdiction. If the supporters of the Meech Lake accord are right—that it is to be a more activist Senate—then one must look very carefully at what happened in Australia in 1976.

I would now like to turn to the Supreme Court of Canada appointments. The amendments relating to the Supreme Court of Canada contain a built-in powder-keg which entrenches into our Constitution a mechanism that has a real possibility of questioning the very constitutional validity of the Supreme Court of Canada itself. As you know, under section 6 of the accord, the proposed subsection 101 B(2) of the Constitution Act, at least three judges of the Supreme Court of Canada must be appointed from Quebec. Between 1976 and 1985, when a separatist government was in power in Quebec, the federal government appointed two justices to the Supreme Court of Canada: Mr. Justice Lamer and Mr. Justice Chouinard.

What would have happened if Meech Lake were in place between 1976 and 1985? What would a government committed to the dismemberment of Canada, to the destruction of Canada have done if Meech Lake were the law of the land? First of all, they could have done absolutely nothing—made no appointments and put no names forward. Second, they could have continually put forward names of known separatists who would have been entirely unacceptable to the federal government. In either case, we would have had a perpetual vacancy in the highest court in the land.

However, the accord itself states that there shall—I emphasize the word "shall"—be three judges from Quebec. In other words, without this constitutional requirement being fulfilled, the Supreme Court of Canada is no longer constitutionally constituted. A separatist government in Quebec would be free to disobey and ignore any decision from the Supreme Court of Canada because the court itself would not have complied

with the provision of the Constitution itself, which is three judges from Quebec.

I submit that the first intelligent idea contained in this aspect of the Meech Lake accord is to provide a mechanism in our Constitution that potentially creates the crisis in the first place. I do not think anybody in this room can say: "Well, we had a separatist government in Quebec between 1976 and 1985. That was an aberration—a rather long aberration, almost a decade—and it will never happen again in the future." I do not think anyone can suggest that. So you have to ask yourself in your deliberations—because this is rather long-term; this is not a simple act of the Legislature or Parliament but a Constitution—what would happen if another separatist government were in power. As I say, we have a Constitution that creates a mechanism for this crisis to occur in the first place.

The second, I submit, brilliant idea, which I say sarcastically, is that we demand unanimity with respect to changing the Constitution regarding the Supreme Court of Canada so that the crisis is entrenched. The reason it is entrenched is that the province creating the problem is not about to resolve it. That, of course, is the genius of unanimity. So I ask, who speaks for Canada?

Again, by way of a compromise solution—I say "compromise" because if I had my first choice, I believe the federal government should maintain its power over appointments of Supreme Court judges—there should be a mechanism set up at the various law societies and others, such as the recommendation the Canadian Bar Association has already put forward, for appointing Supreme Court judges. I think in the final analysis the constitutional authority should rest with the federal government.

Surely a simple solution to this aspect—I am not even questioning this aspect; I do in my brief, but for these submissions I do not even question the fact that the provinces may put forward a list of names and participate in the appointment system. I am just talking about this mechanism that may create a crisis if you have a government that does not want to co-operate.

With the other provinces, it is not such a problem. If the Prime Minister decided he wanted a judge from British Columbia and Mr. Vander Zalm did not put the name forward, then the Constitution allows him to go to another province by saying, "Fine, if you do not want the appointment, we will go somewhere else," but with Quebec, you do not have that option. One could only imagine what would happen with a separatist government that refused to put names

forward or continually put unacceptable names forward. There is absolutely nothing in the constitutional accord that resolves this crisis.

The solution is simple: Put a mechanism in the accord that would resolve this crisis. I am not sure what that mechanism would be, but it is clear there must be a mechanism to deal with it. Otherwise, the political consequences are just overwhelming, because you will have a separatist government. If a judgement comes down from the Supreme Court of Canada that is absent three judges from Quebec, a separatist government would say, "We are not going to listen to this because it is not constitutionally constituted."

I would now like to turn to opting out. I think the opting-out provisions of the accord should also be seen in the light of the overall impact of the constitutional reform contained in the accord as a whole. There is unquestionably, in my submission, a substantial shift in power away from the central government in favour of the provinces. If, for example, you are going to allow for a provincially selected Senate to have absolute veto power over matters of exclusive federal jurisdiction, then surely Ottawa must retain its power to spend its money as it deems appropriate. In order for creative federalism to work, there must be counterweights; there must be a balance.

As you know, under the Constitution, Ottawa has absolute jurisdiction over matters of direct taxation. Under section 91, class 3 of the Constitution Act, the power exercised by the federal government is done in its capacity as a national government, and thus the money belongs to all Canadians to be spent in the national interest. When you speak of opting out and the opting-out province having the right as a matter of law to financial compensation, that compensation would be coming from funds raised through Ottawa's exclusive jurisdiction under section 91, class 3 of the Constitution Act.

What is happening then is that Ottawa is losing control over how money raised for the national interest is to be spent. Canada can exist only if we have a strong central government with strong provinces. There must be a creative competitiveness between the various interests to keep us vibrant and imaginative. In order for Ottawa to fulfil its duty as a national government in the national interests of the people of Canada, it must have the power to use its financial resources to extract concessions from provinces for the national good of the country. We elect federal politicians to represent us on national issues. We



do not elect provincial politicians to represent us on national issues.

To give you an example, only last week Premier Vander Zalm was talking of extracting fees from cancer patients and kidney patients for certain kinds of treatment. I think for one of the treatments, I am not sure which one, it was going to cost the patient \$300 a month extra. This runs contrary to every sacred principle of our national health care system in Canada. The federal government must have the power to tell someone like Premier Vander Zalm that what he is doing is offensive to the Canadian national spirit.

When it is a matter of exclusively provincial jurisdiction, I suspect Mr. Vander Zalm wants to do what he wants with provincial funds. That is fine; he can do what he wants. But when he is asking for federal funds in the opting-out clause, I submit the federal government must have the power to extract certain concessions. What Mr. Vander Zalm is doing is contrary to everything that Canada stands for on the issue of health care. The opting-out provision in this regard seriously weakens the federal government's ability to act in the national interest.

1400

In addition, the opting-out clause is so ambiguous that it is effectively a total abdication, in my submission, of political responsibility because there is so much ambiguity in the terminology that the politicians are basically saying, "Leave it to the courts." Well, if I were to be selfish, I love politicians who do that. That keeps me in business. However, I believe the consequences are too great.

For example, the accord does not specify which level of government sets national objectives under the accord. The accord does not specify who determines whether the provincial plan meets national objectives. The accord does not specify whether "national objectives" means "standards." The accord does not define the difference between a provincial program and a provincial initiative, if any.

The accord does not provide a definition for the word "compatible." The accord does not provide criteria to determine the difference between being compatible with a provincial program, as distinct from a provincial initiative. The accord does not provide for a formula to determine whether a province can have an objective compatible with a national objective, but have a substantially different view as to the best means of achieving that objective.

I shall end my opening comments. I am leaving "distinct society" in the charter perhaps

to some of your questions because, once I start on those two topics, there is no way I can keep to 20 minutes as an opening statement. So I will leave that. I hope you will read my brief and you will see that I advance my position on "distinct society" and the charter in some considerable detail and refer to certain very specific case law.

I shall end as I began, that there was a dream and it was a most precious dream, and I think we are now being told that this dream will remain just a dream. Those are my submissions.

**Mr. Chairman:** Thank you, and particularly, thank you for the emotion. We have had during our hearings a number of dry submissions, but also a number where people are expressing their beliefs. After all, if a Constitution is to mean anything, it must presumably be reflecting feelings, views and a sense of what the country is all about, and it is very helpful to the committee to get a sense of that. I think that also provides a framework for a lot of the things you have mentioned here.

We have roughly 225 briefs that have now been submitted and I can assure you we do read them all, so those areas that we do not get to cover in detail, we will most certainly go through and make sure we understand your points on those issues. We will start the questioning with Mr. Harris.

**Mr. Harris:** I want to ask you a few questions and to congratulate you on a thorough brief. I certainly do not disagree with your concerns. I may not agree entirely with everything you say about every aspect, but I want to ask you a few questions.

On page 4, at the top of the page, you say, "Respectfully, there is no electoral mandate to do this." Usually, whenever somebody does not like something, they always say there is no electoral mandate for you to do this. Could you tell me what there is an electoral mandate to do? Are you saying there has to be another process for constitutional change, other than every legislature, the Senate and the House of Commons unanimously agreeing?

**Mr. Danson:** The difficulty I have with the provinces agreeing—this is not perhaps the most appropriate forum to express that point of view for people who are provincial politicians—is that I believe that the Meech Lake constitutional accord so overwhelmingly favours and strengthens the constitutional powers of the provinces that it does not surprise me. For people who are elected to represent provincial interests to have a further legal arm to effect that interest, it would be a very attractive proposition. I would not think

politicians at the provincial level would want to walk away from what I perceive as a significant increase in their powers.

I would agree with you that if you take day-to-day legislation, it is incumbent upon politicians to create new initiatives, and that even if they were not elected on those initiatives, they should pursue them. However, there comes a point where value judgements have to be made and you have to look to what, in fact, one is considering. In this case, you are talking about the Constitution of the country.

**Mr. Harris:** But the aspects that concern you are those that deal with provincial and federal powers and the resolving of where any of those come into conflict.

**Mr. Danson:** I go further than that. In my opening submissions I just deal with Senate, Supreme Court of Canada and opting out. When you read my brief, I deal at some length with the whole unanimity provision, with the "distinct society" clause, and I am very concerned about the Charter of Rights and Freedoms. I simply submit, and perhaps a short answer to your question is that the Constitution of a country is so fundamental that it is something that ought to be dealt with in a national sense and debated in a national sense. I do not think the fact that we are having hearings necessarily reaches all the people, or that all the people are coming forward to express an opinion. It would seem to me that from 1968 onwards, Pierre Elliott Trudeau did campaign on constitutional issues, and except for, I suppose, a hiccup in 1979, was continually elected.

I cannot help but recall a long program on Cross-Canada Checkup in which this came out. Many people from the west were addressing the fact that they had never voted Liberal in their lives, had never liked Pierre Elliott Trudeau and would never vote for Pierre Elliott Trudeau; however, on this issue, they agreed with Pierre Elliott Trudeau. Because this issue is of such great national importance, not only for the present but for the future, and inasmuch as Pierre Elliott Trudeau put true proposals to the Canadian people for consideration, to be voted on, I think this is something that has to be done as well, and it has not been done.

**Mr. Harris:** I would totally disagree with just about everything you said.

**Mr. Danson:** You would not be the first.

**Mr. Harris:** My sense is that you are saying the provinces should not have a role in it, and that is fine; any role the provinces have in this is over

and above what Trudeau gave us in the last round, or Davis gave us, because the provinces did not get, as I recall, to have significant involvement in the last round at all, nor were there any hearings, nor were there any proposals put to the electorate. I guess I am asking you what the mechanism is that you would suggest for involvement. Are you suggesting that you have to campaign on this, on a certain issue?

You have not offered me an alternative. I do not know what the alternative is to having every legislature, the Senate, the House of Commons, certainly the leaders of all three parties at the national level. I do not know what else there is, other than another mechanism, perhaps a referendum. I do not know what that is, but by any measure, anything you have told me is that we are going to have an election on it and we have three leaders all saying this is a wonderful thing. I went through that once in this province on an issue of funding the school system and I found that people felt left out.

**Mr. Danson:** I would respond, first, by saying that I am not suggesting the provinces across Canada do not play a major role. Of course they must play a major role, particularly when you are talking about the division of powers. However, I would suggest that—certainly, with testifying before the House of Commons-Senate committee, I am not so sure how open that hearing was.

As I have indicated in my opening comments and as I argue in my brief, the problem with this is that I do not think we are getting a fair hearing. I think that basically the federal government and the provincial premiers are saying: "We support this. This is good, and if you can come and tell us a few things that may not be good, well, maybe we will consider it, but I doubt it." It seems a little bit like loaded dice. It seems to me that nowhere in any of this discussion has there been a discussion with the Canadian people as to what their vision of Canada is.

#### 1410

I have found, on a personal level, discussing this with people who do not really know much about the Constitution but will engage in a discussion about it, that when they are truly educated as to the implications of the Meech Lake constitutional accord they are shocked.

I gave a talk to the Rotary Club of Mississauga about four weeks ago. I was the only Liberal—I should not say this at this hearing—in the room. Everyone else was a strong Conservative. We started it with them being very much in favour of Meech Lake. I mean, people trust their governments, believe it or not, from time to time. I say



this, and I hope I do not sound overly self-serving, but when it was over and they fully understood, their question was, "What can we do to stop this?"

I do not believe there has been a full discussion. I think this is the kind of thing people should bring out. We just went through a provincial election. I did not hear Meech Lake really being debated in the last provincial election. It is not an issue politicians want out in the open.

**Mr. Harris:** There was one party that tried to talk about it, but nobody wanted to listen. Let me also say that if I accepted your brief as being factual, I would be appalled and astounded too. So that does not surprise me. Let me ask you a couple of specifics. The "distinct society clause," on page 7, "will provide for a constitutional mechanism which, over time, will allow Quebec, step by step, to promote its distinct identity right out of Confederation." First of all, that assumes they want out. If they want out, should we not let them out?

**Mr. Danson:** If they want out, I suppose the question is, in what context? If you are talking about a full, open democratic election where the people of Quebec do not want to have any part of Canada, I do not know the answer to that. I suppose one has to listen to the democratic process. My sense is that you would have a small but vocal minority in Quebec who would talk about separation. To me, that is too hypothetical.

I believe that what you have, though, is a mechanism being set up that will allow Quebec, piece by piece, to keep passing various legislation pursuant to its obligation under the Meech Lake constitutional accord not only to preserve, but also to promote its "distinct society." The consequences of that will be significant.

**Mr. Harris:** Can you think of anything that we can do to keep a province in that consistently, over a period of time, will use any devious method, as you suggest over anything, to work out a way to get itself out? Many people from Quebec argue that the fastest way out is to turn this down. Others, like you, have said the long way out is to turn this down. If I am faced with a fast way out, or a chance, maybe this is better than the fast way out if I want to keep Quebec in Canada, and I want to keep Canada together. I sense those are the options I have been presented with on this issue.

**Mr. Danson:** My short response to that is that I do not accept it. I do not think the majority of Quebecers want out. I do not think that rejecting this means they are out. There are alternatives.

For example, I articulated at some length in my brief what the "distinct society" clause means. If, on the one hand, it means what supporters of the accord say, that it is merely a formality, that it represents an historical social fact, then I do not have too much problem with "distinct society," if that is what it means. But if that is what it means—I do not know what the other constitutional lawyers are telling you, but I do not think I am the only constitutional lawyer to say this—then it should be in the preamble because that is what preambles are for. You do not put it in the body of the claim.

When you look at some of the statements that are made by Quebec politicians as to whether it is a mere formality, I think the Prime Minister has put a lot of people in a political straitjacket because they have created a political mood that if you reject it you are anti-Quebec. That is quite unfortunate.

For example, I will just give you a couple of quotes as to what the "distinct society" clause means. Robert Bourassa said in the National Assembly: "While the French language is a fundamental characteristic of Quebec's uniqueness, it is not the sole characteristic relevant to the 'distinct society' clause. There are other aspects such as Quebec's culture and its institutions, whether political, economic or judicial. The 'distinct society' clause will allow Quebec to be confirmed as a French society." Hardly; when you talk about culture and institutions, political, economic and judicial, you are not talking about a formality.

He also said, "English rights will no longer be a constituent part of Quebec, but purely a limit on the power to be exercised by the National Assembly." One can go on and on. I have about 15 of them, depending on the questions that were being asked of the statements that were made by René Lévesque.

If you go to some of the separatists like Claude Morin, he says: "The 'distinct society' clause is a significant clause and should be exploited to the utmost. This would lead to results that provincial premiers who signed the accord would not be very happy with." He also said, "If the recognition of Quebec as a distinct society turns out not to mean anything, Quebecers will realize it and begin fighting again."

**Mr. Harris:** If you were a separatist in Quebec and a politician and you wanted to make a public statement, would you not want to make one that you would be a winner no matter what happens? I do not attribute any of those statements by any of the people you have quoted

to anything more than politics in their own province.

**Mr. Danson:** Then I will perhaps leave you with one more quote.

**Mr. Harris:** It is what the Supreme Court decides.

**Mr. Danson:** That is right.

**Mr. Harris:** That is what is going to happen.

**Mr. Danson:** One thing that is for sure in constitutional law, as Mr. Bourassa said before as he introduced the motion for the Quebec National Assembly to approve Meech Lake, "According to jurisprudence, the statements, the intentions of the person writing the Constitution can be very useful in the interpretation that can be made by the courts."

What Bourassa said was that we know that the courts, in situations like this, especially when you get into ambiguity in constitutional matters, will look to what the politicians happen to say. So what Bourassa does, he talks about all these comments of how strong the "distinct society" clause is, that it is not a mere formality, that it is going to bring about fundamental change, which I suggest to you over time could in fact affect Ottawa's exclusive jurisdiction over communication, cable television, radio and so forth. Even the Quebec politicians recognize that and so state in the National Assembly.

**Miss Roberts:** Supplementary to that, you have the tendency to believe what Mr. Bourassa says when he says what you have just quoted, but you do not believe him when he says that if it does not pass, we have some very hard constitutional problems. So you have two sides of it. You believe him on one point but not on the other.

I understand what you say, that the Supreme Court will look at the intent and from such and such, but might it not also look at the intent of the Premier saying, "The reason we are accepting this is to stay in Canada and not for anything else"? They will have to balance those two, because Bourassa is saying one thing on one side and one thing on the other. You accept him for one thing but you do not accept him for the other. I think Mr. Harris's point is that we are between two statements.

My question supplementary to that is: what would you do to bring Quebec back into this particular Confederation as we see it today?

**Mr. Danson:** First of all, fundamentally, you have to ask yourself a question. Here we have 11 people at a table deciding on a new Constitution for Canada, and after it is signed we find out that they have different interpretations. So it must be

alarming to know that people come out of the same room, put their signature to the same agreement and have a disagreement as to what it means.

**Miss Roberts:** As a lawyer, you find that alarming?

**Mr. Danson:** As a lawyer, I think it is terrific. It keeps me in business.

**Miss Roberts:** This is how it usually happens.

**Mr. Danson:** I think the problem here is that the differences of opinion as to what it means are so fundamental that the full solution is to reconvene another first ministers' conference and say, "Listen, every premier has a different interpretation of what this means." To use a legal term, we are not *ad idem*, we are not of one mind as to what this means. When that happens, I think politicians have a duty and a responsibility not to sit back and say: "Boy, there is so much ambiguity, there is so much confusion, we will leave it to the courts. We will hold our breath and hope that it works and they come up with something good." My first response to you is that we clear up the ambiguities in that sense.

#### 1420

Second, I think that you deal with "distinct society" by making it clear that—the "distinct society" clause, in and of itself, I suppose I could live with, if it was clear that it was not superior to the Charter of Rights and Freedoms. I think a simple statement that the Charter of Rights and Freedoms is paramount might go a long way in dealing with the "distinct society" clause.

I have already given you my suggestions on the Senate, which I think are absolutely critical. I think the comment on clearing up the mechanism in the Supreme Court is absolutely critical.

I think that clearing up the language in the opting-out clause is important. I suppose I could argue that I am not saying you should scrap it, although you would perhaps look at the amendments and say that if you go with one it is going to unravel. I suspect that the biggest problem you will have when you sit to determine what your views are of the various submissions is, "Will this unravel the whole deal?" I think there are such substantial areas for improvement that it is simply not enough to say: "This is the best we can do for now. We'll deal with it in the future."

I suppose in another sense I would say to you, "You can have this constitutional accord just the way it is, but eliminate unanimity so at least someone in the future will have the option of not having their hands tied to what politicians do today."



As I say, not tomorrow, not the next day, but five, 10 or 15 years from now, what is going to happen when you do have the crisis in the Senate because you cannot have change because of unanimity? What are you going to do when you have a crisis in the Supreme Court of Canada? If you want a quick route to separation, try a Supreme Court of Canada judgement that deals with the rights of Quebecers when you do not have three judges from Quebec.

**Miss Roberts:** Before you go on, my question to you was, what would you do to get Quebec in? Suppose Meech Lake disappears. Quebec is still on the outside. Mr. Trudeau went through, and we completed our Charter of Rights and Freedoms in 1982. The question that is put to us is, how do we get Quebec in? That is what I am asking you.

I am not asking you to look at the Meech Lake accord. How do we get Quebec in? What steps do you suggest and how can we do it in a process that is going to be such that it will not be torn apart again? We do not have that process anywhere in our Constitution and we do not want to do it the way Trudeau did either, because that was not perhaps the freest way possible.

**Mr. Danson:** He certainly continually got re-elected.

**Miss Roberts:** It does not mean it was the proper process.

**Mr. Danson:** Perhaps. If I could answer your question off the top of my head as to what is the alternative for getting Quebec in, I suppose what I would say is that one should implement the changes to the accord which I think are important and put it to the people of Quebec to see if they are going to reject it and, if necessary, perhaps have a referendum in Quebec.

**Miss Roberts:** Why put it just to the people of Quebec? It is all over. Everybody in Canada has been—

**Mr. Danson:** You asked me specifically about getting Quebec in, but if you are going to have a referendum, it would have to be for all of Canada.

**Miss Roberts:** OK. Thank you.

**Mr. Allen:** I appreciate the care and preparation that have gone into the brief Mr. Danson has brought before us. There is certainly a consistency in his line of argument and his presentation this afternoon.

To be frank, my principal concern is a tendency to overextend your language, Mr. Danson. For example, I note that on page 27 you say, "When we see the accord in its totality"—I

presume that is the accord as it stands now—"with provincial governments selecting senators and provincial governments appointing Supreme Court judges and provinces opting out of national programs with full federal financial compensation, we see that Canada's destiny is clearly being threatened."

I submit to you that you are fudging every one of your phrases; that in point of fact the provinces, while they may be nominating, will not be simply appointing senators. There is option for refusal. Certainly in the accord as it stands there is no alteration in the central powers of the Senate vis-à-vis the House of Commons, perhaps only with respect to its participation in unanimity judgements on amendments regarding federal institutions, where it, along with the Commons, has some role to play. So I submit that you have exaggerated the terms of the agreement there.

With regard to appointing Supreme Court of Canada judges, you of course would have to realize, as you have said yourself in other points in your comments this afternoon, that that is not in fact the way it will happen. There is the possibility of federal governments not accepting nominations.

With regard to the opting out of national programs with full federal financial compensation, that of course is only with respect to exclusive jurisdictional territory of the provinces, but even there, there is no full compensation unless there is some kind of provincial proposal that is at the least compatible with federal programs. Some of the more recent things we have been hearing around "national objectives" indicate that it is a broader term than some people seem to want to say it is—in comparison, on the other hand, to "national standards."

When I look on page 34, you suggest that the "distinct society" section "transfers extensive powers to the Quebec government." By powers I understand you to mean those that are in the division of powers in sections 91 and 92 essentially, and there is no transfer. In fact, there is an explicit statement to the contrary. I could go on. You say it "freezes for all time Quebec's distinctiveness," but since there is no definition of "distinctiveness," it is not quite sure what is frozen, and in the course of judicial interpretation that may be elaborated in many interesting directions.

When it comes to the conclusion you make that we now, in the wake of Meech Lake if it is passed, will have two nations and two languages, that seems, at least on the face of it, to ride

squ岸ely opposed to the parts of section 2 which tell us that all levels of government, federal and provincial, have an obligation to maintain the linguistic dualism of the nation. There is no evidence in the accord that distinctive society simply means promoting finally the French-language character of Quebec until it is totally and completely French and everybody else is gone from that province.

Perhaps you would respond to my principal observation, that you seem to be running your language on ahead of the terms of the accord and presenting conclusions and speculations rather than what one can reasonably infer from the terms of the accord itself.

**Mr. Danson:** My first response is that I disagree with you.

**Mr. Allen:** Obviously, or you would not have written it the way you did.

**Mr. Danson:** Yes. When you talk about the Senate, for example, I, for one, take the people who support Meech Lake—and there will be the same problem with respect to Supreme Court appointments—to say that there is a mechanism for those who are selected to be turned down, but the fact of the matter is that the concept behind it is to make the Senate a more provincially activist body. That is what they say they want the Senate to be; that is the direction in which the Senate is to go.

If you take that at face value, the fact of the matter is that through the process of time—and I cannot speculate as to what future Senate reform may be in order for Canada—what I argue in my paper is that you are not going to get any kind of meaningful Senate reform on which you are going to get unanimity.

If you look at this in and of itself, and taking the supporters' view that you will have a more provincially activist Senate, which as Professor Hogg says if you do not get unanimity for constitutional change will turn into a House of the Provinces, then the fact of the matter is, whether you like it or not in constitutional terms, it will be a provincially selected Senate that will have absolute veto power over matters of exclusive federal jurisdiction.

You may say to me, "But the constitutional powers are not significantly different from what the Senate has today." My answer to that is that it may be true, with the difference that it will change its orientation from a federal orientation to a provincial orientation. If the supporters of the Meech Lake constitutional accord are saying that the whole purpose of this change to the Senate is to make it more activist, because the

present Senate is not activist—it has been a little more activist since Mulroney came to power—I am not saying that is such a healthy thing, I am not even defending that, but the fact of the matter is that over a period of time you are going to find that the counterweights which are so critical for a creative federalism to work would be eliminated.

#### 1430

If you think I am overextending the words on the Senate, I disagree with you. The fact of the matter is that the provinces can put forward names for selection. Ottawa cannot make that decision unilaterally. With respect to the Supreme Court of Canada, I submit it is the same thing. You say I have perhaps extended the language for appointments to the Supreme Court of Canada. I do not know if it is for me to ask you questions, but how do you deal with a situation if you have a separatist government in Quebec and, let us say, there are three openings on the Supreme Court of Canada from Quebec?

If there is an absolute constitutional requirement to fulfil those vacancies and you have a separatist government, or Jacques Parizeau is in power and he says, "I do not want anything better than to separate from Canada. How can I really throw a monkey-wrench into Canadian federalism? I am just not going to put any names forward," then you have no mechanism to resolve it. That is something which, I submit to you with respect, is mind-boggling. Surely there must be a mechanism to resolve that.

About the transfer of power, you say there is really no transfer of power. I agree with you because I have won cases in court that I should not have won and I have lost cases that I should not have lost, which suggests to me that anything goes in court. It may be that all the fears we advocate will be resolved by the courts, but maybe not. If you have two intelligent positions that can be advocated for a particular interpretation of any aspect of Meech Lake, all you can say with certainty is that the courts may go one way or they may go the other way. I am suggesting that going the other way will be disastrous for Canada and it has to be cleaned up.

On the transfer of power, the fact of the matter is there are so many areas in constitutional law that when you start reading the division of powers cases it is mind-boggling, perhaps like splitting hairs, to know which way the court is going to rule. Is it something that really is in pith and substance a matter within the exclusive jurisdiction of the provinces or is it really in pith and substance something within the exclusive



jurisdiction of the feds? It is amazing the kinds of things that sway the courts either way.

I suggest that when you look at the case law on the division of powers and you see the problems the courts perhaps have in defining those things that are on the line—and so many are on the line: what is going to tip the balance one way or the other, for example, with something like a “distinct society” clause? If the “distinct society” clause is going to mean anything, and all the quotes that I referred to in my opening and that I have in my brief say it means something significant, it has to go to culture, and if you go to culture you have to go to communications. All of a sudden they may be passing laws that are dealing with communications, which is something Ottawa has exclusive jurisdiction over.

But then, if they are promoting their distinct society, which is a constitutionally guaranteed right, it may be enough to tilt it the other way. In terms of the transfer of powers, it is not so simple as to look at section 91 and section 92 and see which way it is going to go. The “distinct society” clause will tilt the balance, in my submission, to a very large degree.

The other concern is that if it does not—this really is a catch-22—then you are left with a situation as indicated in the quote I read from Claude Morin. If it does not mean anything, if it does not give real powers and if it does not make Quebec different in substantive legislative ways, there is going to be an explosion. Unfortunately, I think we have created a political climate where in resolving this people are between a rock and a hard place. I do not know if that answers your question but I do not think it is fair to say it is stretching the language.

**Mr. Allen:** In part at least it confirms it, because when you start talking about the Senate, you always want to talk about the provisions in the accord in the light of those who support Senate reform; in other words, principally Mr. Getty, I presume, Mr. Vander Zalm and those who are looking for an elected provincial Senate, the triple-E idea and all the rest of that stuff. Quite frankly, that may be never be in the works. Who knows? That is just very speculative. That is what I mean by overextending the language to make it look as though what is here is consequential and immediate on the passage of the accord, and indeed that may never be the case.

**Mr. Danson:** Does unanimity not confirm that?

**Mr. Allen:** With all due respect, when you talk about transferring extensive powers in this language, you are not talking about what you

then said later, which is the sort of subtle, long-term, down-the-road effect on nicely balanced cases where things might go one way or the other. It would be ultimately perhaps, because of the “distinct society” clause, that the case would fall over in one direction and somewhat slightly at that point amplify Quebec’s powers in a de facto, precedent-setting way rather than any actual transfer of sections in the Constitution.

I submit to you that if that is the case and the case is so finely balanced, perhaps that is the way it ought to fall in those circumstances, if falling in the other direction were to impact adversely on the distinct character of Quebec society, since no one has really yet proved to me that what it meant by that phrase is something that is particularly menacing given all the fullness that one can read into it. Again, you really have not reassured me.

Let me submit to you that what Meech Lake does try to address is a series of issues that have been around the federal-provincial agenda for a long, long time. Mr. Trudeau himself, for example, in one notable stab at it in 1978, proposed a white paper which would have included the participation of the provinces in the appointment of Supreme Court judges. He would have guaranteed four places, not three, to Quebec.

By the way, presumably not all those judges are going to die at once, so even though Mr. Parizeau, in a short term in office, might not want to make an appointment, there would always be other justices from Quebec who would be present and able to represent that legal tradition. I am not sure the impasse would be nearly as great as you imagine.

There would also be a replacement of the Senate by a House of Confederation, of which half of the appointments would be directly and fully provincial. That, taken together with the congruence of the spending power arrangements and the shared-cost programming stuff in Meech Lake, which comes right out of the Trudeau era and the practice of that regime, when you come right down to it, unless you are really splitting hairs, is something that is an attempt to resolve those issues in very similar fashion.

I find it very difficult to understand why you and Mr. Trudeau and others are linked together in opposition to something which is so congruent with many of the initiatives that were proposed, at one time or another, in the course of those years.

**Mr. Danson:** The simple answer is that it would be very unfair to take the proposals for

constitutional amendment by Trudeau over the years, one by one, and—

**Mr. Allen:** He did it himself in one white paper.

**Mr. Danson:** —put them all together. The other aspect of Trudeau's constitutional reform package was, "We will give you something; you have to give us something back." Trudeau has always talked of creative federalism, and there have to be counterweights. In order for it to work, you have to have a strong federal government and you have to have strong provinces.

But if you look at this whole Meech Lake constitutional accord, you cannot point to a single clause in this document that gives anything to Ottawa as distinct from the substantial powers that the provinces are gaining. There is not one. My understanding of history and Pierre Trudeau on constitutional reform is that is not the way he negotiated. It is simply not good enough to say: "I propose this, this and this. Now you come back and tell me what you're prepared to give." There have to be counterweights. There are no counterweights here.

**Mr. Allen:** There is clear recognition of spending power. When you are talking about counterweights, this is very much a counter-weighted document. I would have thought that Mr. Trudeau, who believes in countervailing powers and so on, would have thought this was a wonderful way to go, philosophically.

**Mr. Chairman:** I am just a bit mindful of the time this afternoon and the number of witnesses. I think this has been a very useful exchange, but I suspect that the points are clear. You have raised so many issues, and there are a whole host of other ones, Mr. Danson, that I wish we could take even more time, particularly on the questions around the sense of national identity and how we find the balances between provincial and federal roles. I am sorry that we cannot continue to explore those areas.

1440

I think you have certainly set out a very cohesive view of the accord. I think that comes through in your paper and as well, of course, in the statement that you made. We thank you very much for coming this afternoon and sharing those thoughts with us.

If I could call our next witness, Professor Michael Bliss, professor of Canadian history at the University of Toronto. Professor Bliss, we want to thank you for joining us this afternoon and perhaps offering some constitutional insulin

to our deliberations. We have received a copy of your submission, of course, and everyone has a copy of your statement. If I might just ask you to proceed with your statement, we will follow up with questions.

DR. MICHAEL BLISS

**Dr. Bliss:** Thank you, Mr. Chairman, and thank you for giving me the opportunity to address the committee. You have my 17-page brief, which I will not try to summarize or regurgitate. I will deal with any questions you have from it. But I have prepared this supplementary statement to focus on what I think are key issues.

I am sure you have now been thoroughly immersed in people's concerns about the process that gave us Meech Lake. You have heard so much critical testimony, including testimony from Mr. Danson immediately preceding me, that I do not need to repeat the points in my brief.

I think we now realize that this agreement is a wild constitutional leap in the dark for Canada, one that possibly menaces the future of our country and one that alarms most thinking Canadians.

I think the testimony before your committee is indicating that the preponderance of informed opinion in this country has turned hostile to the Meech Lake accord. You have heard from the accord's remaining supporters, including some who were its paid perpetrators, but surely you have found the message they have given you unsatisfactory. Even as you were being given Pollyanna-like assurances to the effect that the courts would not take the language of Meech Lake seriously, the Supreme Court of Canada was busy striking down Parliament's abortion legislation, showing how very active it is going to be in taking its new constitutional role to the fullest extent. I think the vague but loaded language of Meech Lake invites the Supreme Court to decision-making which may change this country beyond recognition, and in the light of the court's record only deeply foolish people would presume to predict the outcome.

It seems to me that you, as responsible legislators, have to discount the hypothetical fancies of the constitutional "experts" who presume to do the Supreme Court's job for it. In other words, you do not know what it is going to decide.

I hope you will also question the motives and the intellectual integrity of those who assure you in one breath that the Charter of Rights and Freedoms is safeguarded by the accord and then,



in the next breath, disagree with the common-sense suggestion of making that safeguard explicit in an amended accord. When you are told that the accord cannot be reopened to protect the charter, you are really being told that some of the first ministers will never agree to such protections; in other words, that some of its signatories do believe the accord will override the charter.

The other signatories, including the Premier (Mr. Peterson), are endorsing these views when they accept the argument that the accord should not be opened. In this sense, no matter what he says, Premier David Peterson has endorsed a process and, in fact, is deeply complicit in a process, that plays fast and loose with the Canadian people's rights and freedoms. To many of us, the failure to face up to the implications of what the Premier has done, and do something about it, is simply shameful.

The committee surely now realizes the fraudulence of the argument that the accord should be passed as it stands and then reconsidered in the second round of discussions. The problem is that, once the deed is done, it cannot be undone, and if the unanimity required to change the accord now is impossible to achieve, then it will also be just as impossible, perhaps more so, after it is passed. I hope that as responsible legislators your report will reject, with the contempt it deserves, the argument that we should attempt to let the patient die and then try to cure him.

I also urge you to reject utterly the last remaining argument of the accord's supporters, an argument used frequently by the Premier himself and one that ought to be deeply disturbing to all thoughtful Canadians. This is the argument that the accord is an accomplished fact, that Quebec has accepted it and that it would gravely damage national unity for the rest of Canada to turn its back on Quebec at this stage.

This argument has many things wrong with it. To cite only three: first, it makes a farce of what we are doing today, for it implies that nothing mattered after Mr. Peterson and the other ministers entered into their agreement at Meech Lake, their literal conspiracy to change the Constitution. We should forget about the democratic process, forget about informed comment and debate and just do what the Premier, in his infinite constitutional wisdom, tells us is right. By implication, we should treat you, our elected members, as mindless ciphers whose views can be ignored in advance as the Premier has told us he will ignore them.

Secondly, the argument implies that Canadians cannot say no to Quebec, although the

Quebec government did exactly that to the rest of Canada in 1971 in rejecting the Victoria accord and then 11 years later in rejecting the 1982 pact. If we cannot say no to each other occasionally as Canadians and then go back to the table and resume negotiations another day, do we really have the basis for one country?

Thirdly, this is just crude political blackmail. It is a tactic that the Premier of Ontario seems to have both surrendered to and endorsed, and one that ought to cause all of us to ask hard questions about Canadian democracy and our public responsibilities.

Finally, I have been trying hard to think through Constitution-making and legislators' responsibilities, and the notion that we are accountable to history for the position we take on great issues such as the shaping of our Constitution. I do not think it is necessary to spell these out, because I am sure you are thinking about them and you are asking yourselves hard questions about principle and conscience and perhaps especially about party discipline, and about the public's concern that our politicians demonstrate independence and integrity that are above question.

I know you are reflecting on the grave responsibilities of this committee. It seems to me this is possibly the most important committee Ontario has struck in its 120-year history. I think you are being asked to assess constitutional proposals which many experts believe could lead to the destruction of the country. If you endorse them, many of us think you will be anathematized in the history books as shortsighted men and women who assisted in the destruction of your country. I am using those words with a full understanding of their seriousness and meaning.

The glory of Canada's federal system is that in 1867 we decided to recognize and celebrate our distinct societies by creating provinces and provincial governments, but in our diversity we also celebrated and enhanced our unity by creating a strong national government. This was a wonderfully delicate but flexible balance, one that has worked for more than a century to give Canadians and Ontarians peace, order, prosperity and good government.

Last May and June, the Premier of Ontario made a mistake in consenting to a series of proposals that will upset and destroy the historic Canadian balance. For the sake of your constituents today and tomorrow and for all of our children, I urge you to assist in undoing the error of Meech Lake.

**Mr. Chairman:** Thank you very much, Professor Bliss. As you note, we have the fuller text which we received earlier, and it sets out your thoughts on a number of the specific issues. I think perhaps one of the things that is useful today, both in your opening statement and that of Mr. Danson before, is some strong feeling, which I think this debate obviously has engendered, and indeed should because of the nature of the topic that is under discussion.

If I might just begin with one thought and question: clearly, if we come to the conclusion that this is a bad deal, we have a responsibility to say it should be set aside, renegotiated, whatever. I think that is fair comment. One of the real problems in dealing with this accord or any other document that perhaps came to a committee in the way this has is that, having been accepted, we have to address this and I think we have to try to find a way of discussing factors, not in the sense of blackmail but in trying to determine where do we go.

I think there is a legitimate question in that as legislators, if we were then to make proposals—because after our report, life goes on; so to a certain extent we are trying to look at the accord to determine, first of all, is the accord so flawed that it should be rejected? Is it that we perhaps feel it is something that we should support but with certain kinds of changes? But no matter what it is we are saying, we are also having to ask ourselves where would we go? What would be that next step? The day after our report comes out the gentleman in the second floor at the east end is going to have to go somewhere, going to have to do something.

**1450**

It is very difficult to determine what the reaction will be. We can speculate about reaction in Quebec in terms of what our position might be, but I think it does come back then to some fundamental issues where I sense that you and the previous witness, in terms of your vision and your view of Canada, I do not think can accept what it seems to me is one of the fundamental requests that has come from Quebec, this recognition of a distinct society.

I wonder if you could elaborate a bit on that issue and the extent to which you feel there would be a way to take into account Quebec's request, demand, call it what you will, for some recognition of its distinctiveness; in terms of how our committee, and perhaps Manitoba's, New Brunswick's, the Senate, then handles that? How do we deal with that in a way that it lets them think we are serious?

**Dr. Bliss:** Mr. Chairman, you have raised several questions on the overall view of what you ought to do. I think my view is that you ought to take the Premier at his word and say that you have found this accord so seriously and grievously flawed that it has to be reconsidered. I believe the Premier gave you that opening. There are really major errors, such that it would be grossly irresponsible for this province to endorse it.

On the specific question of the recognition of Quebec's distinctiveness, I appreciate your concern and I appreciate Quebec's concern. One reason I feel strongly and deeply about this is that I feel we have forgotten the ABCs of Canadian federalism. It is extraordinary in this country that we understand our federal system so badly. We have recognized the distinct society of Quebec. That is what federalism is about. That is why there is a province of Quebec. We have recognized our distinct communities across the country, and we are distinct; Newfoundland is as distinct as Quebec is. We have recognized our linguistic differences in other kinds of ways.

I am satisfied to believe that if we Canadians understood our country and its history, we would realize that we do not have a problem with distinctiveness. I do not believe there was a problem with Quebec that required the urgency that Meech Lake seemed to have created. There was no tremendous popular demand for a constitutional settlement welling up from the Quebec people after 1982.

Given, however, that this is water under the bridge and that something has to be done, I believe the Quebec government originally asked that the distinctiveness of Quebec be recognized in the preamble to the Constitution. They got rather more than they asked for. They got the recognition of a distinct society as a principle on which the whole Constitution would be interpreted, creating the problem of the uncertainty in the decisions the court will make.

Possibly we could go back to recognizing everybody's distinctiveness in a preamble—Quebec's distinctiveness, Newfoundland's—on the notion that we are a nation of distinct societies, which I deeply believe. Maybe our Constitution should call us a community of communities.

**Mr. Chairman:** A community of distinct societies.

**Dr. Bliss:** Yes.

**Mr. Breaugh:** I want to pursue a couple of areas with you. First, I want to say how much I appreciate that you took 17 pages and put them into five. As a footnote to others who may come



and see us later on, I think most of us would be really grateful if people would do that. We have been Meech Laked to death.

Most of us who have sat through this process, I think it is fair to say, reject those who get hysterical on either side of the argument. But you are going to have to do something pretty spectacular to show us something we have not seen so far on either side of the argument.

What I want to pursue with you a little bit is where we go from here. I think any one of us could sit down and put together a short list of things that we think are, if not flaws things which have not been done quite the way they ought to have been done. Sooner or later we are going to rectify those things, so we might just as well do that now. Most of us, too, although we listen to the premiers say that this deal is done, that there will be no more dealing and that it is take-it-or-leave-it time, are somewhat amused then to read in the newspaper that the government of Quebec is indeed talking to the government of New Brunswick, and somewhere our friend Brian has his nose stuck in it too. It continues to be business in the back rooms as usual.

For me, the single most important thing we have to do now is to get this on a little firmer ground, to put a little sanity in the process so that I am not embarrassed when I explain to my constituents how this deal was put together, so that I can point out to them that there is a reasonably legit public process for constitutional change in this country.

I wonder how that sits with you, as I sense that our greater challenge here is to say: "Enough of this. It is not suitable now to do this by means of executive federalism"—whatever that is—"If we are going to have these folks sit down every year and talk about the Constitution, this is what they will talk about. This is the process whereby we arrive at constitutional amendments. This is the way in which we deal with concerns that various groups have brought before us."

I want to get your perception on how important that process is. Is it enough to say, "Do these half-dozen things"—we have seen the list of those—"and put in place a process that people will recognize and really feel is legitimate, and we can proceed"?

**Dr. Bliss:** Not if you are saying that we should pass the accord and then get a new process in place, because I can circle back to say that you are asking us to let the patient die and then develop some cures. That is what the federal committee concluded. It seems to me that the problem is Meech Lake now, and if you let it go

through all of your suggestions for a new process will be redesigning a barn door after the horses have slipped.

We could then argue about a process, but my view is that we ought to continue the political process we are in now. This committee, in its wisdom, ought to suggest to the Premier that he ought not to bring these resolutions before the Legislature and that the responsible second thoughts of the province will become a factor in the political equation that is in fact causing Quebec to begin to bend a little bit and Mr. Mulroney to become concerned. In effect, it is causing the kind of responsible reconsideration that ought to be part of our political process. It seems to me that this is natural and Ontario ought to further it. Indeed, Ontario is the province that can, and in my view, should do it.

If you want to talk about processes for constitutional reform after Meech Lake, I do not think we need annual constitutional conferences. I am convinced that is trivialized constitution-making. Constitution-making is something, as we know from most countries' history, that you do not do lightly. You do not have a regular or a commonly used process. We spend too much time in this country on the Constitution. I dislike it as much as you do.

**Mr. Breaugh:** No, you do not.

**Dr. Bliss:** Yes, I do. Indeed, part of our problem with Meech Lake was the sense we developed that you can have a constitutional conference and open the Constitution at the drop of a hat. That is the last thing you want to do, I think.

1500

**Mr. Breaugh:** OK. To pursue it just a bit, the one thing we do have is that there is no deal that has to be signed tomorrow morning. There are a couple of years left before it is slated for approval. We do have the time to go through this committee process, however difficult it may be. There is a need to do it and that is why we are elected, so we are here doing this.

If I were to give you my half-dozen concerns, they do not vary a great deal from what, as it is reported in the Toronto Star, Frank McKenna has to worry about on this matter. I think that as a consensus of this committee, whether we all buy it or not, those are the concerns that have been brought before the committee in the course of our hearings. It is not hard to identify the things which should be done. Some groups have been so good as to actually put together words that could be used as companion resolutions. In their view, that would resolve their problems. The combina-

tion of what you do to correct what is being suggested in Meech Lake is not that difficult to come up with.

The nagging suspicion I have is akin to what you talked about a little bit. When you put this package together, although individually it seems fixable, to put it in those Oshawa terms, when you put it all together there is another ingredient that comes into play here: the rules change substantively, so that by the time that final ratification vote occurs I am a little unhappy that it is not fixable after that point.

In other words, I could refer things to the Supreme Court of Canada to determine whether or not the Charter of Rights is impacted by the Meech Lake accord and get the decision I want, maybe. I could pass companion resolutions across the country that would resolve some of the concerns of the Northwest Territories, the Yukon, the aboriginal groups and things like that. We could do some wording changes, a few deletions. In other words, you could go to work on it in the way legislative committees normally do. You could do that, but I am a little concerned that at the end of the day, if we all ratify this thing as is, none of us will be able to undo it. That is why the process is incredibly important to me. I have to see that we are back on to more normal, recognizable, democratic terms in this country to solve problems which may come out of this.

**Dr. Bliss:** I entirely agree with you. The problem is the way in which our political processes seem to have been—we all have been most trapped by the way this was done. I have used the term “conspiracy” to describe what happened at Meech Lake, and I use that advisedly. The 11 first ministers made an agreement not to change it. They used their assurance of the discipline of the party system as the kind of cement that would give them credibility.

Now one has been turfed out of office, another has resigned and it may be starting to come unstuck; but it seems to me that in the way they have set the process it leads to terrible dilemmas if you are a committee, because I know your committee has seen the flaws in the Meech Lake accord. I cannot believe your committee could possibly give a blanket endorsement of this, and more and more this is becoming the case, but we have also heard from the Premier that what you say does not matter very much.

That is why, in my penultimate paragraph, I meditate on what your responsibilities must be as legislators. It seems to me that ultimately a process like this, which has been premised on

iron party discipline, can only be stopped by members having the independence, the concern for principle and the concern for the province and the country that will cause them to break party discipline. I do think it eventually comes down to that. It comes down to the independence of committees. It comes down to the intellectual and possibly the moral independence of members of parliament who will not find that their views on the future of the country are told to them by their party leader.

**Mr. Breagh:** OK. At the risk of being intellectual and moral, I thank you.

**Mr. Chairman:** We appreciate having the problem put in such a simple manner. I will move to Mr. Harris and we will catch Mr. Allen when he gets back.

**Mr. Harris:** In your written brief to us, you ask whether the “no” side’s promises to Quebec in the 1980 referendum were left unfulfilled. You say not according to Quebecers who played the leading role in that campaign and actually made the promises, Mr. Trudeau and his colleagues. We have heard from a number who feel that until Meech Lake-Langevin they were unfulfilled. We have heard from a number of Liberals like Pepin and Kaplan who said Trudeau would have been delighted to grab this deal had it been offered to him.

You have brought out the point that “distinct society” is now an interpretative clause, as opposed to in the preamble. From those who argue that this package is the very least Quebec could have asked for, this package it has accepted, and argue that were this available there would not be any Meech Lake, it would have been done long ago, Trudeau would have been delighted to have it, the one thing that appears to have happened is that they appear to have put this “distinct society” into the agreement as an interpretative clause.

If I accept their arguments, in my view we have to try to decide is that the very least. In other words, we were told that all the other demands that were asked for constitutionally guaranteed all the things that the worriers tell us “distinct society” gives them, so this appears to have been the compromise. I do not know; I was not at the table. Does any of that sit well with you?

**Dr. Bliss:** Well, no. What really sits badly with me is the notion, which I heard earlier in the questioning of Mr. Danson, that people know Mr. Trudeau’s mind better than he seems to, that people would say, “These are proposals Mr. Trudeau should have accepted; therefore, they are OK,” when, as you know, Mr. Trudeau has



explicitly condemned the agreement. It is so depressingly absurd to use Mr. Trudeau at some time in the past when you have the live Trudeau telling you what he thinks of it, that it is—

**Mr. Harris:** You are assuming we have to accept the ultimate integrity of everybody who is speaking, and we have heard political leaders speak on all sides of this.

**Dr. Bliss:** I know.

**Mr. Harris:** For every Trudeau you quote, somebody quotes somebody else.

**Dr. Bliss:** But there is the real Trudeau, and especially Liberals might listen to the real Trudeau, who two days from now will be again saying what is on his mind. He will tell you, as he has explicitly, why the package is unacceptable.

I am going to give a two-hour lecture tonight at the University of Toronto on Mr. Trudeau's Prime Ministership. The first and basic principle that brought Mr. Trudeau into politics was to make all of Canada his country, to reject those people who believed Quebec was separate and should be more and more separate from the rest of Canada. The notion that the Meech Lake accord is in any way a fulfilment of Mr. Trudeau's aspirations in politics is mind-boggling. I just do not find it acceptable in the slightest.

On the recognition of the distinct society, we can go back to—if you want to do it symbolically, which is what many Quebecers say they want, a symbolic recognition, fine, do it symbolically. Do not do it in such a way that you invite the court to upset the balance of the Constitution, or set up a situation in which, as Mr. Danson said quite rightly, a separatist government could bring the country to paralysis. With the "distinct society" clause, can you imagine what Mr. Lévesque would have done to this country under the Meech Lake proposals?

Put it in symbolically. We can satisfy everybody symbolically. But do not put it in in such a way that you create the possibility of paralysing the country.

**Mr. Harris:** I guess you are assuming that if you put it in symbolically and do not do anything else for them, they will accept it.

1510

**Dr. Bliss:** If you turn it down now, there is going to be a lot of unhappiness. I would not minimize for a moment the consequences of a rejection of the accord. It may be that there will have to be another referendum in Quebec. Once those commitments were made at Meech Lake, they did change the thing, but it seems to me that

the cost of accepting this is going to be worse than the cost of refighting it. That is a delicate calculation. I, as much as the next person, would like to see the Quebec question resolved and go away.

But separatism is never going to go away. The notion that somehow Meech Lake is going to put an end to Quebec separatism is Utopian in the extreme, as we have already seen. We have seen Mr. Parizeau. He is a tough fighter. In my view and in his view, the Meech Lake accord is going to give him better ammunition to fight with. Anyone who thinks that by supporting Meech Lake they are going to strike a blow against separatism in Canada is in a fantasy world.

**Mr. Harris:** Quite frankly, I agree with you. If Quebec wants to separate at a given time, I do not think it matters what is in the Constitution, nor do I think it should.

**Mr. Morin:** What is the point of the Constitution, then?

**Mr. Harris:** Well, if I want to stay in this committee, I stay; if I do not, I go. If somebody is determined to tear the country apart or leave, I am not sure you are going to be able to have a—unless you ultimately want to use force.

**Mr. Breaugh:** Force, you know, would never do.

**Mr. Harris:** That is right. The other thing that always tears me is that I have never been particularly enamoured with Trudeau's vision of Canada. I have also found that it changed from election to election.

Let me ask you a specific question. Everybody talks about Senate reform being less likely. You have used that and the previous speaker used that. Everybody I hear telling me about Senate reform is talking somewhere along the triple-E—equal, elected and effective: vast provincial power if that occurs. Yet everybody says about this, which appears to give the impression of and the possibility of some provincial power in the Senate, "That's terrible because it eliminates the possibility of giving total power to the provinces in a triple-E Senate." I do not understand that.

**Dr. Bliss:** What we have done, of course, has just been to create the wasps' nest. Instead of talking rationally about Senate reform and where we want to go, we intersected it with Meech Lake. It has thrown the whole Senate thing upside down and topsy-turvy, because we now need unanimity for Senate reform, in anything we want to do. It seems to me that we have got our priorities reversed. We should have hammered out the question of the Senate.

I agree with you. It may well be that the Senate is the one area of our Constitution where we want to safeguard regional and provincial interests. Maybe that is the direction Senate reform should take. I do happen to believe, though, that the other direction Senate reform ought to take is reducing the powers of this appointed body. The Meech Lake accord has already created an ongoing constitutional crisis in this country because we have a Senate that is now operating with the assurance that it cannot be disciplined by the House of Commons.

We can see it in our current refugee policy today, where obstreperous senators who know that Ottawa cannot discipline them are holding up the government's legislation. This is going to be an ongoing problem. We are only beginning to see the dimensions of the mess we have created with the Senate, because the Meech Lake accord freezes the Senate's powers.

**Mr. Harris:** I am sorry. The Meech Lake accord freezes the Senate's powers?

**Dr. Bliss:** It freezes the Senate's powers in the sense that the majority in the Senate know it is next to impossible to get a constitutional amendment through to change their powers after the Meech Lake accord. Two years ago the Mulroney government, in its first tiff with the Senate, drew up legislation, a draft amendment to change the Senate's power and it was ready to go with it and fight it through. It cannot do that after Meech Lake.

**Mr. Harris:** OK. Thanks.

**Mr. Allen:** Thank you very much. I think in some respects for me to engage with Michael Bliss in a discussion of this issue is like an ongoing history seminar we have all been at for most of our lives. I must say I appreciate his comment that there probably have not been enough historians who have been before the committee or before the federal joint committee of the House and the Senate.

I have to underline that it is not entirely our fault, since we issued the invitation *carte blanche* across the province, and I guess we have not had the full takeup that we might have had. I think that is unfortunate because we have had substantial representation from political scientists, from constitutionalists, either in law or political science departments, and they have given us the benefit of their advice.

It is interesting for us to note that a few of them, like Richard Simeon, who were totally supportive in the beginning, have begun to recognize some problems along the way but are not yet prepared to move against the accord and

still think it workable. Others who came before us early, like Peter Russell and others, I do not know where they stand now, but they also thought that somehow this arrangement—*notwithstanding* some faults that I suppose they are prepared to credit simply to the processes of politics in constitutional debate and the vagaries of life at that level, and having to cement a national agreement of some kind that inevitably involves some tradeoffs—was eminently workable.

I guess I am a little bit concerned, Professor Bliss, when you, in your page 5 summary, make a reference to many experts who believe it could be the destruction of the country. In fact, if you were to take the experts and lay them over against the many people who came from groups of concern of one kind or another, I have not done the mathematics but I would be surprised if there was a balance that was, at that level, opposed to the accord. How do you explain that?

**Dr. Bliss:** I thought about that and I know the people who support the accord. They tend to be centred among a few constitutional lawyers, they tend to be centred at Queen's University, and it is a number that is noticeably not growing. As you know, as you have suggested, it is shrinking.

**Mr. Allen:** We have canvassed about as many of them as were prepared to talk. We ran out.

**Dr. Bliss:** Some of them have second thoughts. It is hard. You eventually do an opinion game. I am sure we are finding that it is very difficult in public forums these days to get people to defend the Meech Lake accord. More and more of them do have doubts. I find particularly the alleged constitutional experts are not particularly impressive because they are in a mode of attempting to forecast court decisions, which I think is methodologically wrong, and the court is proving this daily. I am more impressed by the unanimity of historians, the people trained to take the long view of the country's evolution and to try to think about the long-term implications of these constitutional changes.

Among my colleagues in Canadian history, I do not know of a single historian who has good words to say for the Meech Lake accord. You have perhaps met a few, but I have not. You know that in my concerns I am really not saying anything more than Professor Ramsay Cook said at your very earliest meetings. I assure you that I disagree with Professor Cook on almost every point in the interpretation of Canadian history, but not—not on these constitutional issues. I do believe the preponderance of opinion has moved



our way because this is an accord that has not been able to withstand criticism.

I would finally say that I had exactly that first reaction after Meech Lake came through. I read it; I thought this is the price of getting the Constitution off the table; sure there will be some problems to work out, but we are flexible enough to do it. Only gradually, as the weeks went by, did I realize that this is not the case, this is far more serious, there is much more at stake here and it is just not going to work in the normal political way.

I wish I was not here. I dislike everything to do with constitutions and constitutional history. It is only because this seems to me to be so serious, with so many unforeseen consequences, that it has seemed necessary to agitate.

1520

**Mr. Allen:** I do know English historians in Quebec who think it is quite all right, quite frankly, not to refer to the French ones, for whom either its discussion is *passé* now or who have accepted it and think it is quite fine. I would not want, in going at this as a professional historian, to number among my colleagues only the anglophone non-Quebec historians. That gets rather partial for my taste in terms of an assessment of this document.

Do you not, in your original document, rather understate the issue in Quebec after 1980 and 1982? You say nobody is around much who is much concerned about this question any more, 1982 did not seem to bring any great aftermath, the Parti québécois fell apart and so on. I really wonder if that is fair to the public of Quebec, and least of all to those who, in the sort of middle nationalist spectrum, found themselves in an extremely unusual and difficult situation in the wake, of course, of the failure of the referendum and then the failure to get anywhere in 1982; and then the problems, of course, of Mr. Lévesque who, far from being an extremist in those circumstances, tried to strike a quite different posture and become a co-operative federalist of sorts after his own light.

In the turmoil that followed, it was very difficult for anyone to imagine that the PQ was going to be able to mobilize itself or that nationalists in Quebec were going to be able to somehow get themselves together again around favourite subjects. You yourself say this is not a question that is going to go away and separatism is going to be here probably as long as Quebec is around, and I quite agree with that, just as the Canadian confederal structure will continue probably to oscillate in its interpretation from

more or less decentralist to more or less centralist interpretations.

**Dr. Bliss:** Not if you freeze it.

**Mr. Allen:** Do you disagree with the fundamental proposition that many have said this is probably the minimal request that we are likely ever to get from Quebec? Because it certainly is not the most extreme.

**Dr. Bliss:** It is certainly in the interest of people in Quebec who want this accord to go through to tell you that this is the minimal, but we all realize that it was an extraordinary bargaining situation in which the government of Quebec went into negotiations and came out with more than it asked for. Everybody talks about their minimum requests. I would be content, I do not think there was any sense of urgency. We may disagree about opinion in Quebec. You would agree that the Constitution was not a major issue in the 1984 federal election or, for that matter, in the provincial election.

Who knows what Quebec's minimum is, unless we sit down and have some real negotiations in which we ask Quebec what it is willing to concede in return. These have not been negotiations. The minimum has not been tested, so we do not know.

**Mr. Allen:** Who does that, Professor Bliss; and in what forums? We have been through a forum and it was not just something that was dreamed up; Mulroney and the gang saying, "Let us get together next week with all the guys and see what we can do." There was a lot of back and forth, as they usually do with these things. Provincial bureaucrats tested each other out on options and so on. There were clearly matters left over after 1982 that were more than just a question of whether you talked about distinct society. There were immigration matters as well, for example, and there were concerns that were long-standing around the Supreme Court.

Those matters were there and had to be talked about. You cannot finally get the boys around the table without somebody putting something more on it. What other forum would there be and how different would the negotiations be and what different kind of result would one get in the actual play of events and personalities and provinces and federal standpoints?

**Dr. Bliss:** But you do not change the Constitution of a great nation in a couple of all-night bargaining sessions in which you have exhausted people wheeling and dealing as though it were a collective bargaining agreement.

If this goes down in the history books as how Canada changed its Constitution, it will be a black mark on the history of the country and on the politicians who were involved. I think that you change the Constitution through serious constitutional conferences, as happened in the 50 years that it took to get the 1982 Constitution. It is not an easy process. It is not a quick process. It involves years and years of negotiation and serious thought.

By comparison with what gave us 1982—and I grant you that there were some hard sessions and times when people had to bite the bullet. None the less, that process is reasonably appropriate to a nation discussing its Constitution. The Meech Lake process is reasonably appropriate to settling a longshoremen's strike. To defend that, it seems to me, surely flies in the face of the seriousness of the issues.

**Mr. Allen:** We have had problems with the process and we have said so. Mr. Chairman, do you have other questioners?

**Mr. Chairman:** No.

**Mr. Allen:** We obviously have problems with the process. At the same time, the process, as it is, is a significant improvement over what it was when, first, we were stuck on unanimity on all points and we had to go to Great Britain. Now we have the capacity to do it at home. Second, we have the opportunity, at least, of limiting the number of items, under one formula or another, that will be treated under the unanimity principle.

The provinces are clearly legitimately involved, and that implies that these legislatures ought to be involved. That is a point that we hope to make stick in the future in some way, and that is one reason we are being fairly deliberate about these proceedings here ourselves.

Obviously, we are in midpassage towards some more appropriate formula for dealing with these questions in the country at large. I think all of us regret deeply that we did not make it in one big jump to a more consultative process. I think the premiers, in their wisdom, could well have opened that up for us by not signing and sealing the issue quite so quickly and then handing it to us the way it was done.

Notwithstanding all that, I am not sure I am prepared to say that just because they themselves only met overnight on this one particular corner of the Constitution—I mean our great classic example in 1964 and 1966, bringing in the original document, was after all the Constitution for an entire country, and it was not just a small corner of the federal-provincial relations around Quebec and a few other matters pertaining

thereto. I am not sure that I would be able to object to premiers being put down and forced to go through their paces in the pressure cooker.

**Dr. Bliss:** All right, forget the process. Is it a good deal? Let us not talk about the process at all. Maybe it took months to work out. Then let us look at it clause by clause. Is this what we want the future of our country to be? Do we want to upset, in my view, the balance of our federal system and freeze it with an amending mechanism that will take away the flexibility we have had in the past? We can talk about the specific issues.

Do we want to use language that in effect turns over the responsibilities of legislators to appointed judges? Are we willing to face the consequence of this? Are we willing to go down in the history books with this constitutional deal? Forget the process.

**1530**

**Mr. Allen:** I guess the question is: is that even an open question any more in the wake of the charter? We have already told the courts and the appointed judges that that is the power they are going to have, by setting the charter over against everything else in the Constitution.

**Dr. Bliss:** I agree with you that we—

**Mr. Allen:** And I see some problems in that; I really do.

**Dr. Bliss:** Yes. So should we magnify them by adding more loaded language and giving them even more openings to set the fate of our country? It seems to me we are multiplying problems instead of reducing them.

**Mr. Allen:** Whatever you do with the Constitution, you are involving the court in any case, so the question is not at the point of whether you involve the courts; it is to whether the questions around which you are involving the courts are appropriate ones.

**Dr. Bliss:** No, it seems to me that there is a vital issue as to whether legislators, in drafting constitutions, do a responsible job in using clear, explicit language; or whether legislators duck their responsibilities and avoid facing up to issues by using vague and ambiguous phrases and, in effect, leaving it all for the courts to decide.

With the abortion decision, of course, we have seen how the courts have a knack of throwing it right back to legislators and, in doing so, getting us in a worse mess than we were before.

**Mr. Allen:** Those things can happen, obviously, as long as you have a court-Legislature dialectic in the system. I think that is true. I am



not entirely sure that that is particularly helpful for us.

Some people have come to us and suggested that what we should do with "distinct society" is to explain what it means. I submit, of course, that if you start being clear in that sense, you get yourself into even more hot water. I am much happier to see "distinct society" develop over time in terms of specific cases. I think that is often the useful way in which our legal system has functioned, because then you address real problems and not imaginary ones and you get real precedents and not figments of people's imagination.

If the courts, in fact, are prone to throw it back to us, so much the better, because that just improves the dialogue around the points at issue. I cannot say I am massively impressed that I should be hugely nervous about having put that language there without having either defined it further or without having made some attempt to circumscribe the capacity of the courts to work with it.

**Dr. Bliss:** With respect, it seems to me that you have just given an excellent example of the legislators' avoidance of the issue. You are saying, in fact: "I can't spell out 'distinct society.' It's a can of worms. Therefore, I'll leave it to the courts. I'll put the can of worms in their lap and we'll find some way of living with what they do and it won't be our responsibility."

I am saying that it is your responsibility. It is the legislators' responsibility to set the Constitution of the country, not to leave it up to the courts. To say that we have a "distinct society" within Canada and we do not know what it means but we will let our appointed judges do it, I submit is an abdication of responsibility which is just monumental.

**Mr. Allen:** I would disagree with that, and disagree with it pretty frontally, because I do not think it sets anything in stone for time eternal. Secondly, the question of defining: given time, what that means may make that language quite inappropriate for another time. If you take some language presently in the original Constitution, "peace, order and good government," it has been interpreted, of course, from one end of the spectrum to the other over what that means in terms of federal power. I think that is not necessarily bad, because it does make for a more livable Constitution. A slightly looser-fitting garment sometimes can be helpful.

Professor Bliss: I think you are moving, though, from the principles we would agree on, that of course constitutions have to be interpreted,

the words have to have meaning, and you are using that to justify constitutional change in which you add new concepts, particularly vague concepts; I am sure you have had a lot of expert testimony on the problem with these concepts. There is a difference between "peace, order and good government" and "distinct society."

To say you think it will work out, it seems to me, is to take an optimistic view of what the courts will decide and our capacity to work with them, which in my long brief I suggest is historically unfounded. We have seen in this country examples of the courts surprising us and of unintended consequences. You well know from your studies of the 1930s of the way in which judicial decisions have nearly paralysed Canadians' capacity to safeguard themselves as a national community.

We have already had one experience in which a combination of judicial decision-making and political antagonisms have paralysed the country, in the late 1930s. It seems to me we are setting the stage for the same thing to happen again under the Meech Lake accord. I just do not believe that responsible legislators can go ahead with optimism that it will work out. I call it Pollyanna-ish, and I think it is. I think we have to be ready for the worst case.

**Mr. Morin:** Last week one of the witnesses we had was Gordon Robertson, who used to be a senior adviser to former Prime Minister Trudeau, and he made the following statement, "I don't think the acceptance of this accord would lead to separatism, but failure to implement it may well be the beginning of the road to separatism." What do you think of that?

**Dr. Bliss:** I think that is blackmail. We cannot have a country in which legislators, especially legislators for the province of Ontario, base their decisions on threats of separatism. It seems to me we will be paralysed as a nation and we are simply going to be held at ransom by people who make those threats. I think that is unfounded. It is unfounded in the pre-Meech-Lake reality. It is unfounded in the current reality. In any case, you cannot proceed that way, any more than any of us can live our lives under the shadow of blackmail, and it seems to me there comes a time when you call blackmail blackmail.

**Mr. Morin:** Mr. Bourassa has heard the accusation in Quebec that the accord does not go far enough, that Quebec lost in that deal. It also took 60 years to be able to bring 11 people together, to finally agree on specifics. Do you mean to say that you are proposing we wait another 60 years?

**Dr. Bliss:** Sure. I do not have that kind of impatience. I am interested in the long view. The country was not broken before Meech Lake; now it may be. I am willing to take the long view and to talk about these things. Most of us want to get on with our lives. As legislators, there are many more important things than constitutions.

On your other point, I would like to stress that in my briefs, and I hope in my presentation, I have suggested that we do not know what the courts will decide. In your exchange with Mr. Danson, I think you were quite right in suggesting that he was also predicting the courts' decisions. Mr. Bourassa's critics may be right. If the court does come in with the innocuous interpretations, in a way I will be happy, but the result will be to cause tremendous problems from the separatists, who will then say, "You sold us out." What will we have achieved? Will we be right back to having a separatist sentiment in Quebec? I am sure we are going to have that inevitably, Meech Lake or no Meech Lake, and whatever the courts say about Meech Lake separatism is going to be a fact of Canadian life.

**Mr. Morin:** On the other hand, if the accord does not go through, Quebec is saying it is a slap in the face.

**Dr. Bliss:** Yes.

**Mr. Morin:** So what do you do?

**Dr. Bliss:** It seems to me you judge the accord on its merits and particularly in the light of the interests of all of Canada, and then of course your own constituents, the people of Ontario. I think it is a particular problem for MPPs from Ontario, because we are the least provincial province; our people think of themselves as Canadians as well as Ontarians. What is your responsibility to your constituents? I do not think it is to say, "I am hamstrung because I am afraid of separatism and I have to do what Quebec tells me to because they're going to threaten separatism." I do not think that is your responsibility.

**1540**

**Mr. Harris:** You have said we should not be judging this on the basis of whether Quebec is going to go or is not going to go. I agree with you, I do not think we should either; but I do not want to hear all your arguments about how they might go because of it as opposed to the other way around. I am prepared to entertain your arguments. Let us leave Quebec out of it for now, or the Quebec question and "distinct society." Just go back to what it does to federalism as you see it, and you dislike it.

I think you are extreme, but I have some concerns, which you have raised as well, about some of the interpretations. If you ask me to consider my constituency of Ontario, anything that strengthens provincial powers probably is in the interest of my constituency in Ontario. I do not think Ontario will have a problem meeting any kind of standard in a national program, if you take that as an example. I think other provinces will have difficulties. But talking only about my constituency of Ontario, if there is not a national shared-cost program my constituency will probably have as good a program as there is in Canada.

**Dr. Bliss:** If I agreed with you on that point, which I am not sure I would, it is not in the interests of your constituents in Ontario that you give veto power over their constitutional future to the 130,000 people of Prince Edward Island. That is such an abdication of responsibility and an abdication of principles of democracy that it is mind-boggling.

**Mr. Harris:** Is not the problem with that veto, as you see it and as you are outlining it to us, that it will lead not to a strong federal government but to strong provincial government?

**Dr. Bliss:** No. It may lead to strong provincial governments, but it will simply lead to paralysis. The Americans found this out under their Articles of Confederation 200 years ago, and I do not know anybody who is familiar with American history who believes we can make this kind of decentralization work in Canada.

**Mr. Harris:** Paralysis in what? What are the main arguments against federal powers to spend in provincial jurisdictions? Does it break that down?

**Dr. Bliss:** That issue, which is extremely complex, I am frankly not able to get my mind around, except I know we would never have had medicare under Meech Lake.

I am thinking about other kinds of constitutional change. I am thinking about the concerns of the Northwest Territories and the Yukon. I am thinking of how Canada could never have operated in the past under the universal veto. Ontario would not have a north under Meech Lake, because Prince Edward Island would never have given Ontario that north country; it would have insisted on some kind of similar compensation.

Once you give every premier the veto, and every one of them has legitimate interests—that is their job—those interests are going to clash and you are not going to be able to change the Constitution.



In terms of your responsibility to your constituents, who believe in democracy, I think that by your acceptance of a veto power by an exceedingly small minority you are giving veto power over the future of your constituents to a body of people less than the size of the city of St. Catharines. What are we doing when we do that?

**Mr. Harris:** I guess we are trying to look at what it is that we are giving them that veto power over.

**Dr. Bliss:** Yes. It is our country's future, that is what.

**Mr. Harris:** No. It is not our country's future. It is some of the constitutional changes that affect how our country is operated and how that affects our future.

**Mr. Chairman:** Professor Bliss, you have raised so many issues, and they are disturbing ones. They are ones that have been raised, and we have been wrestling with them. The wrestling goes on as we proceed with each witness. Nobody wants to be blackmailed in any way, shape or form. I think we are trying, as a committee, to come to terms with the accord.

I guess the only closing statement I would make is that I think it is possible that reasonable people might feel that the accord is not as bad as perhaps you do and that that decision might be reached by people who are trying to wrestle through it and deal with some very complex issues. Perhaps that is the only comment we can make, and I guess the Senate committee, as well as perhaps the future committees in Manitoba and New Brunswick.

We have now spent long enough on this that I suppose we realize more and more the difficulty of seeking constitutional change in this country and how to go about it and how to deal with the number of the questions you have put to us, not the least of which is how we as individual legislators view the future of the country and our role and what it is we ought to do. It does not make our task any easier, but it is quite legitimate to raise it in that context. I think it is good that we are reminded of that.

I want to thank you very much for coming and sharing your thoughts with us. I do not know that you have made the task any easier, but I think you have certainly raised questions that we must deal with. Thank you very much.

**Dr. Bliss:** Thank you, Mr. Chairman. I do not envy you your responsibilities.

**Mr. Chairman:** Before calling the next witness I would like to make a note because, as these hearings are on television, there may be

some people who were expecting to see Ms. Barbara Cameron of the National Action Committee on the Status of Women next. We have had a communication from Ms. Cameron. Unfortunately she is ill today and will not be able to be with us. We hope, however, that we can reschedule her testimony in April.

I would then like to ask Professor Peter Meekison, the vice-president of the University of Alberta, if he would be good enough to come forward and take a chair. Professor Meekison, we are very pleased that you could join us this afternoon and particularly that you were able to arrive somewhat earlier so we can move into your testimony.

For the committee and those viewing, I might just note that prior to your present position you were for a number of years Deputy Minister of Intergovernmental Affairs in Alberta, so matters constitutional are not things that are totally foreign to you either in terms of the process of bringing about constitutional change or from the academic perspective.

We are very pleased that you could join us and bring your particular experience to bear on the Meech Lake accord. We have a copy of your statement. If you would like to proceed, we will follow up with questions.

DR. J. PETER MEEKISON

**Dr. Meekison:** First of all, let me apologize for my nonappearance a month ago. I am sure I confirmed everything that committee members might have in their minds about absent-minded professors. Please accept my apology. With your permission, I will read my statement.

I appreciate the opportunity to make a presentation to this select committee on the Constitution. Before commenting on the accord, I think it is important to state at the outset that I have made most of these comments before when I appeared before the special joint committee of Parliament. Since then nothing has occurred which would lead me to believe that the accord should be modified. I believe the accord was and remains a carefully drafted and balanced document and, if ratified, will benefit Canadian unity and Canadian federalism.

The most obvious reason is that it brings Quebec politically into the Canadian constitutional framework. Secondly, it commits all governments to a process of constitutional review and reform in the future. The former corrects the problem which has existed since 1981, while the latter means that Canadians will have the opportunity to continuously review their

Constitution with a view to improving its operations. To Albertans and other western Canadians, this opportunity means that there is a real opportunity to reform the upper House, the Senate.

### 1550

Constitutional reform has in one way or another been a fact of life of the Canadian political process for at least 100 years and the subject of extensive debate since 1967. In each of these debates, Ontario has played a critical role. Perhaps its role was most significant during the Confederation of Tomorrow conference held in 1967. At that conference, Canadian federalism was seen to be in a state of crisis and Ontario believed it had a crucial role to play in maintaining Canadian unity. The 1967-71 discussions culminated in the Victoria Charter, which was subsequently rejected by Quebec. A later round of negotiations ultimately led to an agreement in November 1981, which resulted in the Constitution Act of 1982.

When examining the 1987 constitutional accord, two points should be noted. First, all five items had previously been the subject of constitutional discussion, ranging from a limited review of "distinct society" to an exhaustive analysis of the amending formula. With respect, there was nothing new or surprising about the five subjects. The second is that there was considerable publicity surrounding the speech in May 1986 by Gil Rémillard, Quebec's Minister responsible for Canadian Intergovernmental Affairs, who outlined Quebec's five conditions for a constitutional rapprochement. To be sure, no draft constitutional texts were included, but the principles were clearly enunciated.

Three months later, the 10 premiers at their annual conference in Edmonton (a) agreed to begin negotiations on Quebec's five subjects; and (b) added a sixth, a so-called second round including discussions on Senate reform. The process would not start and stop with Quebec's initiatives but would continue into the future, a matter of importance to Alberta and other provinces which had other constitutional issues to debate. They were prepared to wait until Quebec's items were resolved. There was a considerable amount of publicity surrounding the Edmonton declaration. In November 1986, the 11 first ministers reaffirmed their commitment to a constitutional agreement which would bring Quebec into the constitutional framework.

At Meech Lake, the long-awaited agreement in principle was reached, to everybody's surprise. It is somewhat disconcerting to hear critics

say today that they were unaware of the negotiations or Quebec's five conditions. It was no secret that Quebec was meeting individually with the other provinces and the federal government. I for one do not subscribe to the argument of unseemly haste. The issues and questions have been on the constitutional agenda for a long time. What caught people by surprise was the fact that an accord had been reached. Once an agreement was achieved, the exercise had to be taken more seriously, particularly since unanimity is supposed to be almost impossible to achieve.

At the Langevin meeting, Quebec's five conditions were presented in constitutional language, while the sixth condition, sketched out in Edmonton, was also incorporated into the amendment. The Langevin meeting finalized the text. Time does not permit an exhaustive analysis of the text, and I assume members of the committee are aware of its provisions. Permit me to make a few general observations.

The change to the amending formula has led to assertions that the prospect of Senate reform is indeed dismal. I disagree with this view for a variety of reasons. There is the assumption that Senate reform is easy or easier under the existing formula than under the proposed changes. To start with, Senate reform would be difficult under any formula. In my opinion, the change to the amending formula does not alter that basic fact.

It has been suggested that neither Quebec nor Ontario will give up its clout in any reformed Senate. If that is the case, then the 50 per cent test found in the existing formula would not be fulfilled, even though eight provinces, not seven, could favour a change. People are too quick to look at the two-thirds rule and ignore the 50 per cent population requirement, which I think places a special burden on the province of Ontario, given its percentage of the population of Canada.

I also find it difficult to accept the fact that any federal government would itself recommend to Parliament reform of the Senate over the strong objections of either Quebec or Ontario.

Unlike matters covered under the general formula which affects provincial legislative powers, the proprietary rights or any other rights or privileges of the Legislature or government of a province, a dissenting province can do little about a change it may disagree with to central institutions, such as the Senate. The proposed amendment gives every province an equal say. It extends the principle of provincial equality, which is the basic premise underlying the amending formula. As a result, the idea of



provincial equality has been extended beyond the 1981 agreement to become one of the cornerstones of the Meech Lake agreement. Provinces are treated alike. There are no first- and second-class provinces. To Alberta and other provinces in eastern and western Canada, this principle is fundamental. To that extent, I would disagree with the previous witness.

The proposed unanimity requirement establishes a different political dynamic than that which operates in the general amending formula. There is no need to form or to seek coalitions or alliances when you have a veto. At the same time, it is very difficult to cast a veto when all around you are seeking a change. The dynamics of intergovernmental negotiation generally force governments to look for a compromise solution. That was true of the Meech Lake agreement and it has been true in the past. The myth that unanimity is impossible to achieve is not substantiated historically. The unemployment insurance amendment of 1940 and the amendments affecting pensions in 1951 and 1964 are three examples.

Discussions on Senate reform will not take place in a vacuum. Other subjects will also be on the agenda. I assume that governments will enter these future discussions with a view to seeing an agreement or agreements of some kind reached. A quickly cast veto on Senate reform could lead to rejection of other proposed changes. From my experience, governments are more likely to agree on reforms when a variety of topics are discussed simultaneously. Some recognition and attention must be given to the different priorities and concerns of each government.

Nor do I accept the view that provinces will enjoy their temporary responsibility for recommending names of senators to the government of Canada so much that Senate reform will be sidelined. It will take a very long time before the entire Senate is changed by this means. I predict that the public will grow weary of yet another annual failure. That alone should expedite change. The idea of celebrating the 50th or golden jubilee meeting on Senate reform somehow seems highly unlikely.

I have considered at length Senate reform and have neglected to mention the overall change to section 42 of the amending formula. Under the proposed changes, the provinces will extend their veto to the six matters referred to in section 42 of the Constitution Act.

To read the public commentary on this provision would lead one to believe that the provinces had acquired a veto on any and all

changes to the Constitution. This belief is simply not correct. Most subjects, including the division of powers, aboriginal rights, the Charter of Rights and equalization, to mention but a few, will continue to be governed by the two-thirds/50 per cent rule. The one qualifier here is that section 35.1 of the Constitution Act, 1982, requires that before any amendment can be made to one of the sections affecting the aboriginal peoples, there must first be consultation with those aboriginal peoples.

Another part of the accord which has received considerable attention is the provision on the spending power. A multitude of interpretations has been given to this section and many doubts have been expressed about the ability of the government and Parliament of Canada to undertake new national initiatives. I feel a second look at both the provision and the history of shared-cost programs is essential.

In the first place, the provision applies only to areas of exclusive provincial jurisdiction. To me, that statement is critical. The section also recognizes the federal spending power for the first time in the Constitution. In one meeting I had with a strong Quebec nationalist, this particular law professor was most dismayed that the spending power was in fact given recognition.

We have a federal system, and this section reflects that reality. For one thing, while there may be fiscal reasons to do so, there is no constitutional requirement for a province to participate in a shared-cost program. Let me illustrate. While the Canada and Quebec pension plans are not shared-cost programs, they do provide an excellent example of what is possible within the federation. Surely this same type of creative thinking is feasible in the area of shared-cost programs. The principle of parallel action is one that has existed in Canada for some time.

To me, this provision strengthens the federal system because it provides for flexibility. To take an extreme case, if a majority of provinces opts out of a proposed shared-cost program, the federal government can say to them: "Forget it. We will do something else with the money or develop the program in a different way." The other example is when one or two provinces say they wish to establish or continue their own programs. Regardless of which scenario is followed, negotiations and discussion are inevitable. The objective is to have everybody participate and/or to ensure that the program of a province which does not participate is compati-

ble with national objectives. As I have already mentioned, these programs take place in the areas of exclusive provincial jurisdiction, which is a principle of some concern to provincial legislators. The political process will dictate how this provision evolves. To me, it is a safety valve.

Other provisions in the accord require annual first ministers' conferences, one on the economy and another on the Constitution. First ministers' conferences have been held periodically since 1906. At a first ministers' conference, all governments are equal around the table, something which cannot be overlooked.

For the past few years, provinces have placed great weight on convening an annual meeting on the economy. In 1985, the 11 governments agreed to annual meetings on the economy over the following five years. In recent years, these conferences have been held in front of the television cameras. They are hardly secret affairs. In my view, they have proved themselves to be a valuable mechanism for exchanging views in our increasingly interdependent federal system. To me, they are equivalent to a convention of the Constitution, and this provision merely confirms that fact. It should also be remembered that a constitutional revision along these lines was included in the Victoria charter of 1971.

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The conferences on the Constitution are a different matter. Again, this mechanism is one which has evolved over time. Since 1927, approximately 27 such conferences have been held, the vast majority in the last two decades. The future agenda, other than for Senate reform and fisheries, is open-ended. What constitutional changes will emerge are unknown.

The provision does not guarantee change but merely provides a vehicle for examining issues and proposing them. It is inconceivable that a major amendment would be seriously considered without first having some kind of intergovernmental discussion. It should be remembered that whatever is agreed to at any conference must still be debated and approved by Parliament and the appropriate number of provincial legislatures.

The question you might ask is, where does this provision leave us, a legislative committee? What I feel will occur is that committees such as this will examine the problems associated with the Constitution. They can propose remedies on a continuing basis. With an annual conference, there should be no difficulty in getting material on the agenda.

I still believe one of the most far-reaching and important reports on the Constitution was that prepared by the joint parliamentary committee in 1972. To me, it stands as an example of what can be done. There were many opportunities to review issues and propose innovative solutions to constitutional dilemmas.

In summary, when an agreement is reached after long and sometimes difficult negotiations, it is usually based on a series of compromises and the recognition that perfection or absolutes may be impossible but that acceptable solutions are realizable. To pull on one particular thread could unravel the entire agreement, because the delicate design so carefully woven can be easily destroyed. There will be future discussions. All of Canada's problems cannot be solved at once nor for that matter through the constitutional process. I would respectfully suggest that this committee recommend the adoption of the resolution without change.

**Mr. Chairman:** Thank you very much. I think one of the aspects that is particularly interesting for us today is the fact that your experience has come from the west. While I am not suggesting that through one person one can reflect the various views in the west, that is certainly one area where we have not, as a committee, been able to explore some of the dynamics of the development of western constitutional thought with respect to the accord. I think that will be an area we will want to explore as we go through our questions.

**Mr. Breagh:** One of the things we have not spent a lot of time on, actually, is this idea that is very popular in many parts of western Canada about reforming the Senate. In part, that is probably a reflection of our own constituencies. This is not all the buzz at the Midtown Mall in Oshawa. No one could care less about the Senate; no one quite knows that we have one. They are not sure why it is there. They seem to be aggravating Mulroney. We generally think that is a good idea.

What is it that has made this a focal point of discussion in western Canada? I had a chance to talk to the select committee from Alberta about its proposals for Senate reform. They were very enthusiastic that this was not only something that was possible but also something that in many ways would redress some things that they thought were wrong with Canadian federalism for a long time.

I wonder if you would share with us a little bit the importance of Senate reform that you see, and why it has fallen into its place in western Canada



as opposed to Ontario where it has not received much attention.

**Dr. Meekison:** The principal reason I would give in response to the question is that there is a feeling that many of our national institutions, particularly Parliament, do not really give the different regions an equitable say in decision-making. In the House of Commons, which is based on representation by population, which is of course certainly democratic, the vast majority of members come from Quebec and Ontario.

This point was driven home to the people in Alberta in the 1980 election, which saw the federal Liberal Party returned to power. When the people turned on their television sets after the polls had closed at eight o'clock, they discovered that somewhere around the Lakehead a majority government had been elected, and regardless of what happened in western Canada it would not affect the outcome.

There is a lot of discussion one can have on how the electoral system works in Canada, but the fact remains that many people in western Canada felt that their voice would no longer be heard, and if the federal system was to operate effectively, changes in the upper House whereby provinces could be given equal representation would be one way of addressing that problem. In fact, that is the model that we see in the United States.

Senate reform is something that has been pursued by other provinces in western Canada at different times. It is certainly something that British Columbia has pursued on and off for the past 15 years or so. In Alberta, it has been a policy which has had quite strong support at the grass-roots level. It is discussed in shopping malls, perhaps not every weekend, but it is certainly something that one can get into a debate on. I think it is the one way many people see in which this imbalance within the country can to some extent be offset.

A key issue that Alberta has pursued in constitutional discussions is the notion of provincial equality. It is certainly the cornerstone found in the amending formula, and it is one that I think Alberta will continue to pursue. It certainly is manifested in the triple-E concept of Senate reform: equal, elected, effective.

**Mr. Breough:** Let me just pursue one other point you have raised there. My assessment of the accord is that it puts in place a rather subtle shift in power towards the provinces in some ways, but I do not read a dramatic shift from the federal government to the provincial governments. To be fair, there is a lot of ranting and

raving about this being the end of Canada. The beaver will die and we will be balkanized. The earth is coming apart quickly on us here.

There has to be a recognition of a shift of responsibility to some degree. This province, for example, has resources, population base, needs. It is clearly different from other provinces in Canada. To treat Ontario the same way as you treat all the other provinces in some respects is silly, because our needs are different.

The reality of government is different. This Legislature sits almost year-round now. The members are devoted almost exclusively, full-time, to legislative responsibilities in one way or another, and they represent a lot of folks. It is hard, I guess, to design a system that says: "Here is a population base of nine million or 10 million people with 130 people in their Legislature. We will treat them in the same way that we treat a population base of 130,000, with a smaller chamber that does not meet very often." But I think we have to do that. I read Meech Lake to be a recognition of the fact that there are differences among the provinces, different structures, and the Constitution of Canada has to reflect that.

I am interested in your assessment of the shift, though, of the basic power, decision-making process from the federal government to the provinces. I read that to be nuance. I think it is very delicate. I do not read in there the massive balkanization of a nation that many others, who are eminently qualified to use those words, have discussed in front of the committee. We have heard it this afternoon again. I am interested in your assessment from a slightly different perspective. Is that a dramatic shift in there?

**Dr. Meekison:** I certainly do not see it as dramatic. In fact, on a scale of one to 10, if one is the least and 10 is the most leading towards balkanization, I would say it would be about a half or one. Basically, the provinces have a very modest role now in recommending names of senators. They are recommending Supreme Court of Canada judges. The amendment on the Senate is very similar to one which was proposed in 1887. It is hardly new and it is something that Ontario, I believe, if my memory serves me correctly, was very keen on 100 years ago.

The one area I feel people have focused on is the spending power. The language is quite clear that it is the authority of the federal government to spend money in areas of exclusive provincial jurisdiction, and there is recognition of the spending power now in the Constitution. In that sense, one could argue that there is a tradeoff, that there is at last recognition of what the federal

government has claimed it has. Yet in order to exercise it, the federal government allows the provinces to opt out, if you like to use that term, of certain programs. Again, that is not new. That was recommended in the mid-1960s by, I believe, the government of Mr. Pearson, the Established Programs (Interim Arrangements) Act, where Quebec was allowed to opt out of the hospital care program if it so chose.

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Immigration is another area where, through federal-provincial agreements—and Quebec was the only province that pursued it, although Alberta tried to pursue it later on in the late 1970s, but it should also be remembered that immigration is at the moment a concurrent responsibility under the Constitution, along with agriculture.

I read one statement by one academic which said that if Meech Lake is approved, Canada will become virtually ungovernable. Not only do I not accept that, I find that statement irresponsible.

I feel that this is a balancing of what I would say was too much centralization, leaning towards a recognition that in developing national programs—a truly national program is one that can be put together and crafted through federal-provincial discussion and dialogue so that the very best experience at both the federal and provincial levels can be put together.

We find right across the country, in our different social programs and health programs, a great deal of experimentation. You can tailor a program to meet the needs of Prince Edward Island versus the citizens of Toronto versus the rural areas in northern British Columbia. There are all sorts of different ways of putting together programs. That is one of the good things about a federal system: You can have different approaches to public policy.

**Mr. Breagh:** There is just one other thing I would like to pursue. In your presentation, you took a rather different view of a number of things. Professor Bliss was just in front of us. He, of course, is outraged at the notion that 130,000 people could form a province like Prince Edward Island and that they would have a veto power over everybody else and would beat up on us regularly and do nasty things to us.

I confess that when you read the accord all the way through, it starts to shrink. They do not have a veto power on everything. They have a veto power on very specific things having to do basically with federal institutions. That becomes less and less. Then it occurred to me to wonder how many times people would actually use that

veto and what the ramifications would be if a province did what I think Professor Bliss anticipated, that is, use that regularly.

As a practising politician, I know that very often one of the things you do not want is a power to take something right off the agenda. You would like to hang around the edges and beat up on it a bit but you do not really want it blown out of the water because it can be used as a discussion point or a bargaining chip.

I would be interested in your experience in intergovernmental affairs, whether you really think that veto power is going to get used a lot. I guess the other way to look at it would be to simply say that it gets untenable in a hurry if one of the provinces did not have a veto power but decided it did not like what you were going to do—reform of the Senate, for example, which is one of the things that would have to be done with unanimous consent—and one or two of the provinces said: “That’s the stupidest idea I ever heard. We will now only lose the political argument and we’ll let it go through, but thereafter, we won’t participate in providing you with nominations and we won’t pay any attention to anything those idiots in the Senate actually do.”

When you get right down to it, if all the players in the room, all the provinces in Canada, do not agree that the proposed changes to the federal institution are sensible, workable notions to the point—I guess the dividing point is simply this: They may dislike the proposal a little bit, but if they dislike it to the point where they would actually proceed to try to veto it, whether they have the veto or not, it seems we have a problem.

Of course, to date, we have had that problem. Supposedly, a lot of what Meech Lake is about is the fact that one of our provinces did not like the last effort at making a Constitution. Although they legally were part of the country, they decided not to be a player, not to attend the meetings. I seem to recall they kind of hung around the edges and kept pretty close tabs on what was going on, but I would be interested in hearing your assessment of whether the veto power that is in here is really the vicious tool that some have suggested it might turn out to be.

**Dr. Meekison:** I do not think it will be. First of all, it is limited to a specific number of areas. It would not, for example, affect the division of powers.

If you applied the existing amending formula to the Meech Lake constitutional accord—let us just take the amendment on the spending power: that amendment could be included in the



Constitution Act with a two-thirds/50 per cent rule, two thirds of the provinces representing 50 per cent of the population. So could the "distinct society" clause. To try your advice, any changes to these in the future would require two thirds of the provinces representing 50 per cent of the population.

Going back to the original amending formula which was agreed to in 1982, there are five areas which are already subject to the unanimity formula, and six more are being added.

I think it is quite possible that a province may veto something, but I talked to some Quebec officials who had participated in the decision to exercise the veto in 1971 over the Victoria charter. In speaking to the Quebec officials, they said that it was extremely disturbing to them because many other governments in Canada felt they had participated and then at the last minute they had changed their minds and it had brought the entire process to a standstill. They said it was very difficult to exercise.

Along the lines, I think, of what you are suggesting, my sense is that a government may threaten, but actually exercising it is a different matter because there are so many elements within an agreement based on a series of compromises.

This is what I find, for example, in the Meech Lake agreement. If it were just a specific amendment to the Constitution on a particular matter, you would probably say, "I don't like that," or the Parliament of Canada would say, "We don't like that." But when you have a number of things on the table and there has been a willingness to compromise on a different range of issues, for a province then to turn around and veto it, I think is going to be very, very difficult. I would expect that signals would be given long before that.

You might ask yourself, in looking at the amending formula, how did certain things get put into the veto column in 1982? Let us take the office of the Queen, the Governor General and the Lieutenant Governor. The question was, if you had, say, eight provinces saying, "We should become republics," or doing away with the monarchy and Ontario says, "We don't want to," would that be good for Canada? The assumption was that we were either all in it together or we should not have such an amendment. To do otherwise would be so divisive.

My sense is that the threat of veto is always a possibility. I do not think the reality of it being exercised is going to be there. We have had a number of amendments in the past which have received unanimous consent of all governments.

I am told that is impossible. The proof is in the changes that have been made to the Constitution.

**Mr. Allen:** Somewhat on the same tack, perhaps I could get your response to the issue around the creation of new provinces, and in particular the arguments the territories have been advancing with regard to their current dilemma as they see it and their exclusion from the future of the process, as they read it, in any case.

First of all, perhaps it is just simply the question, why should we not stay with the existing formula arrangement by which Alberta and Saskatchewan, for example, came into the status of new provinces? Why should we allow other provinces in on that game when they were not in on the inclusion of some others?

**Dr. Meekison:** The question of the admission of new provinces is one which goes back some time. In 1949, when Newfoundland joined Canada, whether or not the other nine provinces should in some way be consulted was certainly raised. They were not, and Newfoundland joined Canada.

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In 1976, when there was some discussion on constitutional reform, Premier Lougheed, on behalf of the provinces, Alberta then being the host province of the provinces, wrote Mr. Trudeau saying, "Here is a list of areas where the provinces feel that changes should be made to the Constitution." One of them was the admission of new provinces. This was in 1976. So when the amending formula was put together, in 1980-81, that particular matter resurfaced and was included.

I think the question is a fair one. The fact, though, is that it was felt to be important that the sister provinces should have some say. It does change the balance within Confederation. For example, if we do pursue Senate reform, and if the principle of provincial equality is accepted—there was a question raised by the previous witness about balancing eight or nine million people in Ontario and 130,000 in Prince Edward Island. The argument is even more extreme if you say Yukon versus Northwest Territories versus Ontario in terms of provincial equality. It does change the operation of the country. It could have a major impact on federal-provincial financial relations, the equalization formula and so on.

It also would apply to the admission of any other parts of the globe which might apply at some point to join Canada. While people might say, "Oh well, that is not going to happen," the

fact of the matter is it could happen. I doubt it, but it could happen.

My sense, though, is—and this goes back to the previous question, of veto—I find it hard to see other provinces vetoing the admission of a new province once the Parliament of Canada had approved it. I do not think the problem is going to be so much getting the provinces to agree and participate; I think it is going to be more difficult to convince the Parliament of Canada to admit a new province.

Should that take place, I think the other provinces would be in a very difficult position to say no, because I think the major debate will take place between the government of Canada and the territorial governments as to, if you like, the terms of union. If we look at the terms of union of the western provinces or Newfoundland, they are different. When Alberta, Saskatchewan and Manitoba joined Confederation, they did not at that time receive title to the public domain or ownership of the natural resources. It took 25 years to correct that.

When Newfoundland joined—and I use this as an example in my classes—one of the things it could legislate over that the other provinces could not was oleomargarine. Margarine today is not a major political debate, but it was in the 1940s, and Newfoundland has the right to legislate over it. You get differences.

It seems to me that if too much power is given, or not enough—in other words, if you are creating new provinces slightly different from the existing ones—they may either say, “We think that is unfair,” or not. I would rather wait and see what happened because my sense is that it is not going to be as bad as one might think. My sense is that I will wait and see what the Parliament of Canada does before I worry what the provinces are going to do.

**Mr. Allen:** I am reading into your response at least an observation that, while in terms of sections 37 and 38 of the 1982 Constitution Act, which referred to including the territories in the discussions around their future status, the dropping of that does not imply that they would not be involved in discussions, there still is a relationship with the federal government that would precede and lead up to anything that happened with regard to their future. If the federal government were so disposed, it would be able to transfer a good deal of responsibilities just short of provincial status. That could happen on a negotiated basis. It would be very difficult then for the other provinces not to agree to the last

step. Is that a scenario you would see likely or possible?

**Dr. Meekison:** Yes. The reference to section 37, of course, in the Constitution Act, 1982, was the reference to the conference on aboriginal rights. The Yukon and Northwest Territories were invited to be participants in those conferences. But if you look at what is happening in Canada today—and it started in 1982 at the premiers’ conference—the territorial governments were, for the first time, invited to that conference. That particular conference was held in Nova Scotia and the territories sat in the balcony. It reminded me of Upper and Lower Canada sitting in the balcony watching the debates in Charlottetown where they had been invited to participate.

The next year, the premiers’ conference was in Ontario. The heads of the two governments were there and they participated, not completely, but they did make presentations to the conference. They debated and participated in the first agenda item, which is usually the state of the economy. There is no doubt in my mind that they are gradually being brought into the provincial fold. After a while they do become, in many respects, similar to being treated as provinces.

In terms of their own political evolution into the future, until they become provinces, that is subject to negotiation between the territorial governments and the federal government. The last step would require constitutional amendment, but if they have been part of the discussions, interprovincially, on a variety of things, I just do not see it as being all that implausible or improbable that they will not get unanimous consent. I just do not think it is going to happen.

**Mr. Allen:** Can I turn you briefly to the question of the debate on national objectives, national standards? Do you see any significant issue or matter at issue there? You will recall, of course, that some people have said objectives simply could be reduced to the mere fact that there should be a national program and that would be it. That would be the objective. Everything else would be open to negotiation, to differences of opinion with regard to the provinces’ commitment. On the other hand, there are those who say standards are so much stronger.

We had a presentation by the Canada Council on Social Development, which seemed to think it would be possible to define and urged the governments in question to undertake a definition of what “national objective” means. They seemed to have no trouble with thinking that it



could involve, for example, the clarification of specific national needs to be addressed; desired goals; anticipated outcomes; that there could be definition of fundamental principles guiding the formulation of the national objective that would apply to all social programs and include levels of comprehensiveness and accessibility and so on; that there would be recognition of rights and social entitlements which would also include even the covenants and international agreements the country had been party to internationally; and that there might finally be a stated commitment to monitor and assess programs in meeting social needs. This would all be beyond the whole question of standards of administration, but rather in terms of content and purpose.

Is your sense that the phrase "national objectives" is expandable in those senses without offending the word or without creating major court challenges around it?

**Dr. Meekison:** That is a difficult question to answer. Any word in the Constitution can be challenged in the courts if people think that whatever is taking place is something they do not like. I found that out recently in reading material; for example, the section that was written on natural resources was written with such care and precision that I would have thought it would be virtually unassailable, but not so, once people started to look at it.

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It strikes me that one should read the language in what I would say are commonsense terms. When legislation is tabled in Parliament, the government is presenting its case; it is stating what the objectives are behind a particular program. They may be multiple objectives; they may not be. It seems to me that a province in developing a program, assuming it opts out, would try to live within that framework. It is quite possible that in certain social programs the national objective could be so broad that it encompasses everything, such as the wellbeing of Canadians. That to me is pretty vague.

I would think there is always the possibility of a challenge, but the objective of the clause is to force governments into negotiating what I would say are good programs. Again, the classic example is the Canada and Quebec pension plans. Had Ontario not participated in the Canada pension plan, we would not have a Canada pension plan today. Ontario's participation was critical. Quebec clearly was not going to participate, and if Ontario did not, the notion of portability and compatibility would just not take place; in that sense, Ontario would be able to say,

"These are areas we think should either be included in the legislation before Parliament or not."

If the provinces push too hard in developing these programs, the government of Canada can say: "We will use tax credits. We will give grants directly to citizens, such as family allowances." There is nothing prohibiting that. If they want to develop a genuine shared-cost program in an area of exclusive provincial jurisdiction, it seems to me these objectives are going to be a blending of federal and provincial interests and concerns.

**Mr. Cordiano:** I would like to deal with the whole question surrounding the Senate. Some critics have argued that what has been put forward now, that the provinces are going to nominate people to the Senate for approval by the federal government—that is, come up with a list for the federal government's approval—will freeze it in time and that we are simply transferring one form of patronage from the federal government to the provincial government. Certainly, critics in western Canada have commented on that, and we have heard from a number of groups which have said exactly that.

Do you think, first of all, that is something that is widespread in western Canada, or is it the view that is held by a few people in western Canada? Second, do you think that is a possibility, that we will not get further on with reform of the Senate beyond what has been accomplished in Meech Lake?

**Dr. Meekison:** The view that you have expressed is one that is certainly being presented by different groups in western Canada. The Canada West Foundation in its submission to the parliamentary committee made such an observation. I disagree with the Canada West Foundation and its observation on that particular point. To my knowledge, the only time this new mechanism has been used was in Newfoundland, when Mr. Ottenheimer was appointed to the Senate. I think Mr. Ottenheimer will bring great distinction to the Senate, given his experience in the Newfoundland House of Assembly.

The more important question is whether that is all the reform we are going to see. Of course, if Meech Lake goes through, any further changes to the Senate, no matter what they are, would require unanimity. Since unanimity is impossible to achieve, people say it therefore stands to reason that nothing is going to happen. I do not accept that. I just feel that Senate reform is not only possible but also desirable and would make our parliamentary system very different. The pressure will be on all governments and all

legislatures to come up with an appropriate, if you like, number of changes, which I think is possible.

The other side of the question you have raised is that the provinces will like their new-found power so much that they themselves will back off. I do not buy that. I feel that the western provinces and—to a lesser extent but certainly once they start to think about it—the Atlantic provinces, see great benefits in Senate reform with respect to enhancing their role within Confederation.

**Mr. Cordiano:** By having elected senators, and the way that our Confederation is balanced between provincial powers and federal powers—and certainly what we are looking at there is the model of the US system, with elected senators and having equal representation from all regions—how do you think that will affect provincial powers versus federal powers?

Certainly one thing I can see happening immediately is that the power of the House of Commons would be somewhat—I will not say restricted, but affected or changed somehow. The nature of the federal House would be changed. How do you see that affecting provincial-federal relations and the power struggles that have taken place in the past?

**Dr. Meekison:** I think you have put your finger on a very important point, that resistance to Senate reform may not come from the other provinces; it may come primarily from the House of Commons. They may feel they share sufficient authority now, that given the realities of party politics and party discipline, the House of Commons itself should be examined and that the real area for reform is there.

The other argument I have seen and heard is that a reformed Senate will lead to the diminution of the role, certainly, of the provinces—not so much the legislatures, but of provincial governments in terms of national decision-making—and that it will do away with the need for federal-provincial conferences and the Senate will become the area where these debates will take place.

I am not convinced that will necessarily happen, in part because of the other provisions of the accord which require annual first ministers' conferences both on the Constitution and on the economy. Second, if the Parliament of Canada continues to legislate primarily in its own areas of responsibility found in section 91 of the Constitution Act, then of course some of these problems will not surface.

On the other hand, if the Parliament of Canada begins a series of legislative programs under the spending power which we just talked about, then you would find much more debate which could have an effect on provincial legislatures and governments taking place in the Senate. There would be a change which would take place, I think, over a long period of time, not overnight.

**Mr. Cordiano:** We have heard certainly that Meech Lake is extremely important to national unity and the most important component of that is including Quebec in the constitutional fold, having accomplished that at Meech Lake. Most people would say that Senate reform is a western initiative, that it is an important matter for the west. How important would it be to the west if we did not go additional steps in the process of reforming the Senate?

Being located in Ontario—I think some of us have travelled to western Canada on a number of occasions, but we do not have the perception that we should perhaps have on this question. Certainly we are closer geographically to a province like Quebec and perhaps can ascertain information a little more easily about what is going on at the grass-roots level in Quebec. I admit to you that I would not have that kind of knowledge of western Canada, making it a little more difficult to simply know how important Senate reform is going to be to western provinces.

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**Dr. Meekison:** I suspect it will vary from province to province. Certainly, Alberta and British Columbia have placed great importance on this. They see it as the principal means whereby their interests can be discussed and debated in the Parliament of Canada and taken into consideration to a greater extent. Whether or not it is true, many people in Alberta feel that the national energy program would not have been approved in 1988 had there been a Senate in existence along the lines of what is being proposed.

**Mr. Cordiano:** Last question, Mr. Chairman. I know time is running out here. Is there a feeling that it is a strongly held view, not just by politicians in the west, but also by the people? That is hard to assess, I understand, but in your opinion?

**Dr. Meekison:** Yes, it is. One way you might test this for yourself is, in the next federal election, look at the number of parties other than the national parties. See how many candidates they field and how they do politically. There was



a by-election in Alberta, the Pembina by-election, and while the Conservatives were returned, a number of other parties, such as the western reform party, the Western Canada Concept or some group like that, were there.

I think you will find that the numbers are significant. They may not be threatening to national unity but they are there. In 1982, a western separatist was elected in Alberta, and some people thought, "Maybe there is a problem there." We thought separation was an issue to the east of us, but there was a problem to the west. The notion of western alienation is something which does exist.

**Mr. Cordiano:** Is it attached to Senate reform?

**Dr. Meekison:** Yes.

**Mr. Cordiano:** Is Senate reform one of those issues that must be accomplished, and that is sort of parallel to having the west feel as though it is a more meaningful part of Confederation?

**Dr. Meekison:** Is a more meaningful part of Confederation and an effective participant, or can participate effectively, if you like, in national decision-making. They see Senate reform as the principal manifestation of this.

**Mr. Cordiano:** Time is running on. We did not have enough time to deal with your views on how Senate reform should take place. I would have liked your views on that, but in the interest of continuing my friendship with my colleagues, I must stop there.

**Mr. Chairman:** In the interest of maybe putting mine at risk, there are just a couple of points the chair would like to raise, although it did strike me that perhaps one of the things we ought to recommend is to get some of the good citizens of the West Edmonton Mall together with some of the good citizens of one of the malls in Oshawa and perhaps have an exchange program.

**Mr. Cordiano:** Mall-to-mall relations.

**Mr. Breaugh:** Solve all the world's problems in a hurry.

**Mr. Chairman:** It would be interesting to continue that way.

There are three other areas, and I wonder if you might comment on them. We have probably had some of the strongest and most articulate presentations made around the area of the aboriginal question, where that is now and, I guess it is fair to say, the suggestion that one of the major problems there is not so much Quebec as the western provinces.

We have had very strong concerns expressed about language rights by the official-language minority groups, the English from Quebec and French-language organizations outside and we have had very strong testimony from a wide variety of women's organizations with respect to the whole question of charter rights and what has happened to their position. I know we can talk about each of those issues, especially the concerns expressed by women and the official-language minority groups. We have had people who have said, "On balance, I think there is a problem" or "On balance, there is not."

I am not so much concerned with that aspect as I am with the perception that some injustice has been done, that something that was possessed after the 1982 agreement has now, somehow or other, been lost. I suspect in a number of these instances one cannot really argue beyond a shadow of a doubt that nothing has changed, because we still do not even know what all the clauses of the charter itself mean, let alone what the Meech Lake accord and the charter together would do.

As we look at the accord in terms of what it has done in terms of Quebec and bringing Quebec more willingly into the Canadian fold, how do you think we should be approaching those three other areas?

There has been an expression before this committee and perhaps also before the special joint committee on the 1987 constitutional accord. None the less, I think we have been struck by a consciousness among major, large minority communities that they have been left out, and there really is not a great deal of faith that the words from first ministers, "We will deal with those issues down the road," will in fact be kept. I suppose we are wrestling then in some respects with: are those concerns serious enough that one really cannot go forward with the accord or are there other ways, not just saying, "Do not worry, we will deal with these"? Are there some other avenues that are open that could deal with these concerns?

I am just wondering, from your perspective and perhaps with a sense of some of the comments in western Canada on these issues, what your reflections are on those three areas.

**Dr. Meekison:** Really, I think you would have to deal with them quite separately or distinctly.

The aboriginal one, to me, is totally different from the questions raised by women's organizations and by minority language organizations outside of Quebec or within Quebec.

When the aboriginal constitutional discussions took place, there were four meetings from 1983 to 1987. Indeed, the last one took place just before the Meech Lake conference, and it ended in failure when the requisite number of provinces were not prepared to agree to the amendment that was being proposed.

The future in that area is, to me, a question mark. It is a question mark in that the governments of Canada could at some point say, "Yes, we should meet again with the aboriginal groups to start from where we left off in 1987." The critical difference—and this is why I make a distinction—is that aboriginal groups rightly feel that if there are to be discussions, then of course they should be part of the discussion. In that sense, the process is fundamentally different. To me, there is nothing preventing that from resuming if the governments in Canada and the aboriginal people themselves say, "Yes, we should take another look at that."

If you look at those discussions—and I was part of those discussions in 1983, 1984 and 1987; I did not participate in the 1985 discussions—one thing was quite clear. The constitutional agenda at that time was devoted, primarily, exclusively to the aboriginal questions or the questions in that area. Governments did not really want to start other areas because the aboriginal people rightly felt that this might detract from or dissipate their work. There is only so much energy and time that people can devote to the subject, as I am sure you are finding out. With the aboriginal one on the agenda, that was pretty well it.

## 1650

As you recall, the Constitution Act of 1982 required just one such conference and I had been part of the preparation for that conference. It became frantic. Since it was the one and only, everything had to get on the agenda. When people said, "Maybe we should have two or three more conferences," it reduced not only the expectations but the agenda. Those conferences demonstrate something which, in part, was addressed by the previous witness, the notion of expectation that a meeting will take place and at the end of that meeting there will be an agreement. If there is no agreement, then people are disillusioned and they are bitter.

The same thing, I would say, would be true of Meech Lake. Had there not been an agreement, I think things had gone too far for people to walk away without saying, "Yet another failure." I know that was not the intention but, having been at Meech Lake and seen the hundreds and hundreds of reporters—maybe that is an exagger-

ation; dozens and dozens of them—and Quebec nationals waving flags saying, "Go away," there would have been a price for failure. All right. I would take the aboriginal question and say that is a separate issue which has to be addressed separately and it cannot be intermingled with other constitutional discussions. I would not say, "Put aboriginal rights and Senate reform on the same agenda." To me, that is just not on.

Take the other issues, the women's one and the minority language one. I think the whole question of language is very important in Canada right now. We are seeing the government of Quebec being challenged. We see a debate in western Canada. We see debate in this province. If you look right across the country, you will see this is surfacing and it shows that maybe Canadians are not as tolerant or accepting of this policy as we might otherwise have thought. Constitutional guarantees are very important at this stage.

What can you do? I referred to this in my presentation and perhaps I should develop it a little more fully. With an annual meeting of first ministers on the Constitution, I think your committee will become a standing committee of this Legislature or provincial Parliament; and you will probably either be holding hearings simultaneously or just before first ministers' conferences where you can then write reports and give recommendations as to what should be on the agenda.

I think committees such as this can determine the agenda in the future as opposed to coming into the process at the end. If anything means that constitutional discussions will be alive in Canada, it is the fact that there will be annual meetings and that groups such as this will continue to meet. Different citizens' groups and individuals can come forward and say, "We think certain things should be done."

Moreover, I feel that, with Supreme Court decisions coming down, people are saying: "We have turned the Constitution over to the courts. It is terrible." I am not convinced that it is terrible. I am not sure we have turned the Constitution over to the courts. The courts have in the past come down with opinions that some people like and some people do not like. In our system there are going to be winners and there are going to be losers in terms of court decisions. What it does mean is that, if people do not like what they hear or see, they can come before this committee and say, "We recommend you recommend changes."

In all of the hearings, for example, for the Pepin-Robarts commission or the parliamentary



committee which went across Canada between 1970 and 1972, people spoke about every possible subject. Then your job is to take it, filter it and make recommendations on the floor of the Legislature.

I am excited about this because what you are seeing is the end of one process. To me, Meech Lake is not the beginning, it is the end of "What does Quebec want?" and resolves an issue which has been debated in Canada for 25 years. We are seeing the beginning of another process. The other process is a much greater public involvement in constitutional development and it is going to be a binding result of court decisions, hearings such as this and presentations to governments. It will be, in my view, a cyclical process; it will continue to unfold, which means that constitutional questions will become matters that Canadians do take seriously and debate.

I am very excited about the future. I feel that you probably have a lot of hearings ahead of you, far beyond Meech Lake.

Interjection.

**Dr. Meekison:** Sorry about that.

**Mr. Chairman:** You will notice some people disappearing below the table.

**Dr. Meekison:** I have been advising the government of Alberta on constitutional matters since 1969. There is far more discussion and interest in the Constitution, and the manifestation of this was the public hearings that were televised in 1980-81 in respect to the Charter of Rights. That is what has given rise to this interest, and I do not see it diminishing. It will place a great responsibility on governments and, to me, on legislatures.

Sorry for the long answer.

**Mr. Chairman:** On behalf of the committee, I want to thank you very much for coming and joining us this afternoon, both for your paper and for the answers to our questions. We do very much appreciate that you were able to meet with us and share the reflections of your own experience, which, as you state, has gone on since 1969.

While we perhaps were reacting with some humour to the thought that we would be doing this for weeks and months and years, I think that if we have discovered one thing through our deliberations to this point, it is that while constitutional amendments may not be what every Canadian citizen most wants to talk about, there certainly is a very representative group of the public out there that feels strongly about a whole series of issues.

While they may not all be able to be solved in a constitutional way, none the less hearings such as this do provide a forum to wrestle with some of those issues and to get them on the public record. I think you are probably quite right that we are going to be hearing a lot of interesting things in the future, whether on Senate reform or any of the other issues that we have been discussing.

We thank you very much for your perspective and for being with us this afternoon.

**Dr. Meekison:** Thank you very much.

**Mr. Chairman:** The committee will stand adjourned until 10 o'clock tomorrow morning in this room.

The committee adjourned at 4:57 p.m.

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**Witnesses:****Individual Presentations:**

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Bliss, Dr. Michael, Professor of Canadian History, University of Toronto

Meekison, Dr. J. Peter, Vice-President (Academic), University of Alberta

Bedford, David, Research Officer, Legislative Research Service











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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Tuesday, March 29, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, March 29, 1988**

The committee met at 10:13 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

(continued)

**Mr. Chairman:** If we can begin our session this morning, I would like to welcome Ronald Leitch, who will be our first witness today, representing the Alliance for the Preservation of English in Canada. Welcome to the committee's hearings, Mr. Leitch. Our normal procedure is to have you make your submission and then we follow up with questions on the different issues you have raised in your presentation. Perhaps without further ado, I will simply turn the microphone over to you and we will proceed.

### ALLIANCE FOR THE PRESERVATION OF ENGLISH IN CANADA

**Mr. Leitch:** I would first like to apologize for being late in arriving this morning. I unfortunately had car trouble and it is still sitting in the garage. I am pleased I was able to get here anyway.

**Mr. Chairman:** We can all relate to that problem.

**Mr. Leitch:** The purpose of this submission is to place on record the opposition of the Alliance for the Preservation of English in Canada to the acceptance by the province of Ontario of amendments to the Constitution of this country which are set out in the Meech Lake constitutional accord.

In 1982, substantial amendments were made to the British North America Act, 1867. These amendments were accepted by the federal government and all provinces through legislative enactment, with the exception of the province of Quebec. Since that time, a myth has grown up, fostered to a large extent by political posturing and aided and abetted by the media of this country, that the constitutional amendments of 1982 did not apply to Quebec because it did not sign the agreement.

Nothing could be further from the truth. This statement is supported by the Supreme Court of Canada's decision that Quebec does not have a veto with respect to constitutional amendments. Of course, there was the further decision of the Supreme Court of Canada, prior to the institution of the Constitution, when it said that it only

needed a majority of the provinces as well as the federal government's acceptance of the changes.

It is the contention of APEC that Canada as a whole represents a very distinct society, a very distinct country, made up of the whole of the people of this country. To recognize the distinctiveness of the society of Canada in the Constitution is one thing; to single out one province as creating that distinctiveness is an insult to the national pride of all Canadians. The use of this term "distinct society," in our opinion infers that the distinctiveness of Canada as a country and a nation lies only in the province of Quebec. We believe that the people of this country are proud of the distinctiveness of this country as a whole and reject the proposition that its distinctiveness lies only in Quebec.

It is APEC's contention that the designation of a "distinct society" creates a special status for the province of Quebec within Confederation. The concept of a special status for any one part of this country is repugnant to the equality of status of all people of this country. If within a family the parents show favouritism towards one member of that family, such favouritism can only lead to discord within the family unit, which in time will lead to its breakup, each member going his own way so that he will not continually be confronted with this favouritism.

Canada is a family. The provinces are the components of that family. To be continually confronted with a special status for one province can only lead to disunity and discord within the family of Canada. The designation of Quebec as a "distinct society" is the creation of a special status. The development of Canada as a nation will in the future be continually hampered by such a designation. The request by one province to have itself so designated displays a selfishness and an egotism which bodes ill for this country.

The very words "distinct society" create the notion of, and give credence to the concept of two nations. The historians of this country, as well as that eminent constitutional authority, former Senator Eugene Forsey, have repeatedly stated that the two-nation concept is a myth. Dr. Forsey has stated that the concept of Confederation as a pact between two founding peoples, two linguistic groups, relatively evenly balanced, is a fairy tale. He further stated, "Over and over

again the Canadian Fathers of Confederation, French, English, Irish and Scots, declared emphatically they were creating a new nation." This constitutional accord attempts to give recognition to the pseudo-history of this country which fosters the recognition of myths and fairy tales about two nations and two founding peoples.

### 1020

To grant to the Legislature and the government of Quebec the right to preserve and promote the "distinct society" of Quebec will be a millstone around the necks of the English-speaking people of that province. Most people, in thinking of Quebec, think in terms of the large ethnic population. Too few people realize that Quebec is the fourth-largest English-speaking province in Canada and that the city of Montreal is the third-largest English-speaking city in Canada.

Quebec has already indicated, through its legislation of Bill 101, its intention to eliminate the English character of the province. Bill 101, as enacted by the government of Quebec, is repugnant legislation to the notion of equality of status of all Canadians. To give constitutional sanction to that repugnancy is, we believe, unacceptable to the people of this country as a whole.

The sections of the accord dealing with immigration are, once again, the creation of special status for Quebec. The notion that this country should guarantee to Quebec a certain percentage of all immigrants every year is totally unacceptable. It should be obvious to all concerned that the implementation of this guarantee is almost impossible of performance. Is our immigration policy to be so hamstrung that each year we have to count noses on how many people are immigrating to Quebec, and to control the immigration to the other provinces by the number of people who are taking up residence in Quebec? Is this country about to embark upon a program of telling its immigrants where they can and cannot settle in this country so that we can satisfy this special status granted to Quebec?

It is also unacceptable that this special status of guarantee should be enhanced by permitting Quebec to exceed its quota by five per cent for so-called demographic reasons. What are those demographic reasons? That Quebec has the lowest birth rate in Canada? That people are emigrating from that province at a greater rate than immigrants are arriving? If those are the demographic reasons, it behooves Quebec to ask itself why this is happening.

Quebec is one of the wealthiest provinces in this country. It is not a have-not province. It is a province of immense natural resources, a province with a distinct location on the seaway, a province with much industry and commerce, and should be able to retain the immigrants that come to its borders. The root cause of the disaffection of the people of that province which prompts them to emigrate is, we believe, the attitude of the government of Quebec. That attitude is an inward-looking nationalism that leads to laws and regulations which many people consider repugnant, and as a result they leave the province.

It is because of this steady flow of people out of Quebec that the immigration agreement with that province which is proposed under the Meech Lake accord is unacceptable. It means that Quebec has a distinct advantage over all other provinces in determining the character of the people who enter this country and who will subsequently leave that province and settle in other parts of Canada. The choice of immigrants to this country is therefore largely in the hands of Quebec and not of the national government of this country. We do not have Berlin walls in this country. Once a person is settled as a resident and a citizen of this country, he or she is free to move wherever he or she wishes, and that is how it should be. That being the case, however, we cannot leave a disproportionate amount of the choice of immigrants to the province Quebec.

To provide in any immigration agreement that the government of this country will withdraw its services for the reception and integration of all immigrants who wish to settle in Quebec is totally unacceptable to the people of this country. It is a denial of Canadian nationhood. To go further, to say that Quebec should be compensated for the withdrawal of those services is absolutely ludicrous.

It is APEC's opinion that the final court of appeal of this country should have the best legal brains that this country has to offer, that promotion to this court should be by merit, not by language, political considerations or any other self-imposed restrictions. The moment you begin to put restrictions on appointments of this nature, there are a vast number of considerations which must be looked at. The entrenchment in the Constitution of a guaranteed number of justices from Quebec is not acceptable. The stated purpose for this guarantee is that the province has a system of civil law, while the other provinces operate under the common law.



We would not deny that this stated purpose has some merit. We do not believe, however, that the motive behind the request has anything to do with the system of civil law. It is a matter of language and culture which the French-speaking people of Quebec are continually putting forward as a reason for their "distinct society." When you take with this the provision that the appointment can only be someone approved by Quebec, is there anyone who believes that an English-speaking lawyer will ever be appointed to the Supreme Court of Canada from Quebec?

Under such circumstances, the Constitution of this country should go on to state that the French-speaking lawyers from the rest of Canada are not eligible for appointment to the Supreme Court of Canada. We in APEC believe that the people of this country would find such a proposal unacceptable. By the same token, it is our opinion that the Canadian people find unacceptable a constitutional proposal that allows Quebec to nominate and be guaranteed a fixed number of judges on the Supreme Court of Canada, and that this is an insult to the national pride of all Canadians.

When the Meech Lake constitutional accord is viewed in its entirety, one gets the distinct impression that this country of Canada is being fragmented and balkanized under this document.

1030

You cannot legislate acceptance and respect for a person or a group of persons. It can come only from knowledge and understanding and a willingness to work together. Acceptance is a two-way street. Willingness and understanding, if it is on one side only, will never bring about national unity.

Quebec must cease to seek special status in this country, must cease to isolate itself, must cease to build a wall around itself based on language and culture. Canada is a great country from sea to sea. It can remain a great country only if its people, all its people, have a unity in action, a unity in purpose, a unity in effort and a unity in meeting the challenges of a country inhabited by people of such diverse ethnic origins.

**Mr. Chairman:** Thank you very much, Mr. Leitch. You have underlined a number of major issues and you will appreciate that at this point in our hearings we have touched upon some of these but I think not always from the same perspective or focus. We thank you for your brief and for underlining some of the concerns that are related specifically to your organization.

I wonder if I might start the questioning by asking you one thing. With respect to the

concerns about the immigration matter, in the actual text of the 1987 constitutional amendment it does not talk about the percentages that you refer to in your brief. Those were part of another statement.

My understanding is that whatever agreement is reached between Quebec and the federal government with respect to immigration must be approved by the House of Commons and the Senate as well as by the Quebec Legislature. At the present time, the Cullen-Couture agreement, which is the one that exists right now with Ontario and Quebec, was an agreement solely between governments; it was not debated or voted upon in the House.

Any province would now be able to enter into an agreement with the federal government, and in point of fact there are six agreements right now between different provinces and the federal government, although the Quebec one is the most extensive and elaborate.

Could the argument be made, however, that because the House of Commons and the Senate would debate any future agreement, whether between Quebec and the federal government or any other province and the federal government, that would perhaps provide greater protection than now exists in terms of what it is that Quebec or another province would or would not be permitted to do?

I would just like to get your thoughts on that one, because I find it interesting that the agreement itself does not go into those specifics in the way that some of the preamble material did.

**Mr. Leitch:** I do not set myself up as a constitutional authority or an immigration authority. What I would like to say is simply this. The accord itself refers to the percentages and says that any agreement Quebec enters into must have those kinds of provisions in it, the withdrawal of services and the right to have a percentage that is increased, and the accord is only being signed because those things are in it. It says that any agreement that Quebec has must include those terms.

In other words, if the accord becomes part of the constitutional laws of this country, it would not, in my opinion, be possible for the Senate and the House of Commons to deny Quebec that percentage, that guarantee and that withdrawal of services and payment. I think that would have to be part of it. I feel the only way in which you can control that at all is by the rewriting of the resolution which is proposed for adoption by all the legislatures. In fact, in some of these things,

in immigration, you have to get back to the very basics before you are going to be able to come up with something which is going to be acceptable to all the people of this country.

You know as well as I do that people in this country move around to a great extent; people move from province to province. That did not happen when I was a youngster growing up in this country, but in the last 20 years, the way in which people move from province to province is something that has amazed me, and that is going to continue to happen. My feeling is that we are giving Quebec an unfair advantage, or giving the rest of the provinces a disadvantage, in this respect, if we go along with these immigration proposals.

**Mr. Chairman:** I think you underline another aspect which could be troubling, which is the right of movement as set out in the charter, the whole question of mobility rights. I had thought they were trying to deal with that in the accord. In subsection 95B(3), they note that the Canadian Charter of Rights and Freedoms applies in respect of any agreement, again whether with Quebec or others.

As I understood it, the reason for putting that in was to ensure that at present and in the future, if any immigrant arrives in Quebec, Ontario, wherever, and tomorrow morning wants to go to Vancouver, there is nothing that can interfere with that right, and I do not think we would want anything that could interfere with that right.

**Mr. Leitch:** I am probably not expressing myself very well, because we want those mobility rights to remain. We are not for tampering with mobility rights at all.

What I am really saying to you is that, in the selection of people who are going to come into this country, the type of agreement we see is going to be brought about as a result of this accord gives to the people of Quebec and the government of Quebec an advantage over all other provinces in the total number of people who are coming into this country. I say that is not fair; it is not fair to guarantee them.

If people do not want to go to the province of Quebec, they should not have to go. If people want to leave, they should have the right to leave. Why set up a special status for this province so that it can, in fact, control immigration? What you have to understand is that, in fact, these agreements allow the provinces to establish the point system, the quota system, and the basis on which people are going to be allowed into their provinces.

In fact, Quebec has its own point system now. If you were immigrating to Canada and spoke either the French or the English language, you would be awarded five points towards your immigration status. If you were applying through the province of Quebec and you were French speaking, you would be allowed 15 points. If you were an English-speaking person coming to the province of Quebec, you would be allowed two points.

We are setting up a system whereby the province of Quebec can determine the character of a large portion of the immigrants to this country, because their portion of the immigrants is based on their population. Because they have a population in excess of six million, they have an opportunity to determine the character of the immigrants, of a lot of the people who come to this country. We find that unacceptable.

**1040**

**Mr. Chairman:** I appreciate your point and I do not have all the answers to that. The only thing that struck me was that what is different or would be different is that any agreement reached in future would have to be voted upon by the House of Commons and the Senate. At the present time, they have no role at all in any agreement with any province.

It seems to me that one of the ways to protect, let us say a national interest, whether it is with respect to Quebec, British Columbia, Ontario or Newfoundland, is the concept that the House of Commons and the Senate are involved. I like that. It is not just a kind of executive decision but indeed one that would have to be debated fully.

For example, the very points that you have just raised would have to be aired in the context of whether this is something which we, assuming we were in the national Parliament, would see as something that was acceptable. But I appreciate your points. What we are doing here is just trying to explore.

**Mr. Leitch:** I think that is an improvement, because before it was just an administrative and executive decision. That part of it is probably an improvement. What concerns me is that the moment you grant to Quebec a distinct society status or designate it as a distinct society, whatever you debate in the House of Commons or in the Senate is going to have to reflect the terms of the overall agreement of Meech Lake.

You are going to have to make your decisions within that, because they are going to say to you: "Look, this is in here. We are entitled to this kind of consideration." Even though it is going to go before the House and the Senate, I do not think



that leaves the House and the Senate much room for movement.

**Mr. Matrundola:** I want to welcome Mr. Leitch here. I have known him for many years. I congratulate you on your fine presentation, so eloquently spoken.

**Mr. Leitch:** Thank you very much.

**Mr. Matrundola:** It has been a pleasure. I think you are a concerned Canadian and I personally welcome your presentation.

**Mr. Harris:** I too welcome you, Mr. Leitch, to the committee. I agree with you on immigration. It causes me problems as well. I am not so sure that I have as many concerns with the Supreme Court as you have, but I want to ask you about this distinct society. Many people have come before us and many talk about the worst-case scenarios and how that would affect them, be they women's groups or groups concerned about national programs and social programs.

I want, if I can, to set a scenario for you and I would like your reaction to it. Many have come before us, the majority I think, on "distinct society" and said that they interpret the "distinct society" of Quebec to include the English minority. I think everybody agrees with you that we are all distinct and that we are all unique in many ways. But when it comes to language—and culture, if you like, but let us just leave it with language for now and everybody can extrapolate that however they interpret it—Quebec is distinct or unique within Canada as a province in that the French language is the majority in that province and it is not that way in the rest of the provinces; English is the majority language.

I think you would agree that when we are talking about "distinct society," we are talking about language and whatever that definition is of language, and we are not talking about many other things that make us all distinct. In that one regard, Quebec is distinct.

As I say, many have said that definition of distinctness includes the English minority and the French majority. The second provision is that all provinces, including Quebec, must recognize and protect minority language groups. That is also in the interpretive section. I think I accept that this is the interpretation that is most likely to come out of this agreement.

I realize I am hypothesizing—if that is the right word—but most of those opposed to this agreement, the Trudeautes if you like, the people who say, "We have a different vision of this country than Quebec, which is more French than the rest of Canada, and the rest of Canada, which is more

English than French;" they have, like you, a vision of everything as equal and the same.

Quite frankly, in my view, their vision of Canada is that the rest of Canada will be so French, so bilingual as to be acceptable to Quebec. They will no longer have to fear for their language, their culture and their distinctness. Meech Lake says: "No, that is not necessary. We must protect the French-language minorities in the other provinces and we must protect the English-language minority in Quebec, but we can recognize that Quebec is distinct, is different and is, if you like, the motherland or the mother province of the French language and culture in Canada."

I guess that if you accept all those scenarios I am laying before you, for somebody who is concerned about the preservation of English in Canada, Meech Lake is the very minimum and in fact preferable to the duality of the Trudeautes and their vision of Canada. I wonder if you could comment on that.

**Mr. Leitch:** I find it impossible to accept the kind of scenario you are putting forward. I do not consider myself a Trudeaute, so I do not think I am trying to set out the kind of proposition that Trudeau was espousing. What I have to say to you is, if you want to know and to understand what words in a statute mean, you have to look to the implementation that takes place as a result. The province of Quebec today has legislation, Bill 101, which suppresses the English, the English-speaking people and the way in which they conduct their business, their signs and their advertising.

It does all this without the Meech Lake accord, without saying they are a distinct society. I challenge you to go to Quebec, to the English-speaking people, to the workers in those places and talk to them. They will tell you, "We feel like an oppressed people in this province because we are English-speaking." I have spoken to them and I know that is the way they feel, like an oppressed people because of language and culture.

**Mr. Harris:** I understand all that.

**Mr. Leitch:** If you add to the powers of Quebec by calling it a distinct society and giving it the right in legislation to in fact protect that distinct society, you are giving constitutional authority to the oppression of the English-speaking people of Quebec. Whatever you say about Quebec's distinct society, in fact it has two large groups of people within it, the larger being the French. I read those words in the Constitution as well, and I say to myself, "What does it

mean?" because in fact without those words those people are being hamstrung in that province.

**Mr. Harris:** That is fine. If that is not what it means, then in your view the country will be making a terrible mistake, but if "distinct society" means there is a majority of French and a minority of English and standing beside it is the obligation to preserve and to protect the rights of the minority, if in fact that holds up, are you then concerned about "distinct society"?

1050

**Mr. Leitch:** My concern is that by past performance it will not hold up; it will not happen. I am convinced in my own mind that, if the Meech Lake accord goes through, you will find that the English-speaking people in Quebec will be subjugated. I think they will leave that province in greater droves than they have left now.

I spoke to a doctor in Montreal who told me that he was treating English-speaking people for the stress that is created by Bill 101. He said, "I am doing it on a daily basis." These people are under constant stress and threat because of the French language and the French culture and the way they are being applied by that province. If you take that sort of scenario without a Meech Lake accord, what can happen when you have a Meech Lake accord? I do not agree that the English-speaking people of Quebec are going to be protected by the Meech Lake accord at all. I do not believe that will happen. I really do not.

**Mr. Harris:** What about the French-language minority outside of Quebec? A number of the groups share your view that Meech does not provide protection for the minority. In their case they are concerned about the minority of French-speaking citizens outside of Quebec. I find it a little ironic, and maybe it is just because of how all the interpretations come together, that l'Association canadienne-française de l'Ontario and the Alliance for the Preservation of English in Canada are coming to me saying exactly the same thing.

**Mr. Leitch:** I suppose for different reasons.

**Mr. Harris:** I thought there might be some different reasons.

**Mr. Leitch:** You will excuse me if I refer to the history of this country. I am not an historian, I am not an authority on the Constitution, but I have done a lot of reading that a lot of other Canadians have not done. I want to say to this group here today: examine the historical documents of this country right from the times of the

Plains of Abraham up to 1867 and show me one document that has any reference to language at all. There is only one and that was the Act of Union of 1841 which made English the official language of this country.

In 1867, we had the British North America Act. There is only one section out of about 150 sections that has any relation to language whatsoever. That is section 133, which says that the Legislature of Quebec and the courts in Quebec may use either the English or the French language. The Parliament of Canada and the court created by that document, which is the Supreme Court of Canada, may use the English and the French languages.

There is nothing in that document which says that the civil service of the province of Quebec should be French. There is nothing in that document which says that the civil service of the government of Canada should be French or bilingual. Absolutely nothing. Language laws and language difficulties in this country were created in 1969 with the passing of the first Official Languages Act. That is when it all started.

Before that, gentlemen, there were no language problems. Donald Creighton, an eminent historian, said—I do not have his quote right here and I am not saying it word for word—that the people of Quebec got exactly what they asked for in the British North America Act of 1867. They asked for no more language rights than were set out in section 133 and they were given those language rights in 1867. He said that is supported by the constitutional documents of this country.

We are creating these problems for ourselves right here in this country now by creating something that did not exist, something that was not the basis of Confederation at all.

**Mr. Breagh:** I have a couple of quick questions. You have given us your opinion on the existing immigration agreement between the federal government and the province of Quebec. Do you have any comments on the other five existing immigration agreements between different provinces and the federal government?

**Mr. Leitch:** No, I do not. As I mentioned earlier, I think probably before you came in, I am really not an authority on immigration. All I am looking at is what the Meech Lake accord itself said would be in any agreement which was for Quebec. I do not know what was in the other agreement. I do not even know what is in the existing agreement for Quebec. I am looking only at the Meech Lake accord which says that, in any agreement with Quebec, certain things are



going to happen, certain things are going to be there. Those are the three things I mentioned in my brief. I really cannot comment on the others.

**Mr. Breagh:** That is not quite true, but do you have any objection to provincial governments entering into immigration agreements of any kind with the federal government?

**Mr. Leitch:** I have not really given too much thought to that aspect of it, but what I would say is that, in my opinion, any immigration agreement should not create any special status for any one province, no matter what that province is; no special status, no special setup so that it has an advantage over other provinces, and I think that is what the Meech Lake accord does.

**Mr. Breagh:** So you would argue now that six of our 10 provinces are operating improperly by means of having an immigration agreement of any kind; that they should not have such things?

Let me just explain a bit. Each of the immigration agreements is, essentially, a province saying to the federal government, "These are the conditions under which we would like to receive immigrants." For the most part, they talk about the kinds of skills they would like to see brought into their province. In a nutshell, what we are talking about here is that each of the provinces has traditionally said to the federal government, "These are our needs as a province, so when you are doing immigration matters, these are the kinds of people we would like to have streamed into our area."

As a matter of fact, I think most of the members of the committee were unaware that there were this many immigration agreements and had not seen them until we began these proceedings, but perhaps that is saying something: they were in operation and working in six of the 10 provinces and not causing any problems. They did not seem to cause a problem until somebody saw it mentioned in the Meech Lake accord.

**Mr. Leitch:** Yes, you see, it is my understanding of the British North America Act of 1867 that immigration was something that was going to be a joint undertaking of the government of Canada and the provinces.

**Mr. Breagh:** Yes.

**Mr. Leitch:** I think that has been part of our history since Canada became a country. I cannot take exception to the fact that that is the way it was thought immigration should work. What I am taking exception to is that any province should be given in our Constitution an advantage over another province in the question of immi-

gration. I believe that what the Meech Lake accord does in fact is give an advantage to Quebec; it gives it a special status that none of the other provinces would have.

**Mr. Breagh:** OK. I do not think very many people would agree with you on that.

Let me just pursue one other area. You have got quite a spirited attack going here against the Supreme Court of Canada. You have a description of the existing process whereby we appoint people to the Supreme Court, the makeup and why, all of that. What leads you to believe that is wrong? What problems do you see now in the existing makeup of the Supreme Court that would warrant such massive changes as you are proposing here?

**Mr. Leitch:** I am not proposing any massive changes at all. I am saying, "Don't put those proposals that are in the Meech Lake accord into—"

**Mr. Breagh:** They are not. That is the problem. You have a description here of the existing process whereby we appoint people to the Supreme Court of Canada. You are saying it is quite wrong. That process is not addressed in the Meech Lake accord. There is a different process that is addressed there.

**Mr. Leitch:** It is not the process. It is the guarantee, a guarantee which is being given in the Meech Lake accord to Quebec.

**Mr. Breagh:** No, excuse me. I must be reading a different document. I see no guarantee. I only see in the Meech Lake accord an agreement that each of the provinces will now assume the responsibility for putting forward nominations. They do not have the right to appoint. There is nothing in there that talks about the makeup of the court, who comes from where, who has a background in what. None of that is contained in the accord. You have taken the time to put a rather spirited position here. I want you to elaborate on it.

1100

**Mr. Leitch:** It is my understanding from the Meech Lake accord that what is happening here is that, first, under this agreement, the government of Canada cannot make the appointment.

**Mr. Breagh:** No. That is a question—

**Mr. Leitch:** I agree the government of Canada is going to make the appointment. There is no question that the appointment is going to come from the government of Canada, but it cannot make that appointment unless the person who is being appointed is approved and on a list given to the government by the province from which the

appointment is coming. It is my understanding that is the way this is going to be. From now on, the provinces will have their own lists and the government of Canada, while it makes the appointment, is going to have to choose from the list it has.

In addition to that, the accord document itself says that Quebec shall be guaranteed three persons sitting on the board.

**Mr. Breagh:** Excuse me. That is not in the document at all. That happens to be our practice now. That has nothing to do with the Meech Lake accord. I would appreciate your argument a bit more if you were saying that none of the provinces should have the right to nominate people for the Supreme Court of Canada, which some people have argued; that the people of Canada do not have a right to know where these nominations come from and that in general terms not one of the provinces should have such a right.

I do not subscribe to that point of view, but that certainly has been put to the committee. Much of what you are discussing here is not part of the Meech Lake accord. That is current practice. If you want to marshal an argument against the current practice, I would like to see a little more in the way of specifics of how the courts malfunction or something.

**Mr. Leitch:** I do not have my Meech Lake accord document with me and I—

**Mr. Breagh:** You do not carry it next to your heart, as we do?

**Mr. Leitch:** So I am sorry, I cannot elaborate any more than I have. It is my understanding that there is going to be a guarantee given to Quebec and that is why it is in my brief. I believe that when Quebec put this kind of proposal for guarantees forward, what is behind this is a question of language and culture and not necessarily qualification.

I am not saying they are going to put a dough-head up for the Supreme Court. I do not want to appear to be that ridiculous. What I am saying is—

**Mr. Breagh:** We have one for Prime Minister. I do not see why the courts should be different.

**Mr. Leitch:** —that the consideration will be language and culture. That is why I made the comments I did.

**Mr. Breagh:** Let me just conclude with one final little point. A lot of us have been troubled by minority language rights in Quebec. Where I have some difficulty with it is that I do not deny for a moment that the government of Quebec has

a legal right, being properly elected, to pass laws, even laws I do not like. The best I can offer to anybody is that if they pass a law and you do not like it, you can challenge it and go to court. That in a nutshell is what is happening.

Quebec passed a language law which some people did not like. They are in the process of taking that law to the Supreme Court of Canada, ultimately. It does not get any better than that in a democracy. You sometimes elect wrong governments. They sometimes do things which I personally do not like. I am still trying to find out who elected Brian Mulroney; nobody will admit to that. But these things happen in a democracy and the best we can offer to people is that if you do not like the government of a given province, you can throw the bums out at the next election. In the meantime, you have a legal right to go to court. That is as good as the democratic process can offer to anybody.

I would like you to comment on that a bit, because you did spend some time talking about one specific law in Quebec. I think it is fair to categorize it as a general attitude on matters of language that at least two duly elected governments in Quebec espoused. Whether we like them is another matter, but we cannot get away from the fact that the people of that province elected both the Péquiste and the current Liberal governments. Both governments put forward language legislation of a similar nature and both have had their laws tested before the Supreme Court. Sometimes they hold up and sometimes they do not, but that is what a democracy is about. How do we get around that little awkward problem?

**Mr. Leitch:** I would be the first one to agree with you that in fact Quebec has the power to enact the legislation it has enacted. I would not take exception to that at all. They have the power. We have the power to do just the reverse here in this province, if we so desire, and so have all the other provinces. Language is in this provincial sphere and is a proper subject for legislation in each of the provinces.

The difficulty I have with the problem is that here we have a country which espouses official bilingualism, which is the creation of an artificial need for the use of the French language in government, in government services. The government, in its implementation of that, has done all sorts of things across this country to bring about a status of official bilingualism in all the provinces. Never, at any time, has it—I am talking about our government now—ever challenged Quebec on its legislation.



In all these things it is a question of implementation. You legislate and then you implement. If you read the legislation and you look at it and say, "That is what it is;" and then you go and find that a different interpretation is being put on it when it comes to the question of its implementation, I find great difficulty.

For instance, if you take the Manitoba crisis in 1984 and 1985, the government of our country passed a resolution in support of the Pawley government's resolution for official bilingualism and French-language services. But when Bill 101 was passed in the Quebec Legislature, they did not pass any resolution which said: "Hey, you should not be doing this. We are an officially bilingual country." They did not do that kind of thing.

They spent hundreds of thousands of dollars advertising in 1984 and 1985 in Manitoba. They did not do it then. When the challenges to the Manitoba Act were done, they spent hundreds of thousands of dollars in taxpayers' money to bring those people to the Supreme Court of Canada and give them an open track. Do you know that it has taken 10 years to get the challenges of Bill 101 before the Supreme Court? Mr. MacDonald's case on his traffic ticket was only heard about a year ago. Mr. Singer's case on his sign was only heard last November before the Supreme Court. Those actions have been going on now for some 10 years to get to the Supreme Court of Canada.

It is the implementation. It is what is happening when these language laws are being implemented that leaves so many people upset. Some people say to me, "Look, Bill 101 is provincial legislation and it has nothing to do with Canada and, therefore, there is nothing that Canada can do about it." My only answer to that is this: the people of this country do not separate it and say, "There are so many items for consideration by provinces and so many items for consideration by the government of this country and never the twain shall meet."

The people do not look on the separation of the powers of provinces and the Dominion. What they do is look at what is going on in the country as a whole, and in the one country they see a province which is declaring itself unilingual and they find that the rest of the country is being forced to be bilingual. That is the kind of thing that upsets the people because they do not make the distinctions that legislators do between spheres of activity, between provinces and countries. They look at what is happening as a whole.

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**Mr. Morin:** Mr. Leitch, you indicated that all Canadians should have the same rights and that differences among Canadians should not be promoted in the Constitution. If Quebecers say that they require—

**Mr. Leitch:** Where did I say that, sir?

**Mr. Morin:** You mentioned that everybody should have the same rights.

**Mr. Leitch:** I think there should be equality of status.

**Mr. Morin:** If Quebecers say they require special protection of their culture in order to be comfortable within Confederation, do you think their concerns should be addressed?

**Mr. Leitch:** I think we have addressed them. We have addressed them on a number of occasions. We have addressed them to the extent that it is now acting to the detriment of this country, and I believe that. I believe that the continued unity of this country is being affected by the continual harping on special status for Quebec. I believe that with all my heart. I do not want to see the breakup of this country, believe me. I do not want to see it, but somewhere down the road it is going to happen. Believe me; it is going to happen. If we keep on going the way we are going now, creating special status after special status for one province, Confederation will never last.

**Mr. Morin:** The Meech Lake accord places each province on an equal footing when it comes to constitutional reform. It provides a guarantee to each province that its rights will never be trampled by the majority of provinces. Is that a bad thing?

**Mr. Leitch:** I suppose you could answer yes or no to the question, and if all questions were that simple then we would not be here today; but you cannot answer yes or no to the question, obviously. I think that there has to be a spirit of co-operation and willingness between provinces to understand and to work with each other. I do not think we are experiencing that today. I do not think we are experiencing it at all.

**Mr. Morin:** One of the witnesses was Gordon Robertson, who was a senior adviser to Mr. Trudeau, and he made quite a statement. He said that the failure to implement the accord may well be the beginning of the road to separatism. Could you comment on that.

**Mr. Leitch:** I would say that the implementation of the accord will lead us well on the way to separatism. I believe this country is being

balkanized by this document. I think we are being fragmented. The question of unity, the question of nationhood is being challenged by this document, and I do not like it.

I gave six years of my life and laid my life on the line for this country and for the freedoms and rights which existed at that time. I do not want to see someone come along and chew that six years of my life up by making constitutional arrangements which are not acceptable to the vast majority of the people of this country, and that is what is happening with the Meech Lake accord.

**Mr. Morin:** What you are saying, in reality, is that if the accord were not to go through, you would not care whatever happens to Quebec?

**Mr. Leitch:** I never said that at all; you are putting words in my mouth. What I am saying is that if the Meech Lake accord goes through, this country will be fragmented and balkanized and eventually there will be separation anyway. That is what I think.

**Mr. Chairman:** Thank you very much, Mr. Leitch, for coming here this morning and presenting your thoughts and reflections and views in a very forceful manner. I suppose one of the good things about the country is that on issues like this there are strong differences of opinion and we are one of the fortunate countries where those can be expressed in all political forums. I think that is certainly a distinctiveness about Canadian society that we all want to preserve. Whether we all agree with every sentiment or thought that each of us might have is not really the case, but those can be presented. We thank you for coming this morning and for your brief.

**Mr. Leitch:** Thank you very much. I want you to know that I too believe in democracy and that when it comes to a question of what are going to be the laws of this country, if the Meech Lake accord becomes law then I have to accept it live with it. I am content that this is the way it has to be in a democracy and I thank you very much for the opportunity of being here and for being able to freely express my views on this subject.

**Mr. Chairman:** If I might then call upon our next witness, Mr. Nicholas Tryphonopoulos. Please be good enough to come forward. We have a copy of your statement. In order to ensure you have plenty of time to make it, so we can enter into a good discussion with you, I will say welcome and turn the mike over to you.

NICHOLAS TRYPHONOPOULOS

**Mr. Tryphonopoulos:** I would like to thank you for the opportunity to bring to your

committee my concerns about the Meech Lake constitutional accord. I would like also to express my appreciation to the staff of the clerk's office for being helpful.

My presence here today is due to the publicity given to these hearings by the Ad Hoc Committee of Women on the Constitution. I believe many people are grateful to that organization; certainly I am.

I have watched many sessions of your committee on television and I know that many competent and concerned persons, such as the Honourable Don Johnston and lawyer Morris Manning, have stated their reservations about the accord. I share their reservations and will not try to repeat what they have already so eloquently told your committee. You will agree with me that these persons are not enemies of the Quebec people. They are simply deeply concerned about the future of this country, and for their concern, I am grateful.

I think that after several weeks of hearing the same objections over and over to the "distinct society," the opting-out clause, the amending formula and all the other alleged deficiencies of the accord, it might be appropriate to take a somewhat different approach in my presentation.

First, what do we, the people who have trotted before your committee, represent? In your view, do we represent the people of Ontario or are we some concerned citizens? If the first is true, which I doubt, then the people overwhelmingly have spoken against the accord as it stands today. On the other hand, if we are some of the concerned citizens, then the voice of the people of this province has not been heard on an issue fundamental to the development of this country.

Does the voice of the people count for our leaders, the Premier (Mr. Peterson) and the party leaders? Does it count for our members of parliament, for the members of this committee? I would like to know very much if it does. If it does, how do you plan to hear the voice of the people of this province?

It is my view that not only have the people not been heard from, but even worse, they have been kept in the dark about the implications of this accord. Very skilfully, the elites of all three parties have presented this accord as an initiative to bring Quebec into the constitutional family of Canada. Who could object to that? Besides, the public has more immediate concerns: taxes, insurance rates, rents, among others. The effects of the accord will be felt some time further down the road.



By any standard, the media coverage of the accord has been sporadic and unimpressive. As for serious, comprehensible analyses of the accord, there have been very few. From a little research I did I found there were no statistics available on the coverage of the issue of the accord for the CBC's *The Journal* and CFTO. As for TVOntario, its program *Speaking Out* dealt with this issue in November of last year. I have to give credit to the *Toronto Star* for doing a better job in this case. Meanwhile, we are well informed about the developments in Nicaragua, Panama and Israel.

**1120**

I realize that the government and this committee cannot dictate to the media what they will cover, but as you know, politicians have ways to attract media attention to issues of their own choice. Meech Lake has not been one of them.

Notwithstanding the above, it is in my view one of the responsibilities of a member of parliament to bring to the attention of his or her constituents important issues and to solicit their views. A little informal survey I carried out among friends revealed that none of them had heard from his member of Parliament on the Meech Lake accord, neither at a constituency meeting nor by mail. I assume this is not a typical case. I would be grateful to you, Mr. Chairman, if you could provide me with any information you may have about the action of your colleagues in the Legislature on this matter. Today, I would be happy to hear from the members of this committee on their own activities in informing their constituents about this issue.

I do realize that once the accord had been signed by the first ministers, it created expectations from the people of Quebec. It would create a crisis to reject it and forget about their legitimate aspirations. But in my view, it is the easy way out to say, "Let's adopt it as it is and hope for the best." In our effort to avoid the difficulties that we will have to face today if we reject Mr. Bourassa's demands and ultimatums, we risk the possibility of creating the dynamics for worse complications for the Canadian Confederation in the future, and then the problem may not be Quebec but any other province.

Up until now, the work of this committee has contributed to clarifying to a large extent the implications of the proposed amendments of the accord. I respectfully suggest that in the next stage of your work you focus on the following:

(a) Establish whether there are divergent opinions among the signers of the accord on the implied powers of the "distinct society" clause.

Mr. Rémillard, Mr. Scott and Senator Murray could state their views to the committee on this clause in person or in writing. At least your colleagues in the Legislature will know what they are voting for.

(b) Set certain criteria for considering whether the accord will contribute in the long run to the improvement of the lot of the people of this country, and in particular the native people and the people of Quebec. Among the criteria I would certainly include is the degree to which the amendments infringe on the Charter of Rights and Freedoms of the people, protect our democratic rights from the powers of the political elite, promote unity among the regions and people of Canada and allow flexibility for the evolution of the constitutional document in the future.

(c) It is worth examining how the contention of the political elite of Quebec that the Meech Lake amendments were necessary for the protection of their culture and their national economy is reconciled with their enthusiastic support of the free trade pact with the United States. One wonders whether the anglophone cultural elite exaggerates the danger to its interests.

(d) Examine whether administrative or legislative arrangements could satisfy at least some of the demands of Quebec without having to add constitutional amendments. Such possibilities were identified by the participants of the Mont-Gabriel conference in May 1986.

I do realize that in order to accomplish these suggestions, your committee needs more time and most likely a commission to carry out the job. So be it. We have followed this path on so many issues which were much less important than the proposed changes to our Constitution. I hope that you will not be unduly influenced by the political agendas of the leaders of your parties.

I conclude by pleading with you that whatever the recommendations of your committee will be, at least object to the request for expanding the unanimity requirement. It inhibits the constitutional evolution of this country. I am not an alarmist. I have faith in the love of the people of Quebec for this country. Thank you.

**Mr. Chairman:** Thank you very much. You have raised a number of interesting questions. I have enjoyed the fact that you have thrown a number of questions rather directly back at members of the committee, if not the members of the Legislature. It does raise a whole series of interesting observations on process and this whole question, especially with constitutional discussions, of the role of elites versus how the

ordinary person, however we define him or her, is involved in this. I am sure that as our questions proceed, we will, I hope, get into some discussion of that.

**Miss Roberts:** Thank you, sir. Your brief was excellent, to the point and gives us many things to think about. To carry on from what the chairman has just said on process, I can see you have thought about that a lot, not only the process we are going through now, but also the process we went through to get to this point. I have read through your suggestions of what we should focus on now. Could you briefly fill me in on what you considered, along with the process, up to this point?

**Mr. Tryphonopoulos:** I would be happy to. First of all, I know that a lot of the members of the committee in the past have emphasized what was traditionally done in the past century or whenever, and it is true that if one goes back and maintains the tradition, there is no hope for any change. But presumably nations have evolved. One expects that we are going to become better than was the case in the Family Compact situation.

In this particular case, the least I expect is to have every member of parliament vote freely without any imposition of directives from the leader or the party. I would feel much happier seeing more discussion, in a very simple way, of the Meech Lake accord with the people. As I pointed out, the media have not done a good job in my judgement. The schools have not done a good job and the universities have not done a good job. I have observed that a lot of academics came here and spoke, but who listens to them? Very few people. At least in this particular case, I say, do not accept that we have to be bound by what the leader has said on this.

I realize that Mr. Peterson feels a little bit awkward because he has signed the accord, and this in a way binds him. On the other hand, I would probably expect the members of parliament to have first loyalty to the people and then to the leader. All of us will make mistakes.

**Miss Roberts:** If I might capsulize, you are saying that you do not disagree with the process to get to the Meech Lake accord. The signing of it and sort of saying, "Here it is," is the part you disagree with.

**Mr. Tryphonopoulos:** Yes.

**Miss Roberts:** You think those persons in the Legislature who are going to be voting on it should use their own best political judgement with respect to that.

**Mr. Tryphonopoulos:** Absolutely.

**Miss Roberts:** You are not suggesting that there be a referendum to deal with the Meech Lake accord or anything further than that.

**Mr. Tryphonopoulos:** If I had a choice, yes.

**Miss Roberts:** That is what we want to know, what your choice is.

**Mr. Tryphonopoulos:** Right. In practice, probably this cannot be done at this stage. Certainly if there is a significant—and at least the unanimity part is very significant and deserves a referendum. Again, it might not be practical at this stage, but I will not be satisfied to have my MPP tell me, "I had to vote because my leader said I had to follow the party line."

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**Miss Roberts:** Did you think of what you will do for the future, whether Meech Lake passes or not? We know there are some difficulties in our Constitution that are going to have to be met sooner or later and dealt with. There is growth in our country, the evolution of our society in Canada as well, that is going to have to be met.

Have you thought about the type of process that you might like to see? Forget about Meech Lake. This is the first time, I believe, that legislatures have had a chance to have committees, and that we really have had the right to deal with a resolution that is before us. Have you thought of any other process? Would you like it entrenched in the Constitution, or should it just be in each provincial House as well as in the House of Commons and the Senate?

**Mr. Tryphonopoulos:** Again, I am not a constitutional lawyer, but I think it would be a good idea to make provision for a committee either appointed by all the parties from each province or even elected by the people for a long period of time, six or eight years. These people would have the job of reviewing the Constitution and the amendments and bringing to the attention of the people the implications of these amendments.

**Miss Roberts:** You are talking about a national committee?

**Mr. Tryphonopoulos:** Eventually you are going to form a national committee, but each province will elect its own people. Again, they will not have the power to force the amendments, except to discuss and make an informed evaluation of the amendments for the benefit of the people and probably the legislators.

**Miss Roberts:** Thank you for your answers. They are very direct and topical.



**Mr. Eves:** The previous questions have already answered most of my questions, but I did want to compliment you on a very well intentioned and, I believe, well-thought-out presentation.

I would like to respond to some of your questions. With respect to what committee members are doing in their own constituencies about informing the public, I have a weekly radio program on four different radio stations in my riding, and have had for some seven years. I can assure you that the Meech Lake accord has been the subject of discussion on that program no less than at least half a dozen times in the last few months.

**Mr. Tryphonopoulos:** Great.

**Mr. Eves:** I have weekly newspaper articles in four or five different newspapers, and I can say the same about those as well. I suppose I should mention the Queen's Park Report, which is a report that many members issue to their constituents two or three times a year.

I would like to say at the outset that I agree with points A, B and D that you make. I am not so sure that I agree with point C in your presentation.

I think your point in point A is very well taken indeed, and the committee would be well advised to do that. I quite agree that there are some areas, especially the infringement upon individuals' rights of Canadian people in the Charter of Rights and Freedoms, which may or may not be infringed upon by the Meech Lake accord depending on which constitutional lawyer or expert you listen to at one particular moment in time.

I would like to point out to you that with respect to point D, which I think is a very good point, several delegations and witnesses that have appeared before the committee before you—and you are probably aware of this—have suggested the idea to the committee of the companion resolution or companion resolutions, and I think that is one area that indeed the committee should consider looking into.

I thank you very much for your presentation.

**Mr. Tryphonopoulos:** Thank you.

**Mr. Allen:** I am delighted that Mr. Tryphonopoulos has come before us and is going to help make up the gap he feels that exists in the representation of the people of Ontario before our committee. We have indeed tried, of course, very hard to let people know these proceedings are here and are available to them. We have said no to none that I am aware of. With the TV coverage that is happening, I think there is a

widespread awareness that this is at least going on.

I suspect you are right that some aspects of media coverage could have been better, but it is always difficult to get one's voice as a member heard over all the conflicting claims that people have and the other interests that they do have. Like Mr. Eves, and I am sure other members of the committee could repeat something of his story, I have dealt with it in a variety of forums; but in particular, I have written about it in the local newspaper so that people are aware of some of the issues that are concerning us on the committee.

With respect to the first point that you suggest, number A, for example, I think we have had people telling us what their views are of "distinct society." Our problem, of course, is that Mr. Murray, Mr. Rémillard, Mr. Scott, Mr. Mulroney and the others tend to say somewhat different things. I am afraid that will go on being the case because Mr. Bourassa has a vested interest in exaggerating his accomplishments for the people of Quebec, while Mr. Mulroney has a vested interest in telling Canadians: "Well, it isn't going to do a great deal. Don't worry. It isn't going to disturb your breakfast tomorrow morning." Whether it helps us to ask them once more to say those things, I have some very serious doubts.

It is indeed a curious matter for some of us that, on the one hand, the province is very concerned about its own identity and protecting its cultural interests in North America and, at the same time, runs very strongly on the question of free trade. My own sense of that, from articles I read in *Le Devoir*, is that they do feel they have a kind of protection in having their own language and if they are protected in their language and culture, in more general fashion, they do not have much fear about the capacity of English-speaking Americans to sort of readily penetrate and compete with them on their own turf. They have got a built-in barrier that the rest of us do not have on that business, and I accept their argument that they perhaps are not as exposed as the rest of us.

I wonder if you could tell me a little bit more about something that is a new note for me, and that is in item D, where you suggest that we should "examine whether administrative or legislative arrangements could satisfy at least some of the demands of Quebec without having to add constitutional amendments." Then you add: "Such possibilities were identified by the participants of the Mont Gabriel conference." My limited knowledge of all the proceedings of

the Mont Gabriel conference do not bring back to my mind a memory of those suggestions. Can you tell us in some detail what they were or what the proposals were?

**Mr. Tryphonopoulos:** The unfortunate thing is that the document that I read myself on the Mont Gabriel conference was not extensive; it was more or less summarizing the proceedings. They mentioned there that they felt a lot of the economic concerns that the Quebec government presented at the time through Mr. Rémillard could be satisfied by changing the legislation, or by certain political agreements or administrative arrangements. Again, they did not identify specific things. I recall that they were saying something about the need to co-ordinate or harmonize the stock markets, but again they did not go into any details. I am sorry I cannot give you more information.

**Mr. Allen:** Thank you. It might repay our searching out that document to see just what the contents of those proposals were.

**Mr. Tryphonopoulos:** Right. By the way, I feel it is a privilege to come and express our concerns, give our opinions or make suggestions; but I and many other people who came before you are not experts in many, many things. That is why I feel this committee should press for some people who have expertise on different matters that relate to the accord. As I said, probably a commission is the only way that you can do the job and inform yourselves. I have the impression that eventually, when you get through with this part of the hearings, you might have more questions yourselves than answers to the concerns that the people have presented to you.

**Mr. Allen:** I think that is often the case. The more answers they get, the more questions they have.

**Mr. Chairman:** The amount gets larger every day.

**Mr. Tryphonopoulos:** I sympathize with you and I do not envy you.

**Mr. Allen:** Finally, I just want to say that I appreciate the point Mr. Tryphonopoulos has made that most of the people who have been coming before this committee have not been opposed to the proper aspirations of Quebec.

**Mr. Tryphonopoulos:** Not at all.

**Mr. Allen:** They do have a genuine national interest. In that respect, I think there is a new mood in the country that comes across that there is a lot of openness to Quebec, but people do have legitimate questions about some of the implica-

tions of some ways of responding to that. I appreciate that.

**1140**

**Mr. Chairman:** In closing, just in response too to your question earlier, one of the difficulties that I guess all members have with the number of issues, especially constitutional issues—and I think you phrased it as how to raise some of those issues, because it can get so complex—on the one hand there is a need to listen to “experts” and yet, like so many things, you can find experts on both sides of the issue. I suppose it is the way we joke, and I say this with respect, about economists on a number of issues, and so you also want to get a feeling of what is a kind of broad perception of what people think the accord means, or any sort of constitutional change.

I think a number of members around here at least, have in different ways addressed the issue, but probably everyone would say it is at times difficult to find a proper way or an appropriate way to really have a discussion with people about some of these issues.

Miss Roberts was asking some questions around the whole business of process. I think one of the challenges we have, as legislators, in our own report is to come up with recommendations regarding process that will ensure not only that there will be a public participatory aspect but also that it can be meaningful and that people do not have to feel that they need the experts. We are not experts around this table—although I suppose after six weeks we may be beginning to think we are, but we are not—and I do not think we ever want to get to the point where constitutional amendments are decided only by experts. We need a variety of points of view, and then finally we have to have a sense of how that responds to our vision, I suppose, of what our country is all about.

I think you have really underlined an aspect there in terms of how this whole issue and other constitutional issues are in fact discussed and debated in this country. I want to thank you very much for coming this morning and sharing those thoughts with us and for sharing the four specific points about how we might look at our mandate and continue from here. We accept your comments that it is not an easy task.

**Mr. Tryphonopoulos:** Thank you very much. I appreciate it.

**Mr. Chairman:** I now call upon the representatives of the Income Maintenance for the Handicapped Co-Ordinating Group; Richard Santos, who is a member of the group, and Harry Beatty, who is the legal counsel. I want to



welcome you both here today and also will state at the outset that while we are running behind time throughout our hearings—we have inevitably at some point been behind time—we have lots of time and will certainly ensure that we hear your comments fully. I know we will have a number of questions following the presentation of your brief, so I want to say welcome again and please proceed with your submission.

#### INCOME MAINTENANCE FOR THE HANDICAPPED CO-ORDINATING GROUP

**Mr. Santos:** We appreciate the opportunity to appear before you. I represent BOOST, Blind Organization of Ontario with Self-Help Tactics, on the co-ordinating group. Mr. Beatty is our legal counsel from Advocacy Resource Centre for the Handicapped, or ARCH.

Our group, the Income Maintenance for the Handicapped Co-ordinating Group, has been in existence for approximately 10 years. In my personal opinion, it is one of the best and most worthwhile efforts that is made within the disabled community. It brings together representatives of organizations for disabled people as well as organizations of disabled people, and it brings together a wide variety of expertise. We have used this expertise and this broad-based group to examine issues and to bring forth to governments, both federal and provincial, various recommendations and also various issues which we feel have to be looked at for the betterment of a disabled person's life.

Based on this, even though this is a monumental task—and I have to say I am very proud of our brief, and Mr. Beatty should be given a lot of credit for that; I think it is a very well thought out brief—it is basically looking at the income maintenance field as the constitutional amendments of 1987 might impact on this area.

As all of you know, this is a tremendous area and very difficult to deal with. You have had experts who disagree. You have had experts who say "No," "Yes" and whatever. That is not what we are here for, frankly. What we want to do is point out some concerns and have them considered by you.

The first concern I would raise is that since both the Prime Minister of Canada and the Premier of Ontario have said that the amendments should go forward without change, even though we are having this opportunity to appear before you and to present our concerns, we have an initial concern about what is going to happen if this is not changed at all, if it cannot be made

better. I think there is some general agreement that it could be made better, but there is certainly not agreement that it should be changed, and this is the major problem.

One of the other major issues we want to point out—and you have heard it before, but we add our voice—is around individual equality rights and the equality rights of people. What happens? Two groups are mentioned within the constitutional amendment of 1987. What is going to be the interpretation? Mr. Beatty is a lawyer. Fortunately or unfortunately, I am not; so I will not venture an opinion. My only statement will be that from every lawyer you will have a different opinion and interpretation. That is a real problem. If you mention some groups and not all, that leads to the question: why not? If it was done deliberately in this way, I again ask, "Why?" The governments should come forward with their explanation.

I will turn to one of the real areas that we are concerned about. As all of you probably know, when you talk about income security for disabled persons, you are looking at three or four levels. You are looking at the federal government. You are looking at the provincial government. In Ontario, you are looking at municipalities. Also, you are looking at cost-shared agreements between federal and provincial governments.

One of the issues we would like to call your attention to is: are the constitutional amendments of 1987 weakening the federal participation? It can be argued that could be, and it could be argued that it should be strengthened. However, we are not sure what is going to happen. We feel that it potentially could weaken the federal participation within the income security area. I will not get into whether income security is adequate, because that is another whole discussion. However, I just want to point out that the federal government does have, one way or the other, a piece of the action with unemployment insurance and with Canada assistance. I will not go through them. They are all in the brief.

The other issue is: what is the interpretation of what is provincial jurisdiction only? We focus on cost-sharing programs. Perhaps, since this is one of our major pieces of concern, I will let Harry explain and go into this. You will find it around page 6 or 7, or somewhere like that, I think. Harry, would you like to do that? I think you will do a better job.

1150

**Mr. Beatty:** I think if you turn to about two thirds of the way down page 6 in our brief, it identifies the concern that the proposed section

106A of the Constitution or section 7 of the constitutional amendment fails to establish a clearly defined and accountable model for federal-provincial co-operation.

We do not necessarily say, by the way, that the system right now is working or that the constitutional issues are clear. On the contrary, we think there are problems, but we do not think the proposal addresses them. Primarily, it is just the interpretation questions or uncertainties created by the wording. I am sure you have heard this before, but there is the issue of what is reasonable compensation.

The federal document, *Strengthening the Canadian Federation*, seems to imply that a province which opts out, so to speak, or which establishes its own initiative, will get the money the federal government would have contributed to the shared-cost program. That, while it is general language in a document written for the general public, seems to indicate that reasonable compensation is really equal compensation. However, it leaves open the question of whether there can be a federal deduction or penalty where the nonparticipating province falls short of the national objectives in some way.

The notion of a shared-cost program itself is one we believe some uncertainty attaches to. Sometimes it is used in a restrictive way to mean a conditional grant program. Really, the Canada assistance plan is the only remaining example, or the Vocational Rehabilitation of Disabled Persons Act, which is much smaller.

But there is a question: does it include block-funded programs? How about things like income tax provisions, which are really part and parcel of the income support system for people with disabilities? If you look at what a disabled person actually has available by way of support, you have to look at income tax as part of the picture and as one of the techniques used by the federal government, but with provincial share.

There is also the phrase, "after the coming into force of this section." Many disability groups would like to see the Canada assistance plan amended, and the Vocational Rehabilitation of Disabled Persons Act as well. Some of the proposals that have been recommended in Ontario are in the appendix, which is the result of a consultation conducted by the Ministry of Community and Social Services.

When do amendments attract section 106A? Again, we believe that is an open question. It would seem maybe the right answer is it depends how substantial the amendments are. What is an initiative? When is a program a program and

when is it an initiative? Then there is the question of compatibility and the question of national objectives.

It would seem that the intent of the section as a whole is to lessen the federal role and to lessen the federal authority. But exactly where the line is drawn as to what the federal government can and cannot do in consultation with the provinces, we believe is uncertain.

Our concern really is that, looking at the federal-provincial area since the great advances of the 1960s, the Canada pension plan and the Canada assistance plan, there have not been major reforms. We think some of these are overdue. For example, the Canada assistance plan, developed in the 1960s, seemed to be premised on there being a defined class of people who were poor because they were unable to work and who needed welfare services, to use the term under the Canada assistance plan.

Over the last couple of decades there has been increasing awareness of needs of, say the working poor, which we also find in the disabled community. Disabled people who may have drug costs or whatever, as has often been pointed out, have many disincentives to work. If they are working, they often have almost fewer supports than if they were on social assistance.

These things need to be reformed. We do not see the reforms happening. We do not see a public process and we do not see section 106A as combined with the development of a model of federal-provincial co-operation. What we see is very general language and we would express great concern if these become viewed as matters for the courts, because if initiatives in this area are going to be litigated or if there is the threat of litigation, at least there is a delay.

There is the possibility that governments at both levels may back away altogether. And if, in the last analysis, these questions are dealt with by the courts, looking at those interpretation questions I think could fairly raise the question whether an appellate court is the forum where these issues should appropriately be addressed. Is a court really the forum in which there should be decisions on what may or will be essentially new questions of public social policy?

I think this summarizes our concerns in this area. We have had an opportunity to meet with the Social Planning Council of Metropolitan Toronto and review its brief and we note that it brought forward the idea of an interpretative document. I think we would have some support for that. Given the reality that there is a commitment from both the federal government



and this provincial government not to amend, that does seem to be an alternative.

I think there would be perhaps more willingness to consider section 106A if we saw progress in defining the rules as to how the federal and provincial governments would work together; but, unfortunately, it almost seems as if it is the other way, as if the section represents a sort of verbal agreement, but at the cost of using vague language that is not understood or may not be understood in the same way by the governments at different levels, which may create more problems than it has solved.

Dick, do you have things on your mind?

**Mr. Santos:** Yes, I was just going to use one example to illustrate how it potentially could affect disabled persons. Some of us met with the Minister of Community and Social Services (Mr. Sweeney) yesterday. The Vocational Rehabilitation of Disabled Persons Act has been worked on. There have been new negotiations and the federal government and the provinces have agreed to an extension for two years, with some changes. That is going to go into effect quite quickly. More negotiations and, hopefully, major changes will come about within the two years.

That particular act has a lot to do with employment and with the supports, etc., that disabled persons who are trying to become full members of society can draw on. That is one very concrete example of what do these terms mean. How will it affect the new agreement?

I would just like to add that our group is supportive of having Quebec come under the Constitution. We know there are all kinds of issues and questions that you have been hearing, but we hope you can take into consideration our concerns around income security and around the safety nets and pieces of support that have been put into place for disabled persons.

We are certainly open to questions.

1200

**Mr. Chairman:** Thank you very much. We really do appreciate the submission you have made this morning, along with the various attachments. I think one of the questions, and it is critically important to the work of this committee, is particularly those areas where there are individual groups that are receiving support through various programs that are federal-provincial in nature. I think it is critical that you make sure that whatever changes may be proposed at any given time are not going to have an adverse effect on the kinds of developments

you want to see as we proceed over the next number of years.

While it is true that some of the specific questions you raise have been raised by other organizations in the area, they bear repetition, because we do want to make sure that any new arrangement is not going to block developments that we are already looking at as being positive and forward-looking.

**Miss Roberts:** Thank you very much, gentlemen, for your presentation. It is very helpful and very interesting to hear from people who had to struggle with this income support program for many years and with the differences between the funding of the various programs.

I was interested in your comment when you indicated that the system as it is now set up is not very helpful at all, and you have been struggling with it. Am I right in reading into what you have said that you feel the Meech Lake accord will crystallize a way of dealing with a system that we are not sure of? We do not know exactly what "national objectives" means. It is not that you do not agree with it; it is just that there is so much ambiguity around that you are not sure it is going to be helpful. Is that correct?

**Mr. Santos:** I will give a more gut-level reaction and let Harry give the more legal reaction. My gut-level reaction is that we do not have a perfect system now. The Meech Lake accord might give a chance for coming up with a better system, but I feel there is definitely no guarantee that it is going to be better, and it is probably going to be worse.

**Mr. Beatty:** I think one way of putting it is that we would know better what our position was exactly pro or con the provision if we understood what the effect was going to be. If the effect is going to be an effective veto by every province over any significant national initiative, clearly we have a lot of concerns. If it is going to be implemented through strengthening the federal-provincial process, one of the things we would support is making it more open and more accessible to the community; then we might well be supportive. The concern right now is simply that it is not clear exactly what it accomplishes.

**Miss Roberts:** One more question: you indicate there is not a model set out, and you have also indicated that you would support, I believe, the Canadian Council on Social Development with respect to having an interpretive document or something further done.

Do you want a model to be set up or do you want a series of models? You are dealing with one part of the opting-out programs or cost-

shared programs. There are many other types of cost-shared programs as well. Do you think there should be a common model or should there be one for one area and one for another area? Do you have any beliefs or concerns about that?

**Mr. Beatty:** If I could start, I do not think income maintenance is necessarily the same as health and social services and education. As we have pointed out in the brief, the reality at the present time is that income maintenance is very largely in the federal area. If you look at the area globally, our figure of 85 per cent is taken from an article by Keith Banting, who has written the only text that I know of specifically on federalism and the welfare state. In other areas, we have a different model with health care and I do not think the issues or problems are necessarily the same.

**Mr. Allen:** I am delighted to have a careful brief from the Income Maintenance for the Handicapped Co-ordinating Group because I have found its presentations in the past helpful on other subjects. I find it similarly here. I think, first of all, it would be very difficult for any of us to support the Meech Lake accord if we thought it was in fact going to impact adversely, to put the most neutral sort of comment on it, upon income maintenance programs, not only for the handicapped but also of course for other groups in the community, seniors and what have you.

I think there is something one has to take very much to heart: simply because the margins are so small, the income levels are less than adequate as they stand. Consequently, anything that makes anything in the remotest fashion more difficult for the handicapped community is obviously something we would find very difficult to tolerate.

As you know, sorting out the question around spending power and shared-cost programs is fraught with all kinds of difficulties and unclarity. I am not entirely convinced in my own mind that it is possible to say everything which has to be said about all that in a Constitution. I guess it is something like legislation and regulations. You need a legislative base, but you also then have to say an awful lot more about what you mean when you come around to the actual applications and regulations.

It is quite clear that we are going to have to say in the course of the foreseeable future, regardless of what happens to Meech Lake, just exactly what was meant by it. The courts will do some of that. Governments will have to do more of it, in terms of specific legislation that may flow out of it, the shared-cost programs and what have you.

I find it very frustrating to have you before me and feel we should be responding in more specific and detailed ways to those concerns, yet not feel quite able to. I should share with you that we certainly have had some fairly strong testimony which tells us that, if anything, the right to federal spending power in exclusive jurisdictions is strengthened by Meech Lake and not lessened, by the simple fact it will be constitutionally entrenched.

It was a notable gain to have that said specifically with respect to jurisdictions which are exclusively provincial, where the provinces in the past would have had more strength in their comebacks in the courts to any federal encroachment in those areas than they will have in the future. I like to think that at least this much is some gain.

I am certainly aware, as I guess you are, that, for example, the latest big social spending area—the shared-cost programming in and around day care—has unfortunately seen the federal government actually, in practice, probably reducing the amount that would be available through the Canada assistance plan by hiving off some of those resources into the new child care program. It has done that because, I think, it was afraid some provinces might, in their expanding programs, access federal funds too liberally. That is an analogous kind of situation to the concerns you have. I think we are aware of those problems.

There have been two respects in which the equality rights question has come up. One has been the way that you have raised it, and that is in section 16—implications, the exclusion argument; and the other is the potential for the diversion of resources in Quebec. For example, under the “distinct society” clause, the resources that might otherwise go to groups, whether women’s groups or disabled groups, because of the efforts to create a distinctive society in Quebec or to protect the distinctive society that is there, might impact adversely upon some marginal groups in particular, and vulnerable groups in the community.

**1210**

I do not want to tempt you into commenting upon another province’s social programs and income maintenance programs when our own leaves something to be desired, but just from the point of view of the force of Quebec being back at the table as a result of Meech Lake, do you have any impression for us whether Quebec has in general a more generous attitude towards income maintenance programs, in particular for the



handicapped, than is the case in most other provinces?

**Mr. Santos:** I have been involved on the national scene a fair bit with various disabled groups and I have been at conferences where representatives of Quebec have been in attendance also. I certainly hear a mixed bag from the handicapped community of Quebec. I think it is a very difficult situation. Many groups in Quebec do receive quite a bit of support from the government. However, other groups, or even some of those groups, say that the basic services—I cannot speak so directly about income maintenance, but I have heard a fair bit of negative comment about the housing policies as far as disabled people are concerned.

I think that is a real minefield. You would really have to have some people who have done research, have various people speak to you. One of the feelings I have always had is that the official line in Quebec is much better than what the community thinks it is; that I will give you as a general impression.

**Mr. Beatty:** I could maybe add that regardless of how you compare the apples and oranges of the Quebec programs and those of Ontario or other provinces, it would be a fairly remote argument to justify inequalities, or that Quebec would even seek to do so on the basis that it is a distinct society. I know there are a variety of opinions on the effect of section 16. Notice that Professor Hogg, for example, effectively says that section 16 is just an interpretative provision, cannot affect the charter and is, as he calls it, a “cautionary provision” and the agreement would have meant the same without it.

Based on what knowledge I have of constitutional law, I think there is a lot of merit in that. You could almost say it is symbolic. If that is the case, I have trouble seeing the argument against including the individual equality rights along with the multicultural and native rights in the section.

I think it is unlikely that it makes a major substantive difference, although you can never predict which case will come before a court. But given that it is unlikely and given the symbolic importance of that section to the communities which fought for it—I mean section 15—I think the gesture of putting section 15 equality rights into the interpretative provision makes a lot of sense. Like many organizations, we feel considerable frustration that it cannot even be discussed.

**Mr. Allen:** I was coming to the section 16 question and I appreciate the caution of your language, because it is the kind of caution we

have in being quite certain about the implications of that. Many of us have an impression, I think, as these hearings are drawing towards a close, that it might have been better if the first ministers had never bothered with section 16 as a political gesture. It muddies the waters considerably.

At the same time, do you yourself, as a practising lawyer, see sections 25 and 27 that are included in section 16 as having any different character essentially to them from section 15? You probably are aware of the argument we have been given that section 15 is a very solid, substantive clause that it would be virtually impossible to strengthen, whereas sections 25 and 27 are mere interpretative clauses and are just simply being reiterated in that fashion in section 16. I think the same argument was essentially given to us with regard to section 28 on male and female equality rights. Do you, in your practised legal sense, see that difference between those being included and omitted, those clauses of concern?

**Mr. Beatty:** The simplest way I could answer would be to say I can see both sides of the argument. If you explain, if you like, section 16 by saying that sections 25 and 27, and the other sections referred to, are in some way different, it is possible there may be a line of interpretation that would be developed by the courts that would support that. At the same time, on the most straightforward reading of section 16, saying that certain rights are unaffected seems to be saying that the other charter rights, by implication, can or may be affected.

I understand that line of argument. It is in an esoteric area and what we are really dealing with, I think, is how Canadians will understand those provisions in the package taken as a whole.

**Mr. Chairman:** I wonder if one of the elements of this whole discussion of section 106A in some respects relates to whether the federal government is losing power or the provinces are gaining power. I suppose one of the things that has been mentioned is that 106A will, for the first time, give the federal government, constitutionally, the right to move into areas of exclusive provincial jurisdiction, and I guess the balancing aspect is that a province, under certain conditions, may opt out and receive some form of compensation.

I suppose there is as well a certain political dynamic that goes on with or without Meech Lake. A lot of the concerns you have raised here today are still on the table in terms of the whole thrust of federal-provincial negotiations around shared-cost programs, income support, income

maintenance and so on, because I guess some 14 or 15 years ago we went through several years of very intense debate, trying to see if we could come up with that one program, so that somehow all forms of income maintenance and support could be developed.

We then get to the point which the Social Planning Council of Metropolitan Toronto has addressed to a certain extent. I am not sure if you have seen it, but I just mention it to you to look at. The Canadian Council on Social Development appeared before us last week in Ottawa and raised some interesting approaches to the definition of national objectives. We have not had the chance to go through it in detail, but none the less I was thinking about them, and you reminded me in your presentation about the Social Planning Council of Metropolitan Toronto. Looking at that, there may in fact be ways of dealing with Meech Lake in bringing forward some fairly specific proposals around how federal-provincial programs in the future should be directed.

With that as a long preamble, in terms of the sort of issues you see on the table today, apart from Meech Lake, would you like to see and would you be advocating a clearer definition of national objectives, national standards, in elaborating various shared-cost programs, whether we go back and alter the Canada assistance plan or in new programs we come up with? Is that a factor that would be recognized by your counterparts in other provinces as something we really have to deal with, whether in the context of Meech Lake or not?

**Mr. Santos:** If I am not mistaken, I think the position of the national group, COPOH, coalition of organizations; no, Coalition of Provincial Organizations of the Handicapped—I always have to unscramble the acronym—they have an interest in seeing national standards. I do not think our group has a particular position, but I would say from my standpoint, just being active within various groups and speaking from a community standpoint, I certainly think it has some validity.

I know somebody mentioned earlier movement around the country. That is even happening with disabled persons. With disabled people attempting to become full participants within society, within the country in jobs, education, living accommodations, etc., these are all reasons for people to try to move, if somebody can count on a certain basis in moving from one place to another, I think it would be a more positive step for a disabled person to become a member of society.

**Mr. Beatty:** Could I add two points, I think, as well. One is that in supporting national standards or clearly defined national objectives, I do not think we are necessarily saying that is something the federal government would do unilaterally without consultation. There is a big difference between the federal government proceeding when none of the provinces agree and proceeding when nine of the provinces agree.

There is also the argument, which I do not really think we are in a position to document but that people like Professor Banting refer to, that in the federal system, if there is a lot of provincial autonomy in this area, it does exert some downward pressure on social programs. From an economic viewpoint, if Ontario wants to increase the supports made available, and there is another province—for the sake of argument call it British Columbia—which does not want to make those improvements, over time there is some economic pressure on Ontario. Whether that can be documented by economists and so on I do not know. It is a generalization Professor Banting offers.

**Mr. Chairman:** Could I just ask you one factual point. You have mentioned his book a couple of times, *Federalism and the Welfare State*. I take it that it is federalism in the Canadian context, or is he addressing a number of countries?

**Mr. Beatty:** He is specifically addressing Canada, but with comparative studies as background.

**Mr. Chairman:** And that is the proper title?

**Mr. Beatty:** The actual title is *The Welfare State and Canadian Federalism*.

**Mr. Chairman:** And the publisher? We might just as well put that on the record; it sounds like there might be some interesting—

**Mr. Beatty:** It is McGill-Queen's University Press, 1982. There is also a somewhat more recent article by Professor Banting in the Ontario Economic Council two-volume set called *Ottawa and the Provinces: The Distribution of Money and Power*. He has an article in volume 1 entitled *Federalism and Income Security: Themes and Variations*.

**Mr. Chairman:** Thanks very much. While we have a lot to read, there are times when one still wants to look at certain other documents.

Gentlemen, on behalf of the committee, I thank you very much for joining us this morning, for your brief, for the attachments and for your observations and reflections upon our questions. As we have noted, we have had a number of



submissions from a number of organizations involved with the handicapped, and I think there is a particular point of view and a concern that has

been expressed there that is being clearly made out to the committee.

The committee recessed at 12:25 p.m.

## AFTERNOON SITTING

The committee resumed at 2:05 p.m. in room 151.

**Mr. Chairman:** We can begin this afternoon's session. I would like to invite Jean MacLeod and Betsy Carr of the women's issues study group from the University Women's Club of North York. Please be good enough to come forward.

I want to welcome you both here this afternoon. We have a copy of your brief. I am also glad to note for the record that you have moved us another step in resolving parking problems around Queen's Park, for which many people yet to appear before other committees will, I am sure, be very grateful. I will simply turn the microphone over to you so that you can make your presentation and we will follow it up with questions.

UNIVERSITY WOMEN'S CLUB OF  
NORTH YORK

**Mrs. MacLeod:** I would like to begin by introducing ourselves. We are from the University Women's Club of North York. I am Jean MacLeod, leader of the women's issues group which has prepared our brief, and I live in the riding of York Mills, represented here at Queen's Park by Brad Nixon. This is Betsy Carr, who is active in the Voice of Women and the National Action Committee on the Status of Women, as well as in the Canadian Federation of University Women. Betsy lives in the riding of Don Mills, represented by Murad Velshi. Both of us are past presidents of the North York club.

We are here today because we believe that the Constitution amendment of 1987 requires changes before endorsement and we thank you for the opportunity to outline our concerns and recommendations. However, we wonder why you are here. The Globe and Mail, on January 26, 1988, reported that the Premier (Mr. Peterson) has said the government of Ontario will ratify the accord without alteration, but none the less, here you are, a select committee on constitutional reform. Are you to be a conductor of our concerns to the cabinet and Legislature or just a safety valve to permit a little steam to be released harmlessly into the atmosphere? The former, we hope.

The University Women's Club of North York is an organization of 400 university graduates and is affiliated with the Canadian Federation of University Women. For 37 years, the club has demonstrated its commitment to the higher

education of women and to involvement in public affairs. Areas of our concern include education at all levels, conservation of resources and the environment, rights of native peoples, economic, political and legal equality of women, world peace, official languages bilingualism, Canadian unity and the future of Canada.

We registered our concerns when the Constitution Act, 1982, was being written and we are concerned now and are grateful for the opportunity to discuss with the committee our reservations relating to the proposed Constitution amendment.

We are happy to welcome Quebec as it joins the other provinces, but we fear that rights now guaranteed in the Constitution are in jeopardy. For that reason, we wish to address the following four concerns which we believe have particular relevance for Canadian women: (1) the democratic process, (2) equality rights of women, (3) equal access to national social programs, and (4) executive federalism.

The democratic process: Canadians are accustomed to the democratic process and will not tolerate avoidance of that process in full or in part. We care about our governments' policies and decisions. We want to be well informed about important public issues and to know that our concerns will be heard.

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How does the Meech Lake accord meet these requirements? When the constitutional accord was announced in June 1987 following a two-day meeting of the 11 first ministers, Prime Minister Mulroney assured us that the democratic process would be respected and that Canadians would be consulted before the accord was ratified. However, we soon learned that the agreement required acceptance without change by the 11 legislatures.

We know the accord has serious flaws. However, we have been told by our parliamentary leaders that the accord is so fragile that changes would cause it to fall apart. Moreover, the amending formula agreed upon gives the provinces such extensive veto power that change after ratification would be virtually impossible. Is it surprising that so many Canadians are unwilling to tie themselves in perpetuity to an imperfect agreement?

The Constitution amendment requires change before ratification and we ask the government to



listen to the concerns and recommendations of the citizens of Ontario.

**Mrs. Carr:** Individual and equality rights: The Meech Lake accord has made the status of equality rights of women uncertain. In the fall of 1981, the women of Canada were aroused by the omission of a clear statement of their equality rights in the proposed Canadian Constitution and Charter of Rights and Freedoms. The government of Canada listened to the demands and, in 1982, equality was guaranteed in sections 15 and 28 of the charter. We have now been presented with an accord that, through the combined impact of two provisions, places these hard-won rights at risk.

The amendment to section 2 of the British North America Act recognizes that Quebec is a distinct society and the role of the Legislature and government of Quebec to preserve and promote that society. Clause 16 of the accord states that native and multicultural rights will not be affected by the "distinct society" clause. By accident or by design, women's rights were not listed and 51 per cent of Canadians have been denied a continuing guarantee of gender equality.

What is going to happen to legislation that has not been amended to comply with the charter? Does the constitutional accord pose a potential threat to the worthwhile studies and activities relating to women's issues which are supported by the women's programs division of the Department of the Secretary of State?

The right of women to equality is clearly stated in the charter. The Constitution amendment must be altered to ensure that this right is not called into question.

I would just like to add here that in the number of presentations to this committee which I have either been present for or have read, I notice it is only women who bring up the threat to the rights of women. I think all we women have to do it or you are not going to hear it.

**Equality of services:** A fundamental characteristic of Canadian society is a range of social programs and services financed by federal-provincial cost-shared agreements. Canadians from coast to coast to coast benefit from medicare, Canada assistance, education and skills training, language training, administration of justice and many more programs made possible by money transferred from the federal government to the provinces.

Canadians have a right to equality of access, but section 106A will permit provinces to opt out of national cost-shared programs in areas of

exclusive provincial jurisdiction. This section provides reasonable compensation for programs that are in accord with the national objectives.

How can national equality of access to services be maintained? Will we ever see a new cost-shared program implemented? Will there be no hope for the development of a national child care program or a mechanism by which maintenance orders can be enforced across the country? Who is to decide national objectives? Will potentially unequal access to social services make Canadians more or less united?

We ask that section 106A be deleted before it is enshrined in the Constitution and becomes practically unassailable.

**Executive federalism:** The importance that women assign to availability of services and the opportunity to contribute to their substance and design leads to our final concern. The incorporation of two annual first ministers' conferences in the Constitution would institutionalize a third level of decision-making in Canada, in competition perhaps with the federal and provincial legislatures.

This third level would, at least potentially, place a further obstacle in the path of women's groups and other volunteers who wish to participate in planning and developing the laws, programs and services that will directly affect their lives. Approaching a member of Parliament or a member of a provincial Legislature is less difficult than approaching a first minister or having to go to every province. We believe these two annual conferences should not be incorporated in the Constitution.

In conclusion, we are really asking that the amendment be altered in the areas we have discussed in order to alleviate the concern we share with hundreds of thousands of women across Canada. I would like to add that interested citizens are now asking who speaks for Canada and the Constitution amendment 1987 leads not to unity but to decentralization and disharmony and puts in question our future ability to function as a political entity. It fosters rival political interests, encourages north-south links, as does the proposed Canada-United States trade deal, and weakens the national policy potential of the country.

The Prime Minister should do more than preside over the dispersal of federal powers like an auctioneer breaking up an estate, leaving the central government mainly a tax collection and distribution role. Canada needs a strong national presence; for example, environmental protection standards, as explained in the Brundtland report

for the United Nations, meaningful child care policy, and a national education and training strategy, with two levels involved but with federal leadership.

Our politicians are blinkered by political expediency. They cannot rise above regional and partisan interests. Who speaks for Canada's future as an independent, democratic nation?

**Mr. Chairman:** Fine. Thank you very much for the presentation and also for the very specific recommendations. I think, as we are in our sixth week of hearings, we are not only grappling with issues but by this point have also heard a number of them developed and are trying to grapple with various ways one might be able to deal with some of the problems. So the specific recommendations are helpful in that regard as well. We will begin our questioning with Mr. Allen.

**Mr. Allen:** I am delighted that the University Women's Club of North York has bent its mind to this national problem and joined the many people who have come before us to make a presentation and offer criticisms. I only regret that the assembly they see before them has apparently lost the two constant female members who are normally part of our committee. There should be more, obviously, but we have lost even those for this afternoon's hearing.

Could I ask you, first of all, to be more precise about your recommendation under "Individual and Equality Rights"? You say this amendment should be altered to ensure that right is not called into question. Do you have a suggestion as to what alteration you would like to see in the accord which would ensure for you that those rights were not called into question?

**Mrs. MacLeod:** One of the simplest things would be to add it to the list that already has Indians and multicultural interests. In the original Charter of Rights, those rights of particular groups are grouped more or less together, are they not? One solution would be to simply add it to the rest. Mrs. Carr, do you want to add to that?

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**Mrs. Carr:** I believe we would also suggest that the primacy of the rights explained in the Charter of Rights and Freedoms would be maintained and would be specified. I think it is by omission that women's rights are threatened in the amendment. As Jean has just mentioned, multicultural rights and native rights are specified as not being affected by the "distinct society" clause and now we are in a position where women's rights, just by omission, could be

interpreted by the Supreme Court of Canada as not having the same status as the others.

**Mr. Allen:** Your language is fairly cautious: "could be interpreted."

**Mrs. Carr:** It could be interpreted. Women's experience with their equality over the years has not been a good one in Canada. We were not persons until 1929, and you know all these things, so we are pretty leery of a place where there could be some misinterpretation.

**Mr. Allen:** And properly so. Could I ask you to respond to the one train of argument that has been given to us to explain what happened—apart from the oversight argument—that on the one hand, sections 25 and 27 that deal with aboriginal and multicultural rights were inserted to protect those rights over against the "distinct society" clause—because those were two cultural entities in our national fabric, much as the society of Quebec with its French language, civil law and so on is another sort of cultural entity in the nation—and therefore, it was with respect to the balance among these three cultural entities that those other two were finally agreed upon as worthy of insertion, whereas the question of women and the question of other equality rights were not considered to be specifically cultural questions in the same sense?

Second, sections 25 and 27 on aboriginal and multicultural rights were framed as interpretative clauses, whereas section 15 dealing with equality rights, which would be one that you would be especially interested in, and section 28 were very strongly worded statements of rights in and of themselves, and since the charter would always, in every court case where anything was in balance affecting those items, be present in the minds of the judges, it would not be necessary to duplicate those clauses in the Meech Lake accord.

That is an argument that has been presented to us and I wonder if you have had a chance to reflect on that, and in any case whether you had it presented to you and what you think about it.

**Mrs. Carr:** The "distinct society" clause has not been defined. We know that Quebec is given special mention in the amendment to preserve and promote that society and we are afraid that women's rights will come up against that and that there could be some change or some alteration in the immigration, for instance, of women to Canada. There is certainly a possibility for that to happen because that has happened in the past, too, where only males of a particular group were allowed to come.



We are not expecting that same thing again, but we also do not know what kind of government every province is going to have from here on. There could easily be a provincial government that wishes to do that, particularly in Quebec with that open-ended, undefined "distinct society" clause and its mandate to promote that. There are just too many questions in there. We just do not know whether women's rights would stand up.

**Mr. Allen:** Does it relieve your mind at all that Quebec has had probably the best record of any of the provinces in recent history with respect to women's rights and that it has a charter of rights and liberties itself which is probably stronger than even the charter or any of the other provincial human rights codes?

**Mrs. Carr:** Sure. I think that is so. I also believe that the Constitution of our country should specify these things and not leave it to the provinces to specify their own human rights standards or anything. It is all very well for them to do it, but we must have an overall one for the whole country that applies to all women, not just the women in Quebec.

I think the women in Quebec have had a very good deal for some time, even when there was a separatist government there. I know that puts them in a rather invidious position now and I can appreciate that, but no provincial government is there permanently. The Constitution of our country is, and that is where it should be spelled out without any possible doubt.

**Mr. Allen:** Finally, am I correct in hearing you saying that, in your opinion, as things stand, the charter itself does not firmly enough entrench women's rights in either section 28 or under the general equality rights section, 15, so that they would prevail in any contest in the courts?

**Mrs. Carr:** I think it was probably quite well done before, in 1982. However, there has not been a lot of case law since then. There have been a few cases, but not enough for us to really feel secure in that.

Now the doubt has been thrown in before some of the case law has been established. I think there is a chance there for women to come out on the short end of it, one way or another, and I think in the Constitution the charter should be pre-eminent, should have primacy. I think now is the time to make sure that is there, because once the veto powers of the provinces are established, it is going to be very difficult.

The example we have right now of what happened when the 11 first ministers got together and produced this and said "no changes" is not a

very good omen for what could happen in the future when they have to have unanimity. The only thing they seem to be unanimous about is saying no.

**Mr. Allen:** I think you echo a concern we all have. Thank you very much.

**Mrs. MacLeod:** Could I say something, just at the end? We were part of the upsurge of women in 1981 when it appeared the charter was not going to include equality rights for women and they were put in. In the old days, diamonds were a girl's best friend; nowadays, equality rights enshrined are.

**Mr. Breau:** Tough crowd.

**Mrs. MacLeod:** We want them absolutely protected.

**Mr. Offer:** Thank you very much for your presentation. I would like to ask a question with respect to the process. You have alluded to that on the first page of your presentation with respect to concerns about the type of process that has taken place in the past. I am trying to ask you to expand upon that because, as you most likely know, we have heard from a number of people who have said basically the same thing, that the process with respect to public participation and input needs a better type of framework. We need to have a better framework for public participation. What went on in the past is not sufficient to carry on with the needs of the future as people become more acquainted with how the charter, how the Constitution, will impact on their very lives.

You have on your first page spoken about the process, in terms of there needing to be a process maybe. I wonder if you can expand upon the type of process you envisage in which the public would have a real part in discussing this particular change in constitutional reform.

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**Mrs. MacLeod:** I think for such an important issue as constitutional change that what came out of Meech Lake could have better been considered a position paper, not an accord that Canadians were to take as is and the governments were all going to agree to it without change. For such an important paper, the mechanism should have been set up, by the way, for hearings such as we are having now, but also with the promise that changes would result in response to the concerns expressed by the people. We have come but we really do not know what outcome our efforts will have, and I am sure there are hundreds of others like us.

We have seen it happen many times. As women, we have been involved in a great deal of discussion and study when the law reform was concerned with family law, this kind of thing. We know what it is like; we have been involved in it in the past and we certainly were involved in it before 1982.

**Mrs. Carr:** To add one small thing, we know that it took 50 years to get to the Constitution that was passed in 1982. I do not know really why even at that point there had to be an overnight session that did the finalizing. This time it was even worse because there were no changes offered at all. As far as process is concerned, I do not think that is good enough, just presenting a fait accompli, as it were.

**Mr. Offer:** In terms of it not being good enough, certainly I take that from your position very clearly and I take that as being a very clear position of an awful lot of groups that have come before us. It matters not whether they are in favour of constitutional reform. In many ways they say: "Constitutional reform is one thing, but the constitutional reform process is another. We now have this accord which does constitutionalize first ministers' conferences where there will be constitutional hearings on an annual basis." People are saying, because of that and because of interests such as yours that might be impacted, they want to have meaningful input into the change.

The point I am trying to come back to is that I sensed from your first response that if the accord were a position paper as opposed to something that had been signed and there were public hearings taking place and then a report back, that would, in your opinion, be sufficient to come to grips with your concerns with the process.

**Mrs. Carr:** I do not think we need a constitutional conference of first ministers annually. I just do not think we need that. I think we did need an ongoing series of first ministers' conferences before the 1982 Constitution, and that was very valuable. We know that there were vetoes offered in those days which put everybody back to the bargaining table or the drawing board, as it were.

But it seems to me that we do not have to do it every year. I do not know what the use is of doing it every year if there is veto anyway. I think that is just an exercise in futility. We should have been having a series of conferences where there was open debate, this kind of hearing, public meetings, various things being presented, and I think it would have simmered down, because I do believe that some of the things we are talking

about here were simply overlooked. I do not think they were done deliberately.

There certainly was not any advice from any women's groups when it was being done, and a lot of the flak you are getting now is from women's groups in these particular areas.

**Mr. Offer:** Not only from women's groups.

**Mrs. Carr:** Well, a lot of it.

**Mr. Offer:** Thank you very much for your concerns about the defective process, because it is something this committee has said in the past and continues to say. It is something we are going to have to grapple with in our report. Thank you very much for sharing your thoughts on that.

**Mr. Chairman:** Before going on to the next question, I would just like to make one point in defence of some of our members who are not here today, just so you will understand that it was not because you were coming. As was mentioned, both Marietta Roberts and Joan Fawcett are miles and miles away from here, and you will understand that, from time to time, members' lives become somewhat complicated. That is why they are not here. Mr. Harris and Mr. Eves, who are normally here, are involved in a House leaders' meeting and hope to get here as soon as they can. I just wanted to make clear that it was other duties that drew them away.

I would like to raise some questions around section 106A and the whole question of the federal spending-power issue. The concerns you have expressed with respect to the charter, for example, are ones that really are of concern to everyone. They have to be, because one of the interesting things that developed following the acceptance of the 1982 constitutional changes has been the extent to which the charter has become part of a national consciousness. One of the things that has struck all of us on this committee is the testimony given by women's organizations, multicultural organizations and official-language minority organizations which really look to that charter as a very firm protection in a number of areas.

As you have noted, there are many cases still going through the courts with respect to determining just how significant some of those charter rights are, and I suppose in a few years' time we may want to come back and look at some of the clauses in the charter, perhaps feeling that they are not strong enough and that what we thought was there has been interpreted as something less than that.

It is perhaps interesting to note that in bringing about changes to the charter, the existing clause for amendment would carry it. It does not require



unanimity, but rather the 7-50 rule, which I think is a comforting thought. There are still many areas of the Constitution, in fact the vast majority, which would be changed not under unanimity but by the other route. Those charter rights are things I think we all feel and can relate to very clearly.

With respect to section 106A, it seems to me there is another argument one can make there, and a very plausible argument in terms of why that may be an important article to have. There are two things that clause does. It reflects a lot of federal and provincial discussion and problems over many years. That brings together discussions at least over the last 25 years, and I think one could probably go back to Confederation itself.

What it does is to enshrine in the Constitution for the first time the constitutional right of the federal government to enter into areas of exclusive provincial jurisdiction. That has never been there before. The balancing act, I suppose, is not the right to opt out, in that provinces can opt out of anything they want, but to opt out with reasonable compensation, and I appreciate there is not a definition of that.

When you look at the division of powers from 1867 and the way that has evolved, when you look at the way the political process has worked in this country and works today in the development of federal-provincial programs, I think the argument could be made that what this new section does is put firmly into place a couple of principles. But in terms of developing various national programs—let us take child care as an example—my strong sense would be that where a federal government saw that as a priority, I do not see that that article would stop the implementation of a national program.

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Even today, without anything in the Constitution, no major national shared-cost program can really be brought about unless there is a strong sense of political direction, sometimes coming from the provinces. After all, it was Saskatchewan that brought forward medicare. Again, it is not a question where one can, with all these things, say with 100 per cent certainty, but I just wonder if that article does not better reflect the way our federal-provincial system in areas of exclusive provincial jurisdiction has operated over the last number of years, certainly since the arrival of Prime Minister Trudeau. It does not necessarily pose the threat to national programs or to a sense of the nation that you might think.

I would be interested in your reflections on that rather long comment. Perhaps I was so obscure by the end that it is impossible to answer.

**Mr. Breaght:** Yes, I think so.

**Mr. Chairman:** Just wait until you ask a question, Breaght.

**Mrs. MacLeod:** First I would like to say that, speaking from the point of view of a women's group, so many of the programs that are involved are programs we are particularly concerned with: the health and the support of the poor, and language training and education. All these things are concerns we have very close to us which affect our lives to a very great extent.

One thing is that we do not think it is right that in one province you would not have the same services that would be available in another province. I know this is a red herring to poke in, but look at British Columbia when the Premier was suggesting that some medical services would not be funded. That is just an indication of the kind of thing that can happen.

We think that, as Canadians, people should have access to these important services no matter where they live. Also, we feel that, as Canadians, it is important that it be known that these services are financed by all Canadians for all Canadians. While the money is collected and goes to the federal government, it is dispersed so that, no matter where you live, you will have a reasonable equality in the services you need.

Those are my two things: actually getting the service is one and a stronger feeling of Canadianism because of the co-operation that makes possible these services is the other.

**Mr. Chairman:** In the clause they refer to national objectives, and we have had some discussion around national standards as opposed to national objectives, what might be the difference and so on.

The Canadian Council on Social Development met with us last week and put forward four objectives. They tried to define what they felt would have to be objectives under a national, federal-provincial, shared-cost program. One would want to look at those definitions more carefully but, none the less, they suggested a way to meet a number of those concerns in the sense of how different a program could be in a province that might have opted out. I realize this is one of the areas of concern. I think people agree that if you have a child care program, you cannot use the money to build roads, but what would be some of the differences, limits and so on? I think that is a very valid point.

There may be ways of defining those parameters that would still permit that kind of balance or tension within the system in terms of the role of the federal government and the role of the province, but we are still talking about areas of exclusive provincial jurisdiction. That, of course, is not Meech Lake; it is not even 1982. It is 1867, plus the various interpretations of what some of those things have meant. We also then get into the problem of, in that area, who defines what the national objectives are and what the role is of the province and the federal government, for example, in defining Canadian educational standards and goals?

I am still wrestling with this, but I am not so sure that in that particular article or clause they may not have found a route that might help in the development of some of these programs. I certainly accept your concerns and I think those have to be addressed in dealing with that.

Having asked the last question, I will now thank you very much for joining us this afternoon and presenting your brief. With respect to the various recommendations you have made, as I mentioned before, we are getting closer to the end of our public hearings, which means we are getting closer to the very difficult questions of how to try to meet and address these concerns. We want to thank you very much for sharing your thoughts with us this afternoon.

**Mrs. Carr:** Thank you for allowing us to come.

**Mr. Chairman:** I will now call upon the representatives of the University Women's Club of York County: Maureen Towns, president, and Marjorie Vendrig, convener of the women's issues study group. Perhaps you would be good enough to join us.

I welcome you both here this afternoon. We have a copy of your submission. I will simply turn the microphone over to you. If you want to lead us through it, we will follow up with a period of questions afterwards.

#### UNIVERSITY WOMEN'S CLUB OF YORK COUNTY

**Mrs. Towns:** I would like to start by introducing ourselves. On my left is Marjorie Vendrig, who is the convener of our women's issues study group. My name is Maureen Towns. I am the president of the University Women's Club of York County.

Our university women's club is a sister club to the North York university women's club. Our club has a membership of 110 women who are university graduates. We are centred in Aurora,

although we go from Richmond Hill to Bradford, and quite a distance both east and west along Yonge Street. We are in the riding of North York. Our chairman is in fact our MPP.

**Mr. Breagh:** You have our sympathy there.

**Mr. Chairman:** You are not going to be able to talk about Oshawa here.

**Mrs. Towns:** The goals of our club and that of the Canadian Federation of University Women are to promote education and foster awareness of and involvement in public affairs. We are an affiliate club of the Canadian Federation of University Women, which has 12,600 members across the country in 126 clubs.

I would like to note that the brief we have submitted to this committee complies with the position of the Canadian Federation of University Women on Meech Lake. CFUW made a presentation to the Senate in January 1988 with respect to Meech Lake. This brief has been endorsed by our club. I would also like to note that it is in the process of being circulated to all the clubs in Ontario for their endorsement. At a later date, we can write to this committee to advise the results of that ratification.

I would also like to note that this brief really only deals with two issues. Certainly, there are many other issues with respect to Meech Lake that are of concern to members of our club. We have restricted our comments essentially to two issues.

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I would also like to indicate that with us this afternoon are Susan Bright, who is the provincial director of Ontario Central which has approximately 3,000 members, Ontario Central being an area of the Ontario Council of the Canadian Federation of University Women, and Betty Tugman, who is the provincial vice-president of Ontario Council of CFUW, as well as the president of the Mississauga club.

We have provided a copy of our brief to the committee. It is not our intention to read from the brief this afternoon, although I will briefly indicate to you what we have said. Initially, we state, as I think everyone does who appears at these hearings, that we welcome the inclusion of Quebec in the Constitution of Canada. We go on to voice our concerns with respect to the opting-out provisions. In brief, we feel it is a dangerous provision and not thoroughly considered in the drafting.

We deal with gender equality. Section 16 of the Meech Lake accord does not deal with gender equality as contained in section 15 of the



Canadian Charter of Rights and Freedoms. We feel we are precluded from the protection offered by section 16 and that gender equality rights are at risk as a result of this. This may well, as indicated by the previous speakers, be an oversight. If it is, we would like to see it fixed. If it is not an oversight, we demand an explanation as to why those rights were not included in section 16.

I would like to deal now in more detail with the federal spending powers. As certainly all the members of the committee are aware, the provinces may now opt out of national spending programs on showing adherence to a national standard. A national standard is not defined. Who is to define it? How is it to be defined? Neither is the phrase "compatible to a national standard" defined. What will that mean? None of the key phrases in this provision are defined, which leaves it open for them to be defined in any number of ways.

How will such an opting-out process ensure equal treatment for all Canadians? All Canadians should have equal access to cost-shared programs. We believe that the opting-out provision will have special impact on women and on children, as women and children are the beneficiaries of many of what we might call social welfare programs. In our submission, the effect of this opting-out provision has not been fully considered.

We ask you to consider the recent national experience following the January decision of the Supreme Court of Canada on abortion. Of course, abortion is a whole separate issue, an extremely divisive and emotional issue across the country. None the less, we believe that it serves as an excellent example of the kind of problem that can occur.

Following the decision of the Supreme Court of Canada, each province has adopted its own policy with respect to the funding of abortion services. That ranges from Ontario, which I think it is fair to say in summary has now banned abortion committees, to British Columbia which attempted not to allow medicare to pay for abortions, to Saskatchewan which has decided that two doctors must be consulted in order for a woman to obtain an abortion.

This is not, under any realm of consideration, equality before the law. The games being played with respect to this issue are being played with health care dollars. The issue has come down to whether or not each province will allow its medical dollars to pay for abortions. We note who the victims of this game are. So far I have

not seen any media reports of any man being denied an abortion when requested.

I would also like to note that at this point if the federal government had the will, it could enforce equal access to abortion funding across the country, as it was able to do with respect to extra billing, by making amendments to the national health care act; I apologize if I have the name wrong, but certainly there was an act that caused a great stir some short years ago with respect to funding.

In our submission, what has happened in the abortion debate provides an excellent example of what can happen in the opting-out provisions. We would also ask you to consider that I think it is fair to say that at this point we are in somewhat of a honeymoon period with respect to Meech Lake. As an example, I use the agreement of the provinces and the federal government to follow the Meech Lake guidelines in suggesting names for the Senate. Although the Meech Lake accord has not yet been ratified, 11 governments are trying to use those guidelines in order to appoint people to the Senate.

Here we are in what is supposed to be a honeymoon phase for Meech Lake and yet we have total disaster with respect to equal access across the country on this one issue. Again, I just use that as an example of the sort of thing we fear happening because of the opting-out provisions.

Next, I would like to deal with gender equality. As noted in our brief, we talk about gender equality but really we are talking about the equality of women. Section 16 of the Meech Lake accord makes some rights stronger than others. To list two rights and not others effectively excludes the rights not listed from the protection in the accord contained in section 16. It is a well-settled legal maxim that, without wording to the contrary, a list is considered to be exhaustive.

That some rights were forgotten seems so obvious that we have great difficulty understanding why this has not been corrected. There have been numerous assurances from various levels of government and legal experts that this will not be a problem. First, we feel such assurances are totally meaningless. Once this accord is ratified, any decision as to the meaning of that provision will be left up to the courts. Second, the suggestion has been made that any problems with respect to the accord can be rectified after Meech Lake is ratified. In our submission, this will be virtually impossible due to the unanimity provisions.

In any event, if it is seen to be a problem, why suggest amending it afterwards? Certainly, it makes more sense to amend it beforehand. At the very least, we would ask that a reference to the Supreme Court of Canada be made to get its thinking, to get a decision from the Supreme Court of Canada on this issue as to what, precisely, the effect of section 16 of the accord is.

We would like to speak briefly about the process that has brought us to these hearings. I would like to indicate that I think it is important that we not get unduly side-tracked by the process and lose sight of the issues that are inherent in the accord, and the issues that concern people making presentations to this and other committees.

The accord was struck after 11 people were sitting around a table in some secrecy in Ottawa until three o'clock or five o'clock in the morning; I forget the exact time. In any event, according to the news reports, the sun was coming up. They had to stay until they were finished. The manner in which it was done brings more to mind labour negotiations than running a country.

The fact that all 11 people were men, in our submission means that the experiences they were bringing to the table were not necessarily experiences of the entire population. For example, if you were striking an agreement with respect to the environment or with respect to the use of natural resources, you would not necessarily expect fishers and farmers to bring to the table the concerns that foresters would have. It is simply a matter of the experiences of the persons sitting at the table.

Once the people in Ottawa reach an agreement, we are advised that the agreement is to be left as it was struck and that there are to be no amendments.

The government of Ontario has subsequently opted to hold hearings into the accord. Certainly, we welcome the opportunity to discuss our concerns. However, Premier Peterson insists the accord is to be ratified as it exists with no amendments. If that is the case, what is the purpose of these hearings? Is anyone really listening? If you are listening to us, will the Premier listen to you?

It is difficult to convey our frustration with this process. In our submission, Meech Lake has some grave flaws. To feel that these flaws are simply being ignored because in April 1987, 11 people decided that this was the way it was going to be and that the collective voice of various people across the country had absolutely no effect on that is extremely frustrating.

To suggest that changes will be made after ratification of Meech Lake is plainly ludicrous. First, changes will be very difficult because of the unanimity provisions. Second, if we need changes, why are they not made before ratification? Third, if changes are not to be made, why are we here at all? Finally, if changes are to be made after ratification, who will bargain for women after ratification? Clearly, we have not seen that before. Why should we expect it would be any different afterwards?

#### 1500

As I have indicated in our submission, the Meech Lake accord is a fatally flawed agreement. We do not understand the insistence of the persons who struck the accord on ratifying it as it now stands. The suggestion that if the accord is not ratified there will be political instability nationally is frankly a suggestion I do not understand. In our view, this comment is politically irresponsible.

I think it is important to examine the question of the cost of achieving the objectives Meech Lake is attempting to achieve. At what price are we willing to have constitutional unanimity across the country? In my view—I must indicate it is a view that is held by myself and is not part of the brief ratified by the club I represent—the price Meech Lake puts on that unanimity is too high on a number of fronts.

We also wonder what the rush is with respect to ratifying this document. Canadians have spent decades trying to work towards constitutional unanimity, trying to have the entire country under one Constitution. Why have we put the gun to our heads with this particular document?

We are asking, first, for an amendment in the area of the concerns we have expressed. Second, in the event no such amendment is forthcoming, we are asking at the very least that a reference be made to the Supreme Court of Canada to examine the question of gender equality rights.

I have spoken earlier of the frustration we feel with this process, and part of the frustration is the great fear that this document will pass as it exists, which we feel will work to undermine Canadian federal democracy as it now exists. We have used some strong words in our submission, but only because we feel very strongly that the Meech Lake accord will have an adverse effect on this country. I must leave you with this question: Why are the Prime Minister and the premiers, and through them their legislatures, willing to be marked down as the creators of this accord, which is an imperfect document?



**Mr. Chairman:** Thank you very much both for the written submission and for your further comments and views on some of these issues, as well as some others that were not dealt with. We will begin the questioning with Mr. Eves.

**Mr. Eves:** I want to thank you for your presentation and your brief. You have made points, as I am sure you are aware, that many other groups have made that have appeared before this committee.

I really want to get down to the question I have asked many delegations: What is your bottom line, so to speak? Personally, I wholeheartedly agree with your suggestion that section 16 should be amended and that the ambiguity in section 16 should be clarified, not just for women's equality rights but for the rights of everybody under the Charter of Rights and Freedoms. I could not agree more that if the clause means nothing, then why enunciate two rights in it?

We have heard from Morris Manning and other constitutional experts and lawyers. They differ, and there is no doubt about it, but Mr. Manning's point of view is that supreme courts have always taken the position that clauses in a Constitution do not mean nothing. The court will impute some intent that legislators put there, because obviously legislators would not be stupid enough to put words in that do not mean anything. Either section 16 should not be there at all or it does mean something. If it means something, perhaps it means others' rights are excluded. I could not agree more. Some groups that have appeared before us have suggested that perhaps, if section 16 said that everyone's rights under the Charter of Rights and Freedoms superseded the accord or were first and foremost, that would not only solve your particular problem but also everybody's problem in society.

I presume you would be happy with such a broad amendment to section 16. Failing that—as you say, and I think quite rightly so, and you are quite realistic in your submission—if nothing else, a reference to the Ontario Court of Appeal should be made for court interpretation of section 16. If one of those two things were done, would you be happy then with the accord, or do you still want the other issues you have raised, specifically the issue of opting out, addressed as well before you would be happy with the Meech Lake accord?

**Mrs. Towns:** I think it is necessary that both issues be addressed because I think there are matters that are substantially different in both issues.

With respect to our bottom line concerning section 16, I would just like to note that at this point we diverge from what is endorsed by our club and we are getting more into Ms. Vendrig's and my reaction to your questions.

Initially it appears to me that if section 16 is an interpretative or guiding clause, it should be in the preamble; it does not belong in the body of the accord. As an alternative, certainly women's rights could be added, but as you know, many rights are left out. There is nothing with respect to rights concerning religion or age—there is a long list of things in section 15 of the charter that are not dealt with in section 16, and we have confined our comments simply to women's rights.

Thirdly, I believe the position that the rights contained in the charter supersede the accord is totally wrong. In saying that, I refer to the Supreme Court of Canada decision in June 1987, I believe it was, with respect to the Roman Catholic funding case. In that decision, Madam Justice Wilson made reference to the British North America Act of 1867 and said—I am paraphrasing—the charter could not supersede the fundamental compromises made in order to achieve Confederation. In my view, the charter does not supersede other aspects of our constitutional document. So legally, in my view, that submission is inaccurate.

The bottom line is that I think section 16 should be in the preamble; it does not belong in the body of the accord.

**Mr. Breauch:** I would like to pursue a couple of things we have wrestled with. First of all, the fact that this committee is here means there will be a response to problems that many groups have pointed out. I do not think anybody is going to be happy with all of it, but it is our job to make political judgements about who is right and who is wrong and who has raised a valid concern and who has not been able to make a case. In the end, a lot of folks are not going to like that, but we are in the position where eminent constitutional experts, the best legal minds in the country, have been before the committee and given us many different opinions on matters. Someone has to make the judgement calls; that is not always a pleasant job, but that is where we are.

There are two things I wanted to pursue with you. One was, I am intrigued by the notion that I have gotten from a number of groups now that the Charter of Rights is gone, that it does not exist any more. That is not true. I am wondering just exactly how that impression became so widespread. My concern basically is that it is not clear

to me what impact this accord has on the charter. I am trying to assess in my own mind what has happened there and how you might most efficiently determine what will go on there, but I do not dismiss for a moment what many people have said, that we will not know that for 50 years. We will probably get some version of this accord put in place. We will probably have more constitutional amendments over that time, but what constitutions are good for is, you put them in place and let them bubble along for a lengthy period; then over half a century or so, you have something that is probably very clear to everybody. But they are still interpreting the American Constitution, so I imagine they will be interpreting the Canadian Constitution for some time as well.

I believe it is not inaccurate to say that a lot of people feel the Charter of Rights, which we just got in this country, has somehow disappeared; that impression appears to be very strong, particularly among women's groups. I would like to hear your comments.

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**Mrs. Towns:** I do not feel that the Charter of Rights is gone, by any stretch of the imagination, and I am not sure how groups arrive at that conclusion. What we do see is that section 16 lists particular protection for two groups of rights and not for others. I think what most groups are saying, although certainly I cannot speak on behalf of them, is that this may present a problem. I think the very fact that it may present a problem is where the concern for women's groups arises. Historically, "may present a problem" ends up presenting a problem. Certainly I think the fact that because of the wording of the British North America Act of 1867 women were not considered persons in Canada until 1929, at this juncture in our history seems ludicrous, but certainly that was the case in Canada for some years and that it may present a problem is of concern.

In terms of expecting our courts to always make reasoned decisions, I would just like to draw your attention to a decision of the Alberta Court of Appeal, I believe it was. It was a discrimination case with respect to a woman being fired because she was pregnant. The Alberta Court of Appeal said the woman was not discriminated against because she was a woman. The discrimination was against pregnant persons but all pregnant persons were treated equally. Now, if that is not discrimination against a woman, I do not know what is. In legal thought, that decision may well be sound legally, but

rationally it does not make any sense at all; and that is the concern, because even if we would like to impute to our courts having the best legal minds and making reasoned decisions, none the less the decisions sometimes can be plainly ridiculous.

**Mr. Breagh:** I feel a little better about that, because I want people to understand that there is a nuance at work here. There is the placing of words in a constitution, and we are all making our best possible judgement call as to how that might impact on another part of the Constitution.

**Ms. Vendrig:** I would just like to add that what we have is some incongruity in two very important documents. If Canadians look at these two documents and see only some discrepancies, how are they going to feel about what their national rights and the spirit of the law is? Nothing is clear there, even their own rights, for 51 per cent of the population. That is a very weak document to have as a national document.

**Mr. Breagh:** Just to conclude this little part of the argument, there are many of us who are looking at the Charter of Rights in a different way than we did a couple of years ago. We are seeing different things in there. It is not that we are stupid or anything; it is just that other factors have come into play. Court decisions have entered into the picture. How people exercise their rights under the charter and the kinds of lawsuits that go before the courts change how I look at the Charter of Rights. There is a mix of things at work there. It is much more subtle than many people would paint it.

As a legislator, I would be the first one to tell you that you do not get any rights from words on a piece of paper. They only come after the fact when someone else goes to court, when some government takes some action, when you take some action. There is not quite as straight a line of relationship there as some would like.

Let me move to one other area that we have discussed a lot with a number of people, and that is the matter of standards or objectives or things that might be called programs of a national stature. I must confess I am trying to understand this argument, but I am having difficulty with it. Is there anybody in Ontario who honestly believes that the education a kid gets in Bolton or Uxbridge or Napanee is exactly the same as the education a kid gets in downtown Toronto, that he or she has the same access to educational institutions, the same access to other learning experiences? You can apply that to almost anything we do.



The reality, as I see it anyway, is that we do the best we can. We write laws and we write regulations and we write objectives and we write standards and we do all kinds of things and we try to balance it out, but we are lying when we say that every Canadian in every part of the country has exactly the same opportunity as everybody else, because that is not true. Whether you are talking about roads or hospitals or schools or access to the courts or access to jails, it is all different.

What governments try to do is attempt to normalize, so to speak, to provide access in the broader sense. For example, we did a bill here which provides, we say, access to people from northern Ontario to the high-technology hospitals in southern Ontario. But we would be lying if we said the access is exactly the same. What we do is give them the right to get on a helicopter and then on a plane and get transported to one of the high-technology hospitals. That is supposed to be the same as somebody having an ambulance deliver them in five minutes? Well, it is not, and we know that.

I am not as concerned as you may be about whether we have national programs with objectives or standards or whatever, because I believe the critical point in there is the intention of the government. How do they want to deliver a program, and can they successfully design one that seems appropriate to the people they are trying to serve? I would like to hear your comments on that because you have brought up that argument again.

**Mrs. Towns:** I think, as a starting point, it is important for people in Ontario to realize that we live in a rich province. I do not think that is a tired saw. I think that is the truth. In addition, Metro—and of course the province represents, geographically, more than simply the Metro area—happens to be a reasonably wealthy area. So there is some plan to our view of what is available to people, because we are lucky enough to live in Ontario.

It is true to say not every Canadian has equal access to a hospital, but at least we are starting and once they get to the hospital, they have equal access to obtain the operation they need, and that is the concern.

**Mr. Breaugh:** You could argue about that.

**Mrs. Towns:** Yes, it is true we could argue about that, but that is the theory. At least we are attempting to start from the same place for everyone. I think this is an important part of the Canadian concept, because otherwise we simply would not be a nation. We are a nation of

incredible diversity, and why do we care? As was stated before, coast to coast to coast there is such a diverse range in this country that in some ways it seems nuts for us to stay together as a country. But obviously that is important to Canadians.

It is an important part of the Canadian concept that we consider that there are fundamental social rights—if I may use that phrase—such as access to medical care and access to education, and all Canadians should at least be starting from the same point of view. The dollars allowable—and that is what we are talking about here—should not be an issue. For example, if one Canadian in Vancouver were to be eligible for a greater Canada pension plan than a Canadian of similar qualifications in Winnipeg, this would not be allowed.

**Mr. Breaugh:** I appreciate what you are saying and I have some sensitivity for it but then, every time, I get down to the last little example you used, that your pension dollar is the same. My dad lives in Napanee. His pension dollar in that small, rural, eastern Ontario community is not too bad, mostly because his housing is fairly cheap there. If my father lived in downtown Toronto and was unable to get into some kind of subsidized unit, his exact same pension dollar would not be worth nearly as much to him.

We try as best we can to give reasonable access, to set reasonable standards, but it is very difficult to do that. I almost get the impression that some groups feel that, if we get the right words put on pieces of paper in Ottawa, all of a sudden, magically, from one end of Canada to the other, the exact same program will appear. It cannot and it will not. It never has and it never will.

**Ms. Vendrig:** I think, earlier, you were talking about the faith and the spirit of the Meech Lake accord and of the Constitution. If we do put the right words down, then that spirit is there. As it stands now, the spirit is not there and the faith is not there. As the years go by, that spirit is still not going to be there. That is something that Canadians are not going to have in front of them that they carry on as their rights and as their beliefs. I think that is why it is important to get those words right. As you say, that is all we can do now, but it is good enough.

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**Mr. Allen:** I cannot let you get away with that, not because I am mean but because I really think it is very easy for us, just in the way Mr. Breaugh set out with this questioning, to suppress a whole lot that is there that says exactly what you want said and tries to get it done and remains in the

Constitution. For example, section 36 of the Constitution Act, 1982, has the whole section on equalization of regional disparities. It talks about all that business of maintaining the promotion of equality, access, the provision of economic and public services and so on. It is all there.

Ever since the Rowell-Sirois commission at the end of the 1930s, we have had a principle in this country that has undergirded funding now for the better part of half a century. It says that there shall be equivalent services for all Canadians in all parts of the country without an unequal tax burden. That applies to certain basic services that we have come to recognize in a civilized community.

It is broadly structured out there. Those ideals and objectives are very well entrenched right now. If you look at the wording in the charter around equality rights, it is unequivocal. There is nothing you could say that was anything stronger. Every individual is equal before and under the law and has the right to equal protection and equal benefit under the law without discrimination. It goes through all the list, and that is there. Nothing that can be done in the language of Meech Lake is going to alter that fact.

If you come to the concerns that you have about the clauses in question around section 16, go back and read the language. If you go back and read the language, you find that the language of sections 25 and 27 is, "This charter shall be interpreted in a manner." It does not give anybody anything, it just says "interpreted in a manner." "The guarantee in this charter shall not be construed so as to abrogate or derogate from." They do not give you anything particularly in those clauses.

But if you take the clauses that do address specific guarantees that are new, straightforward and clear in the charter, the language is very different. Section 15, which I just quoted, is very direct. Section 28 in the charter says, "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." That is very different language. Those are substantive things. They declare what the rights are.

Then of course you get on to the question of application. We have been into that business now: what parts of the country are obviously likely because of very favoured positions geographically; economic concentrations; networks of communications; transportation, and the fact that the hospital has to be somewhere and therefore it is closer to somebody than to

somebody else. All those things begin to nibble away at the ideal.

I think it would be wrong for us to come out of these hearings, both as a committee and as a group of presenters who come here, and somehow have the sense that there is not anything that is very clear or firm around the whole question of equality in Canada any more. That is a real impression that I do get from many presentations. I think it is a case of putting ourselves on the rack and then turning the handle, so that we get that excruciating feeling that we are being tortured, but we are not. We are in some respects, here and there, now and then, and we have to look after that, but there is lots of language there around equality.

What is your reaction to that? I do not always get this worked up around these questions, but there really is something there to defend and it is really good as far as the goals are concerned. It is very strong stuff.

**Mrs. Towns:** I think it is important to note that section 16 of Meech Lake comes after the charter. In my understanding of court interpretation, any interpretation of Meech Lake would have a stronger holding because it came after the charter. Because the charter was first, there is a subsequent act that would be seen to be stronger or more reasonable or of higher priority, because it does come subsequent to the charter.

**Mr. Allen:** Meech Lake would, if the clauses were of an equivalent kind, but they are not clauses of an equivalent kind. What you are ranking is two interpretative clauses over against section 2 of Meech Lake, which is also an interpretative clause. What is being said is that, as you go about the interpretation around the English-French stuff in Canada, around the dualism and around Quebec constituting a distinct society, as you go around the interpretation of specific pieces of legislation and their impacts in the light of that, then these two items are not to be abrogated in that respect, because they are also interpretative items of the same kind.

That is what I mean by equivalent clauses. Therefore, as earlier equivalent clauses, they have to be inserted in order to protect them against the worst-possible imaginable impact to the distinct society. But I do not see them as equivalent clauses to section 15 and section 28 in the charter, or with respect to many other items—for example, minority education rights in the charter—because those are direct, declaratory, substantive statements about rights. You see? There is a difference.



**Mrs. Towns:** Yes, I see, but they were passed prior to section 16 of Meech Lake. That makes a big difference, because in any consideration a court is going to say: "Well, here's section 16 of Meech Lake and here's the charter, but this was passed after. They specifically listed, 'Let's protect these two rights,' and they didn't list all these others and they must have known what was in the charter. So they must have meant that these rights have more priority than these rights, and these rights refer to 'distinct society' and 'linguistic'"—I am sorry. I do not have it in front of me; I do not have the exact word. If rights are abrogated by section 16, that is the manner in which they are abrogated. The very question "if" is, as I have indicated, what scares women's groups. We feel it is too big an "if."

**Mr. Allen:** OK. I just wanted to get the countervail out there.

**Mr. Cordiano:** I want to thank Mr. Allen for asking most of the questions I was going to put forward. I do want to point out one thing with respect to your statements about Madam Justice Wilson's comments on the separate school funding issue. I do not have the specifics in front of me but I will try to recollect some of the arguments she made. You say she pointed to the British North America Act and the section pertaining to dissentient schools.

But there is something right in the charter, section 29: "Nothing in this charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." It is right in the charter. So you could point to charter itself and say, "There it is, a guaranteed right in the Charter of Rights," that you are basically going to have dissentient schools or schools based along denominational lines. The court can not only look back at the BNA Act, but also it is right in the charter.

Therefore, it is not really a deviation for the court to look at the BNA Act and say that overrides the charter because it is in the BNA Act, that it is also in the charter itself. That is a right that is right in there and pretty hard to overcome. It is in both places and it is pretty clear. That is why the decision on separate school funding had to be the way it was and Bill 30, which we put forward, was upheld by the courts because of that. I do not think it could have been any other way.

I do not want to go over what Mr. Allen has said, but those are my comments. I would just point out that certainly there are no rights granted in section 27 with respect to multicultural

heritage. There is no such thing as multicultural rights, certainly not granted by the charter. I cannot point to anything that says we have a multicultural right to this or that. It is merely an interpretative clause.

I think we would have to take into consideration, with respect to legislating, the fact that we do have a multicultural existence in this country, something that is very hard to pinpoint. We certainly make mention of it in whatever we do, but sometimes we have some very difficult battles about just what that means and how far we are prepared to go in terms of claims that are made in the name of multiculturalism.

### 1530

I would argue that there are no multicultural rights that are defended or that are upheld by Meech Lake vis-à-vis the charter. Again, I do not want to take too much time on this because I have argued with a number of people on this question. We have asked a number of questions of people who have come before the committee on this, and fundamentally there seems to be a notion that there are rights in section 27.

The language is pretty clear. There are no rights there. It is an interpretative clause and states it clearly. I want to know from you if you agree with the fact that the language used in section 27 is pretty clear. I do not know if you have had an opportunity to look at the charter, and section 27 specifically with the language that is used there, but the word "interpreted" is right in there. It is hard to dispute that.

**Mrs. Towns:** I do not think I am familiar enough with section 27 to answer your question, to be frank.

**Mr. Cordiano:** Fair enough. I want to point out that what Mr. Allen was saying is that section 16 of the accord speaks to two interpretative provisions. It was felt that because you are dealing with the "distinct society" clause in section 2 of the accord, you are dealing with cultural matters and therefore it is necessary to bring section 27 and section 25 back into the Meech Lake accord. There were no disputes about the level of importance of those two things with respect to another interpretative clause, the "distinct society" clause. Anyway, he made that point and I do not want to go on about this.

**Mr. Chairman:** One of the things we have found over the six weeks so far is that just when you have reached the point where you think you have heard every aspect on a certain point to do with Meech Lake or the charter, you suddenly find that there is still a whole series of other kinds

of issues or questions that somehow will bubble up as you try to go through it.

I think almost every day we are starting to wrestle with certain new aspects and elements. As has happened, we have dealt this morning and this afternoon particularly with issues related to the question of the charter, the relationship of the charter to the accord and to the question of opting out, because this morning we dealt with that with one of the disabled organizations.

I suppose it underlines the number of questions that arise. What at this stage in particular we are doing as we go through this with you is trying to clarify points and at times coming at it from another point of view, to try to see if we are understanding what it is we think we have now learned, because that may be different from what we thought something meant a week ago.

I would like to close, if I might, with one question. One of the issues we have had raised is specifically around the question of women's equality rights. In your organization, the Canadian Federation of University Women, do you have francophone clubs, and have there been any discussions or are there likely to be discussions with them around this issue?

Being an Ontario committee, we are not like the House of Commons and Senate, where we can go all over the country and talk with a number of groups in different provinces. We know there is a difference of opinion here, at least with some of the Quebec women's organizations, about some of these issues. I wonder whether, through your own organization, which is a Canadian-wide organization, there have been any discussions, or whether there are to be, of this particular issue.

**Mrs. Towns:** I can advise you that CFUW does have francophone clubs in Quebec. Generally, our divisions within provinces are regional. In Quebec the division is Quebec English and Quebec French and each has a provincial or regional director, if my memory of the organization is correct.

I am not sure what the status of discussion with the francophone clubs is but I do know that in Victoria, in August 1987, at the annual CFUW meeting, a resolution was put to the body with respect to Meech Lake, specifically questioning the gender equality provisions. It was feared that there was difficulty with those gender equality provisions, and I believe the resolution also dealt with the opting-out provisions, although I am not certain.

In any event, the resolution—because it was an emergency resolution and had not been circulat-

ed to the clubs beforehand, which is normally the procedure of CFUW in determining its policies—was passed unanimously, and there were members from the francophone clubs there.

**Mr. Chairman:** Thank you. I wonder if it would be possible to get a copy of that resolution and make it available.

**Mrs. Towns:** Certainly.

**Mr. Chairman:** It is just one of the elements that at times we are interested in, that is discussion in terms of how people are viewing the way the Charter of Rights is impacted.

On behalf of the committee, I would like to thank you for coming this afternoon. It has given us a chance to do a number of things, including providing Mr. Allen with an opportunity for a spirited defence of the charter. It has been very helpful. I would like to underline, for you and also for your colleagues who were here before, that we quite appreciate your scepticism about the process, and what we as a committee are doing. I think that is normal and natural in terms of how we have come to be here and how you have come to be before us.

I suppose what we as a committee have done is simply say there is a given that has been placed in front of us in the way in which this issue came here. From the beginning we have said that we have to, as we listen to you and others who have been before us within this committee room, try to come to grips with the accord individually. After all, our mandate is from the Legislature, it is not from the government.

There are clearly other matters that affect us because the first ministers signed the accord. Individually, as members of different caucuses, how are we going to deal with that? I think the first step in all of that is listening very carefully to what is said to us and making sure that that does get back in our case to the Premier, to the leaders of the other two parties, as we proceed to the point where the Legislature will make a decision.

Finally, whatever we do in this committee and whatever the Ontario Legislature does, there are at least two other provinces that have indicated that they are going to have hearings. The accord does not have to be ratified until June 1990. There are a lot of factors, a lot of things that are going on.

I appreciate the fact that you took some time to prepare your brief and come before us, even though we do not know where this is all going to lead. If people do not do what you are doing, then there are no possibilities for review and trying to look at how we can incorporate the valid concerns that people have expressed. If that did



not happen, then in fact nothing else would. We appreciate your coming before us this afternoon and we will be looking very seriously at what you have said.

**Ms. Vendrig:** Thank you.

**Mr. Chairman:** I will now call upon Professor Thomas J. Courchene of the Robarts Centre for Canadian Studies, York University. I want to welcome you here this afternoon. We have received a copy of the submission that you had forwarded to us. As always with our afternoon sessions, time begins to slip away, but I will underline that we have found there are many people who want to express different views and opinions. I think we have taken the position that we want to try to make sure that happens. If we happen to be here a bit longer, we certainly intend to hear you and to talk to you, as well as to the last witness. I want you to feel very free to make sure that we understand your views and concerns, and we will follow up with questions.

1540

DR. THOMAS J. COURCHENE

**Dr. Courchene:** Thank you. My paper is very long and I will not be able to cover all aspects of it. For example, I feel quite strongly that one part of Meech Lake that is going to have an important impact is the fact that it effectively creates a House of the Provinces but I will not have time to talk about that today.

Thank you very much for inviting me to appear. I will highlight before this committee a few of the issues that I think are important. My background is that of an economist but, as will become evident, I will probably go beyond the frontiers of my own discipline and very quickly be on the frontiers of my expertise, but I think that is what the nature of this exercise is all about.

**Mr. Chairman:** That has not stopped anyone.

**Dr. Courchene:** Right. I am just indicating that it may not stop me either.

I want first to focus on the spending power provision. The bulk of the discussion here is apparently whether the net result is centralizing or decentralizing. My own view is that both Ottawa and the provinces get additional flexibility. Ottawa now can roam free, as was indicated by Mr. Breaugh or perhaps Mr. Allen before, in terms of shared-cost programs in areas of exclusive provincial jurisdiction, a substantial concession.

The provinces, for their part, can opt out of such programs by mounting parallel programs compatible with national objectives. This does

confer some extra powers on the provinces, but I remind you that opting out is a well-established tradition in our nation. In fact, I argue elsewhere in the paper that opting out is really a solution to many of Canada's problems, it is not a problem. I will elaborate on that if you want.

Overall, my hunch is that this feature is a centralizing feature. I know others take the opposite view but I think that is all really beside the point. The point is that the dominant feature of our federation over the last 20 years has not been the division of powers per se, but rather the fact that the traditional, watertight compartments we had are rapidly and irrevocably giving way to interdependence.

Virtually everything Ottawa does, even if it is wholly in its own jurisdiction, is going to affect in some way provincial programs, and vice versa. One result of this is that the provinces are, almost of necessity, becoming the official opposition to the government of Canada in many issues, in part because they have a civil service, whereas the opposition in effect does not. But this is natural and will continue.

The essential point is that federalism is becoming less and less a matter of the division of powers and more and more a matter of process, the process of adopting joint policies and making joint decisions on joint problems. Here, I think, is where Meech Lake is going to have its most extreme value in terms of the spending power process.

Let me give you one example. In the Toronto Star over the last few days, one read about the problems besetting Ontario's health sector. This is particularly a problem in terms of the ageing of the population. But ageing creates other problems: increased money for pensions, for housing.

With the Meech Lake process in place, I can visualize an entirely new type of shared-cost program, one that cuts across both levels of jurisdiction; namely, a shared-cost program for the elderly that encompasses hospitals, medicare, drugs, welfare, housing. With Meech Lake in place, Ottawa can initiate such a global approach.

Some provinces may opt out—I suspect Quebec would but I doubt whether the other provinces would—but without Meech Lake and without that process, I think it is impossible to conceive how such a program could come about, because there would be constitutional challenges flying in all directions. So I think the exciting thing about the spending power provision is it opens up the process, and that is what, in part,

federalism is becoming when interdependence is starting to play an important role.

I will make a final point on the spending power. Critics have pointed out that the provision will effectively spell the end of shared-cost programs. Obviously I disagree, but apart from the recent day care program there have been no new shared-cost programs over the last 20 years, so this is hardly a criticism. If we have not been able to do these things in 20 years, how can Meech Lake make it work? In my view, as I said, Meech Lake will breathe new life into such programs because it addresses the key issue of modern federalism, namely, the process dimension.

Likewise, I am very excited about the Supreme Court provisions. They can equally be classified as winners under Meech Lake. First, Meech Lake constitutionalizes the court. Therefore, it makes it a national institution rather than what it was before, which really was a federal institution because it was a creature of the federal parliament.

Here I support the view of Peter Hogg in his recent book on Meech Lake that, "It is inappropriate that the court which serves as the guardian of the Constitution should be unprotected by the Constitution." But given that it is a national institution, it then makes eminent sense to have some role for the provinces in the appointment procedures for the Supreme Court. Most other federalisms do this; in fact, every single constitutional reform proposal from 1971 incorporated this, and most of them incorporated it with respect to multilevel courts, not just the Supreme Court.

I recognize that the Canadian Bar Association has a different view of the appropriate process. They want an advisory committee in such appointments to be composed of the chief justice of the province, delegates of federal-provincial attorneys general, lawyers and laypersons. I have no problem with this, but surely such detailed mechanisms do not belong in the Constitution of Canada. If the committee is in favour of such a process, it makes eminent sense to recommend it for consideration to the Legislature and to the government of Ontario, but I do not think you should criticize the accord because it does not go to the very specifics of how you implement some of these things.

Meech Lake has come under considerable criticism in regard to the amending formula. Under the Constitution Act, 1982, the 7-50 provision was in place, plus some unanimity; and Meech Lake, as you obviously know, moves a

few of those provisions from the 7-50 to the unanimity area. I suppose there are two ways in which you could handle the amending formula: put it on a regional basis or on a provincial basis, i.e., unanimity. Both of these would have been preferable to the old 7-50 formula, because under the 1982 formulation Ontario and Quebec acting together could veto all constitutional amendments, but no other three provinces such as the Maritimes or the Prairies could do this. That is not a very federalizing aspect of the Constitution.

The attraction of the Quebec proposal to the provinces, other than perhaps Ontario, is that while Quebec wanted a veto it was perfectly willing to grant that veto to every other province. I think that is partly what made the package so appealing. This is clearly very federalizing in its impact, and since I classify myself as very much in favour of Meech Lake and federalism, I obviously welcome that.

The major issue here appears to be the entry of new provinces. The point is made over and over that the Meech Lake unanimity requirement means it is less likely that we will ever welcome new provinces into the federation. I think this is wrong for four reasons. The real problem is not Meech Lake here but the Constitution Act, 1982. Prior to 1982, Ottawa alone was responsible for admitting new provinces as long as the existing boundaries were respected. That is how we got Saskatchewan and Alberta and how we got Newfoundland. In 1982, the 7-50 formula applied, so this was the real constraint, the first constraint. Meech Lake, I agree, makes it a little more difficult.

Another point is that if Meech Lake does not go through, Quebec will not be at any future constitutional conference, or at least that is my impression. Under such a scenario, I cannot believe that Ontario would vote for a new province without its sister province at the constitutional table; that is, Ontario would not again isolate Quebec on a major constitutional issue. If that is the case there are no new provinces without Meech Lake, so Meech Lake is necessary to get new provinces only because it brings Quebec back to the constitutional table.

Finally, it seems to me that the provinces that have the most to lose and therefore ought to have a say are the equalization recipient provinces, because when you bring in new provinces they are not going to affect Ontario very much but they may affect the way in which Canada redesigns the limited pie of equalization. I have no problem in justifying the fact that unanimity in this section is important and, therefore, I



welcome the concept that all provinces are involved in introducing a new province.

Moreover, since a new province would require an amendment to the amending formula, which in turn requires unanimity, it only seems consistent that getting that new province in should also require unanimity. My own view is that when the territories are ready to accept provincial status, the provinces will not stand in their way, but without Meech Lake there is no chance, it seems.

Finally, I have a couple of points with respect to the distinct society. I am on the side of those who argue that as an interpretative clause it will not override the charter and, in particular, it will not override sections 15 and 28. Again, quoting from Peter Hogg: "A law passed to preserve linguistic duality or to promote the distinct identity of Quebec would, like any other law, have to comply with the charter. If the law was contrary to the Charter of Rights, then the law would be invalid." I have no concerns about this part, particularly because a distinct society obviously involves both sexes, so that it is hard to see how it could be discriminating against one of them.

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There appears to be a second concern related to the issue of Quebec's role to preserve and promote the distinct society, but Ottawa and the provinces' role is only to preserve the fundamental characteristic of linguistic dualism. The francophones outside Quebec appear to want this duality to be promoted by all the provinces; but I doubt whether this would be acceptable to most of the provinces, because if you added the words "preserve and promote" it would be fairly close to requiring official bilingualism on the part of many of the provinces and I think this request is unrealistic.

What is possible is that provinces inclined to do so can adopt measures in their own legislation that will promote the new linguistic duality. I am not saying here that the distinct society does not mean anything. I think it does mean something, but it means something, in my view, in the institutional area more than in the charter area; and that is in my favour.

Just as a final comment, Ontario has played an incredibly special role in the constitutional process and 1988 represents the coming of age, 21 years ago, of John P. Robarts' Confederation of Tomorrow Conference. Meech Lake is, in effect, a culmination of Ontario's 1967 initiative. In the interim, Ontario was willing to isolate Quebec in 1982, and in the process Quebec saw

some of its powers eroded. On the other hand, Canada gained something from 1982; namely, the Charter of Rights and Freedoms and whatever goes along with the Constitution Act, 1982.

Now I think it is time for rapprochement, and Ontario's position is absolutely critical here. Meech Lake incorporates a very reasonable set of demands to bring Quebec back fully into the constitutional family. I hope the committee will endorse the accord wholeheartedly. At this point I think we are all aware that the accord probably needs a dose of support, at least from the perspective of those who support it.

I do not think the negativism in the land about the accord is well founded but I can understand it. All sorts of horror stories can easily be generated with respect to the accord. Equal numbers of horror stories could have been projected with respect to the 1982 charter. The difficulty for those who try to defend it is that they are just going to say, "No, those aren't true." But that "no" does not get a good headline very often, whereas the other side does.

So I would argue—and it is not really my role to do so; I am really stepping beyond the limits of an economist here—that we are at an historic process. Ontario started this issue off by enthusiastically endorsing the accord. The committee would really help put the accord through. As to the whole notion of who speaks for Canada that people talk about when they relate to the accord, I think the correct answer is that Meech Lake speaks for Canada. Thank you.

**Mr. Chairman:** Thank you very much and thank you too for your paper which we do have. I know, having read it, that it really elaborates on a lot of the points, with others, that you have made this afternoon. You note the point of the various views that exist about the accord. As members of a committee that has been sitting here, and also in a couple of other centres, we are aware of a lot of differing perceptions about what it does and what it does not do on virtually every topic.

You have been with us for a while this afternoon. Let me share with you a problem that we have: that is, the whole question of charter rights. The relationship between charter rights and the accord has come up time and time again, particularly with respect to women's rights. Regardless of whether in fact there is a legal case there—and you have heard that we have had constitutional experts on both sides—we are trying to wrestle with a perception which may or may not be real, apart from what the truth is there.

None the less, a large number of people believe that something has been taken away or that the chances that something has been taken away are so real that we cannot, we should not and we must not move on to approve that accord, without bringing about that change. But it seems to be impossible to try to go back to Quebec and say, "Look, most of the people, if not all, who want to see a commitment to equality rights, particularly women's groups, are not saying no to Quebec, are not saying no to the distinct society, but feel it is unfair that, as the price for that, they cannot pursue this particular issue and have it clarified." Quebec is saying to them: "Look, this is a package. You have to take it or leave it. We'll deal with these later." Do you see it as being a fundamental problem that if a province were to try to argue very forcefully with Quebec that the accord had to be opened up again, that is just an impossible route and is not going to happen?

**Dr. Courchene:** I think it is a fairly difficult route. I would not go as far as saying it is an impossible route. There always is the option of endorsing the accord and then starting off another amendment and shipping it around to various legislatures. If it passes 11, it becomes law. One finds out very quickly if it is a problem. That process is much more likely to appeal to Quebec than starting to open up the accord. Once the accord is opened up on one issue, I think it will be opened up on all issues.

**Mr. Chairman:** Could you elaborate a bit on that point? We have had different groups talk about the companion resolution or motion, and a number of the aboriginal groups have actually drafted a companion resolution and left it with us for us to look at. That is pretty new in Canadian constitutional development. It was noted that British Columbia tried it with property rights, but I think that is the only one we have had. How do you see that working? Do you think that is a valid approach in this new period of greater provincial involvement in constitutional change?

**Dr. Courchene:** I think the political scientist and the institutional expert is going to follow me. He might be a better person to ask that question of. But I do not see that there is anything wrong with that process. All that has to be done is to have it ratified by 11 governments. I suppose the only time it could run into a problem would be in a minority situation, where the legislature said yes but the first minister said no. You might run into a problem, but I have not thought about that. Apart from that problem—

**Mr. Chairman:** But the concept, you think, is sound?

**Dr. Courchene:** Yes, I think so. I talk about the process at the end and I realize that the fact that the charter has democratized the Constitution and the amending formula has put it back in executive federalism is unacceptable to a lot of Canadians. We have to somehow work that out. That is the procedure Meech Lake was working under and we may need a special constitutional conference to look at that. I suspect it is going to be difficult to change it.

The reason we have these accords is because we have responsible government. We have to recognize that. Suppose Ronald Reagan and the 50 states decided to set up a Meech Lake accord document and signed it. They cannot deliver their legislatures, so it does not mean anything. In this system of responsible government, where there are majorities all over the place, if the first ministers can deliver their legislatures you can get this sort of system. It may look as if it is just 11 men—or 11 persons; men in this case—but none the less, it comes to us, strangely enough, from responsible government. That really is a problem that people are also grappling with.

**Mr. Offer:** Thank you for your presentation. In your presentation you alluded to the word "process" a number of times and, in response to the chairman's opening question, you alluded once more to process. In general, without being simplistic, there are two concerns: one where people bring forth their opinions about the particular constitutional reform being talked about and the other where people talk about the constitutional reform process.

You are a supporter, as you have clearly indicated, of the Meech Lake accord. The accord itself states that there are going to be constitutional conferences, the first one of which is going to talk about—and I use the words—the Senate reform aspect.

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**Dr. Courchene:** I think it says all of them are going to talk about it, does it not?

**Mr. Offer:** Yes, that is correct. But with respect to the fact that we are now looking at an accord which does say that we are going to have a constitutional conference, in the event that this is ratified as per agreement then we are going to have that conference and it is going to bring to the fore some of the concerns, some of the fears of others with respect to the type of process which is going to be instituted and whether they will be



able to input their feelings with respect to Senate reform or the roles or relations with fisheries.

I am wondering if you have directed your mind to helping us out in grappling with this whole question of what that process ought to be or whether there should be a process. Is there a necessity for change, keeping in mind the very real feeling that people have with respect to how the Constitution can affect their lives? I am wondering if you can help us out. You might want to use the Senate as an example.

**Dr. Courchene:** Let me start by saying that one of the problems with Meech Lake was that it crept up so suddenly. People just did not think there was any chance that this thing would get through, and then there was only one month between Langevin and Meech Lake, or whatever it was. Afterwards, it becomes difficult, so I think the role for the process is to make sure—if Meech Lake is passed, presumably these constitutional conferences will have some lead time, then I think the committees go to work before.

The agenda items will be fairly obvious. Senate reform is going to be one of them. The committees can start working before the constitutional conference and report to the legislatures, so you get your input at least twice, but what is important, beforehand. That is when I think the input is most valuable, because it is very difficult if it is this procedure whereby it ends up with a signed pact. It is a wicked problem at that point. You are in trouble if you say no, and you are also in trouble if you say yes because you do not respect the rights of the average legislature.

I think the House of the Commons and the Senate may do this. In fact, I think the joint committee did recommend that next time around, before these constitutional conferences, they will have hearings with respect to the issues that are on the agenda. That is one aspect of process that one can look at. Then I suppose the whole issue of process can become an agenda item, so maybe there should be hearings on the process.

**Mr. Offer:** You are saying there is the role for provincial legislatures, if they are so inclined, to set up their own framework with respect to the agenda as they see it—

**Dr. Courchene:** In advance.

**Mr. Offer:** —in advance, and then make a report to the legislature for use at the upcoming constitutional conference. In your opinion, would that meet the needs of those who are concerned with respect to any change?

**Dr. Courchene:** I do not think you are going to meet the needs of all those who are concerned,

because these are compromises. There are Canadians on both sides who will have legitimate views that are conflicting and they are obviously both respectable positions. You are always going to get feelings among those who lost saying their views were not heard and those who won being happy with it. That part you cannot solve, but I think that at least it will allow a much more open process ahead of time and the ability to draw on all the special interests.

One of the things that does bother me a little bit about Meech Lake, though, is that it almost appears that if you are not mentioned in each constitutional round you are out of the Constitution. I think Don Jamieson referred to it as the Christmas tree effect: if you do not have a light on in the tree this particular year, you are gone. The fear is that when you do something on fishing, you do not have to talk about multiculturalism again.

We have to learn that those rights are enshrined, that they are there and do not have to be mentioned every time we have an amendment. I understand why everybody wants to use each occasion to increase the degree to which his concerns are entrenched, but I think there is a problem. That was mentioned before. The Constitution is there; if you are not mentioned in this amendment you are not out.

**Mr. Chairman:** Just as a companion question on that: one of the things, though, that has struck us—and your point is a very valid one—is that because of the fact it snuck up, in a sense, on people—although one can show there were a lot of meetings and so on—none the less, in a broader public sense, and because of the fact it was signed and sort of presented as, “Thou shalt accept this accord,” one of the real dangers has been the credibility of the system to handle change in a broader public way.

What has struck us is that wherever we go from here, it is very critical that we elaborate some public participatory input into the constitutional system or we could be running into very grave problems with the way people accept those changes. That is a worrisome aspect which I do not think people necessarily realized at the time, nor perhaps should they have in that what they were doing was what had been done previously, but it is one of the after-effects that people feel they were somehow cut out of that whole process. We have to find a way to get them back in or I think we will all suffer.

**Dr. Courchene:** I think there is a political immorality view in the land that no matter how good Meech Lake is, even for those who like it,

the means do not justify the end. I really have not given enough thought to this issue to really help you out, but I think it is something to worry about, although I really do not know how you are going to get away from the fact of the current amending formula. It is going to take unanimity to change that.

There are alternatives, I suppose. You could go to referendums. You could go to some direct interest group influence. I do not know. Good luck. It is a very tough issue.

**Mr. Allen:** I am not sure that the last questions have not exhausted most of what I wanted to ask, but I thought your observation that federalism is becoming less and less a matter of power and more and more a matter of process was very helpful. I wonder whether you are concerned that in becoming more and more process, it in some ways becomes more difficult to cut in on the issues.

When your territory is defined, your powers are clear, your relationships are known and people know where they go to make this representation or that, who has this power and that power, who to see and all the rest of it, in a sense it is more conducive to fostering a clearly functioning democracy, and yet at the same time obviously the rigidity creeps in and it becomes impossible to function with the old wineskins.

Does the opposite happen with respect to a system increasingly focused on process, where it becomes more and more the bureaucrats and more and more the people at the top who are really plugged in, and therefore they are the ones who push the buttons and move the players, and it becomes almost implicitly more difficult for people who are not formally part of the process to get in there?

In the light of that, I think some of the discussion we have just had becomes very important because it does imply new ways of getting into the flow, as distinct from being in your single place, your compartmentalized power or what have you.

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**Dr. Courchene:** Can I respond to that? I think that is a very valid point. I am just in the throes of writing a paper called *The Tragedy of the Commons*. It relates to the British political economy commons, where individual maximization and all of those things that right-wing economists like will not save the commons, because each herdsman will put another cattle beast in there and eventually overgraze it.

I believe the House of Commons is being overgrazed, and all the legislatures. With the

Commons in particular, you have the charter, in which we no longer have—you know, now we have judicial review based on fundamental justice; we have the Senate, an obstructive Senate, made more problematic by Meech Lake; and we have executive federalism, the things we are talking about today, federal-provincial pacts.

In the process, while we may be democratizing things because of the charter, and individual citizens can use the courts in this more direct access to power, we are losing the traditional British parliamentary role for the House of Commons and the legislatures. I think that is really quite something that should be thought about very much, because we are slowly moving, unwarily, as it were, towards the US checks-and-balances system and towards a separation of powers.

I think executive federalism complicates this very substantially. That is why I think in the next round on Senate reform you are going to see much more interest in it by Ontario and in particular by Ottawa. As for the Commons, there is a tragedy, not in the sense of being necessarily bad, but a tragedy in the sense that things are happening that seem to be out of its control.

I think we are changing the ways that citizens view their governments. It is not clear that we know what the end process is going to be like. I do not think I have responded exactly to what you phrased, but I think it is a very real concern which Meech Lake in some sense exacerbates.

**Mr. Allen:** I think you did respond to the essence of the question. I just had one small item. As you were going quickly over your points on the issue of new provinces, when you said that the problem in the first place was not Meech, it was 1982, was that simply that at that point we made the first break from the old amending formula and therefore that is what got us into this, or are you saying more than that?

**Dr. Courchene:** No, just that; seven and 50 is very different than just one, just Ottawa, and seven and 50 without Quebec really means Ontario has a veto and nobody else has a veto. If Quebec is already not going to be there, Ontario will knock it over the 50.

I am originally from Saskatchewan and I think I carry some of this view through to my living in Ontario. I guess I am known in the system as a decentralist, but I also think that, for all sorts of reasons, the federation is changing. One of the things happening—is it that we are federalizing?

Meech Lake is decentralizing; it is decentralizing the role of the provinces. You are giving more and more power to the individual provinces



and less and less to Ontario and Quebec as a group. In that sense, you are federalizing the system. I think it is hard for a lot of Ontarians and a lot of centralists to accept that, but I think it is inevitable. I do not say I am right, I just think it is inevitable. I have totally forgotten your question. I am sorry. I may, by mistake, have answered it.

**Mr. Allen:** I would say you did it quite deliberately and you did do it. Thank you. I appreciated your presentation very much.

**Mr. Chairman:** The last point you make is a very interesting one. It is one of the factors in terms of future process that it is going to be interesting to work out. As a legislative committee from Ontario or a legislative committee from Alberta, dealing with constitutional change which will be affecting the entire country, should those committees, if they are in existence, as part of their responsibilities go around the country to get different points of view?

I think your point is well taken that, especially in southern Ontario and Metropolitan Toronto, probably this is where we find the largest percentage of centralists in the country. Even in our own deliberations as we look at the accord in the context of, let us say the Quebec round, obviously within our own membership we cannot reflect any Quebec members in the way the House of Commons or the Senate can.

I think it is going to be an interesting evolution as to how committees will determine, when looking at constitutional matters, how to have a sense of what different regions of the country might think about an issue versus their own thoughts. I do not have an answer to that, but it is interesting.

**Dr. Courchene:** Just as the House of Commons and the Senate have a special joint committee, there is no reason the provinces could not put up one member each and have a travelling committee that would feed back into their local committees. Remember that John Robarts's Confederation of Tomorrow conference did not include Ottawa. Did it not come? Ottawa suddenly realized that the issue was important and it had to get on the bandwagon, so it moved. You know, for things to be national they need not be federal. There is a role for the provinces' nation-builders as well as a role for Ottawa's nation-builders.

The process is very flexible, even though it is essential. I think a travelling joint provincial committee may well get each province around the inability that each one acting alone will find.

**Mr. Chairman:** I think that is a very stimulating thought on which to end. I want to

thank you very much for your brief, which as I mentioned before, does go into detail on a number of those issues, and also for the particular perspective that you have brought to the accord in terms of how to look at it. As you say, the democratization of federalism and how that is reflected through the accord is an interesting concept, I think particularly for those of us in Ontario. We thank you very much.

**Dr. Courchene:** Thank you. I very much enjoyed this. I am sorry, I should have been more academic and less enthusiastic about the accord, but it is my version of Canadianism coming out.

**Mr. Chairman:** Perhaps I could now call on Professor Peter Leslie, the director of the Queen's University Institute of Intergovernmental Affairs.

I apologize, Professor Leslie. As chairman, I have not been doing a very good job of keeping us on time, although I guess I would simply add that as we go through this process, inevitably we find that it becomes very interesting in trying to get views out on the table and to give people a chance to set out their thoughts. I hope that while you have had to wait for a while, none the less we will have an opportunity to explore the Meech Lake accord with you and have a full sense of your views.

We welcome you here this afternoon, and we will make sure that you get the 5:30 train, even if we have to sign a federal-provincial accord with Via Rail. We have a copy of the submission that you made, so if you would like to speak to that, we will follow up with questions.

DR. PETER LESLIE

**Dr. Leslie:** Thank you very much. I would like, first of all, to express my admiration to you and your fellow committee members for the perseverance and the stamina that you are showing in the weeks of hearings. You must be feeling at this point somewhat Meeched out, if that is a word.

**Mr. Chairman:** We have strong constitutions.

**Dr. Leslie:** Sure. In any case, since I am aware of the fact that so many people have been before you and that you have covered so many of the basic questions, I suspect over and over again, I am not quite sure what to say at this point.

As you just said, I do have a written brief and I understand that was circulated. It covers ground that by now will have been well trodden and I do not think it would be appropriate for me to try to go over the whole thing, by any means. For one thing, it would take all the time available.

So while, of course, I would be very pleased to elaborate on any points or take questions on any points that I raise in the written brief, I would now just like to touch on three points that I think arise out of the debate on the accord as much as out of the language and text of the accord itself.

Those three points are, first of all, the lack of precision in the use of language in the accord and the way that people have reacted to that. There is concern about the unpredictability of the consequences of adopting the accord, or the unpredictability of how it will be amended, and consequently the element of risk. That clearly is animating a great deal of the public debate. This afternoon I heard earlier presentations expressing an aspect of that.

### 1620

The second issue is the one that you have just been talking about with Mr. Courchene, the issue of process which, I think, as your own questions indicate, is clearly relevant both to the present accord and also to future steps in constitutional change and how we get public input. How do we get legislative input at an early stage in the process?

The third issue that I would like to at least touch on if there is time is the issue of decentralization within the federal system and, related to that, the overall capacity or the incapacity of government as such—and here I do not mean necessarily the federal government or the provincial government, but the whole governmental system, because so much policy is formed through a process of interaction—to meet the needs of Canadians and whether that has been altered in any fundamental way by the accord. There are three points then.

First, as regards precision in the use of language and consequent risk where there is imprecision, there have been lots of references already this afternoon to phrases such as “distinct society,” and “linguistic dualism.” There has been discussion of the impact of section 16 of the accord on the Charter of Rights, and especially on sections 15 and 28. There have been allusions to the spending power.

I think the standard reaction to the reading of such phrases is uncertainty as to what they mean. People are saying, “If we do not know what they mean or what they may come to mean in circumstances that we do not know yet, in those circumstances we shouldn’t be using those terms.” I have heard a lot of that kind of discussion in the public debate. I think the reaction people are feeling is, “Why should we take an unnecessary risk by using words when we

can’t really tell how they will be played out over time.”

The way I react to that is to say that clarifications of the language that will reassure one group will alarm another. That is very evident if one compares the debate that took place in Quebec and in the hearings of the Quebec National Assembly with much of the debate in the rest of the country. Thinking about how that debate has gone, both in Quebec and elsewhere, I think it is unfortunate that more of the debate does not focus on the most likely interpretation, the most reasonable interpretation of the accord and of the provisions of the charter as they may be affected by the accord.

It would be salutary if the debate focused on those matters rather than on imagined horrors. The more one does focus on the horrors, the more you get demands for clarifications that will rule out what may appear really to be quite perverse interpretations.

This poses a general issue, and that is we must remember that here we are addressing constitutional questions. We are amending in certain important ways a Constitution. We are not writing the Income Tax Act. I think there is a significant difference. In the Constitution, what we are doing, and particularly what we are doing in most of the Charter of Rights, is to ask the courts and the Supreme Court of Canada to be the conscience of the nation.

In most respects, we must remember that its rulings will not, in fact, be definitive in the sense that there is for most parts of the relevant sections the possibility of legislative override under section 33 of the charter. So I think really what the courts’ future role is here is to wield essentially moral authority and to tell us when democratic majorities are infringing on principles to which we are all, through the Constitution, committed.

But when they make such statements and issue, for example, a decision to the effect that a particular piece of legislation or a regulation or even an administrative action is inconsistent with the principles in the charter, or most of them, there is still that escape hatch that the legislatures have. We, the citizens of Canada or the citizens of a particular province can say through our legislators that this is a particular case in which we would not wish the general principle to apply. In that context, this is a completely different kind of exercise than in the application of the day-to-day legislation with which you are normally concerned, such as the Income Tax Act.



What we want in this context is the simplest possible statement of principles with a minimum, and not a maximum, of cross-references and clarifications and "notwithstandings" and exemptions. That just adds a terrific lot of clutter. We want to get as clear as possible a statement of principle. We do not want to write a Constitution like the Income Tax Act which, after all, I do not think is really noted for its moral uplift. I think that is an important factor to bear in mind, that this is a different kind of exercise than much of the legislative process. It seems to me the public debate has not made sufficient allowance for that rather basic difference.

There has been one suggestion that one could obtain clarification without that kind of clutter through the use of a reference case. I guess I am pretty sceptical about that. I will not try to develop the point now, but if any of you should wish to pursue it, I am game to do so. This is still, then, on the subject of imprecision and risk, but especially about the concept of risk. While we are thinking about risk that may come out of imprecision, there is entirely too much public discussion about one kind of risk and not enough about another kind of risk. I am not talking about this committee specifically but the general public debate; and I am sure that has appeared, you have had this come before you.

The kind of risk that has received so much attention is what might a court do with the accord or how might it alter the meaning of the charter given the terms of the accord, but there has been much less overt public discussion about the different kind of risk which could be summarized in the question, "What happens if this accord falls to pieces?" It is a different order of risk. It is a more overtly political risk. I guess as I observe the debate and I think particularly of the interventions that have been made by the anglophones of Quebec and also by the francophones outside of Quebec—*Fédération des francophones hors Québec inc.*—I find that there is inattention to that element of political risk that is really very essential.

One of the things that I think is so essential in reaching agreement, as I expressed at the beginning of my written brief, is that this unfinished business of 1982 should be laid to rest and we proceed subsequently to new phases of constitutional change and to carrying forward the business of the country, whether it involves the Constitution or not. If this thing does fall apart, and I am very concerned that it might, then I think there is a standing danger there at any time

at which there is a new wave of nationalism in Quebec, as there may well be.

We know that the people of Quebec now are, on the whole, rather apathetic about politics. They want to not have any part of this discussion if they can avoid it; but we do not know how long that will last, and I think it is important to try to deal with that element of risk as well as with the risk that arises out of imprecision in the terms of the accord. That is my first general point.

### 1630

The second point is on the question of process in constitutional amendment. I would like to distinguish two rather different kinds of amendment and, consequently, different sorts of process that may be associated with those.

In the first place, I think there are, imaginable anyway, essentially single-issue amendments—to take a historical case, the transfer of unemployment insurance to federal jurisdiction in 1940; to take two issues actually mentioned in the accord, possible changes to federal-provincial jurisdiction over the fisheries or the redesign of the Senate; or an issue that came up earlier this afternoon, the setting up of aboriginal self-government and its being written into the Constitution; such issues may come up, one by one. Then the contrast is with other kinds of constitutional amendments which are essentially negotiated packages.

My argument would be that it is a lot easier to get public input in the case of single-issue amendments, because here you can have a sort of process that Mr. Offer was evoking the possibility of with respect to aboriginal self-government, where any group can come forward with suggestions. This can, if desired, go through a legislative process. It can go on from there to first ministers' conferences and so on. That way you can get a lot of public input and the thing may wash, it may not wash.

This would be an analogue—it may not be a particularly happy one, I am afraid—but an analogue would be the equal rights amendment in the United States and that kind of process. Of course, the reason it may not be a happy analogue is that we all know that failed. It is certainly a process that is filled with danger.

In any case, here you get public demands to which legislative majorities may respond; and if you get enough of them then you have a constitutional amendment, in some cases unanimity but the typical rule would be less than that.

We contrast with that multi-issue negotiations where each party, each government, goes into

that process. Typically, the process involves a set of concessions in return for benefits or advantages that are judged by each of the governments to provide, on balance, a positive situation, so that the benefits or the advantages are of greater importance to them individually than the concession that they make.

That kind of bargaining process is one that it is very difficult to imagine being conducted in full public view. The negotiations or bargaining ought to be conducted—and this is where I think future changes in process can certainly be envisioned—in the fullest possible knowledge of public opinion; but I add right away, it is very hard to do that. I have, in a very modest way, a little bit of experience in that because it was the Institute of Intergovernmental Relations, together with *Le Devoir* and *l'Ecole nationale d'administration publique*, that organized the conference at Mount Gabriel where Gil Rémillard laid out the Quebec position.

In organizing that conference, I appealed to really a great many people to participate, people who had nothing specifically to do with government, no particular history before with constitutional affairs; and it was extraordinarily difficult. The conference was not, in its composition, at all as representative as I would have liked. I might mention one group that I made a special effort to get representation from, women's groups; and it was extraordinarily difficult. There was a person there who represented, I think, the National Advisory Council on the Status of Women; but it was very difficult to convince people that this was, for them, something that would have real priority. It had not become sufficiently concrete at that point.

Businessmen would say: "This is really not my métier. I do not know about these things and I have other things to do." It is very difficult to convince people that this is something that really deserves their attention at an early stage where there is maximum opportunity to sound opinion and to get an exchange of views.

I am not saying that is the only way in which it can be done. Clearly, I have never thought of it as being a representative meeting in a general sense, but it is illustrative of the difficulty of getting people to participate in that kind of discussion at a very early stage. I think it was even hard to do that in some respects between Meech Lake and the Langevin meeting, where we already had a text of an agreement in principle.

I would certainly emphasize that what Quebec did at that time should have been done elsewhere. I think it is most regrettable that there were not

hearings in Parliament, that there were not hearings at the provincial level outside of Quebec, where the principles could have been discussed and their significance perhaps brought out. In that case, the first ministers would have gone to Langevin with a much fuller knowledge of how the thing might play out in the public debate later on.

There is a problem there about getting that input. I think that might make a marginal difference, but I still see considerable difficulty, in part arising out of this problem, of which I am sure you are all aware: how much can governments reveal anyway of a negotiating position without, by that very fact, generating opposition to a negotiated result in which they do not have 100 per cent of what they went in for? Maybe there can be trial balloons of one kind or another, but then again you have the problem of how people can take that seriously. I think there is a real problem to be worked on here, but I do not know quite what the answer to it is.

The final issue I would like to touch on, and I can do so only very, very briefly, is the issue of decentralization within the federation, fragmentation of decision-making capacity at the federal level and possible incapacity of our governmental system to deal with basic problems.

I would just like to emphasize here that I think there is indeed a need for coherence between federal and provincial policies. Most major areas of policy-making do involve actions by federal and provincial governments. There is a process of interaction involved here, and I think there is certainly the need for an important degree of federal leadership in that process.

Essentially, we get policies formed through a process of interaction. Sometimes that involves considerable negotiation. Sometimes it is done at greater distance, but the question we have to ask ourselves is in what condition the federal government will enter that process of interaction, that process of negotiation. The answer, it would seem to me, is basically that it would enter those negotiations in the condition that it does now.

As you are well aware, there are no changes to the division of powers under the terms of the Meech Lake accord except in the area of immigration. There are basically unchanged fiscal powers, although there are certainly suggestions that the way in which those powers will be exercised may be different under section 106A, which has to do with the spending power.

I see a process of federal-provincial interaction that is underwritten by the terms of the accord, assuming that it does go into effect, and that this



in fact is something that is very important to develop and cultivate because so much of our policy-making does have to take place in a joint federal-provincial process in which it is necessary to get co-ordination and to avoid a situation in which governments work against each other. Of course, the accord cannot bring that about, but I do not think it is going to make it more difficult. On the contrary, I think it may help marginally move us in that direction.

Those are three general sorts of thought I have had about the accord, but generally about the debate on the accord. As you know, my overall position is that I think this is an important thing to move forward with, and I hope that will be the recommendation of the committee.

1640

**Mr. Chairman:** Thank you very much for your comments and also for the paper which you have submitted to the committee. It touches on a number of other matters, but ones which, as you noted at the beginning, we have been discussing and trying to work out in different ways.

Some people have suggested that if we listen to the argument when dealing with the accord about repercussions or possible things that will happen in Quebec, that it is simply political blackmail and we should not do it, that it is something we should not be considering. I suppose it is one of those hard things where one does not know. We have had the argument that if we approve it, we are going to move down the road to separatism; if we do not approve it, we are going to move down the road to separatism. Clearly, to try to make a choice between those two becomes very difficult because of the way the argument is posed.

I guess there is the broader question that does get back to the way in which this was at the final moment arrived at; not so much all of the various discussions that went on ahead of time, but that sense that especially those who feel somehow threatened by the accord feel they are in a straitjacket: how do they respond? How can they do anything? Are we just a bunch of ciphers sitting here?

How do you measure that issue in terms of the ramifications for Quebec? I mentioned before that one of the hard things for a provincial committee is to have the views, in this instance of persons from Quebec arguing why it is important for them—we can read testimony before the Quebec assembly or testimony before the joint committee, but it is more difficult to do it here within this context.

As you look at that balance and the concerns that different groups have expressed, and you

referred specifically to the minority groups—if one were to push and say we are only going to select two, maybe three, key areas where we think that had there been more time, and had they, instead of signing it, said, “Look, we want everybody to go away for six months and come back and then we will finalize,” in point of fact we might have then made a couple of changes that might have to do with women’s concern, perhaps putting aboriginal rights as an issue back on the agenda and perhaps something to do with linguistic rights in terms of the anglophone minority and the francophone minorities.

We are told we are not to do any of that because something is going to unravel. As you assess that, if they had not signed it and this had come to us exactly the same way and next month they were all going to meet again—because a lot of the same language could have been used, “Look, boys and girls, if you’re going to bring an amendment, make sure it’s really critical, because we’ve come together, all 11 of us, and we’ve actually made some sort of an agreement.”

I guess what people are saying is: “Why can’t we bring that forward? Why should not we be able to say: ‘If you didn’t mean to overlook women, why is it so difficult to open up at least that one?’ or ‘If you did not mean to leave aboriginal rights off the agenda, why is that so difficult? Surely that does not affect directly the concerns of Quebec.’”

Could you just work through that one? I think it becomes difficult in that context, in responding to people in the context of the package or the deal that was structured, not just that night but over a period of time.

**Dr. Leslie:** I suppose I watch these things more closely than most, but it is still very difficult for me to respond to that because I was not actually there. I do not know what negotiating position Quebec put forward. I do not know what negotiating positions other parties to the negotiation put forward. We do know, to take the Senate case, that there was certainly a move afoot to make that part of the package, and Alberta decided that it would not push that particular issue but would leave it until the second round. In fact, the premiers all made the declaration that they were going to give the Quebec agenda priority.

I cannot tell how much was done deliberately and how much was more happenstance, shall we say, so I do not know how different it might be if there had been that process of public discussion between a Meech Lake and a Langevin meeting. I guess all one can say on that is there would at

least have been a situation in which, demonstrably, the first ministers could take account of the public discussion, and they would know more about what flexibility they themselves would have in a political sense to make whatever agreement is going to be made.

In the end result, if there is to be a negotiated agreement, basically I think people will have to react to that by saying: "This is a package. I have to regard it as a package. Is it an improvement or is it something that leaves us worse off?" I know there are people who say it leaves us worse off. I suspect that they are exaggerating the importance of certain features of the accord, as much of the earlier discussion this afternoon suggested. I cannot tell you in substantive terms how I think it would have come out differently.

As to the use of the word "blackmail," I am aware of its use. I alluded to its use in my written brief. But it seems to me that all one can do there is to think where an objection is really an insincere attempt to get something extra and where it represents a real concern. The word "blackmail" was used around 1978, 1979, 1980, when the premiers of various provinces said they would not accept sovereignty association. René Lévesque said that this was blackmail. The clear implication is that they are not serious about this.

The perspective of those of us who were more conscious of the political pressures under which those premiers were in fact acting was that they were utterly genuine about it and that it was not blackmail. It was a straightforward statement of what the limits of their political flexibility were.

I suspect that in the Meech Lake accord case the political flexibility of Quebec is stretched to its utmost now. Everything that I have seen about the political debate in Quebec suggests that they have gone as far as they can possibly go. They have been criticized because the distinct society is not coupled with a statement that Quebec can do whatever it wants in the field of language legislation, for example.

The critics of the accord in Quebec have said that the spending power clause leaves the federal government with not only its existing powers but also greater powers and that it can determine the overall character of provincial priorities and the overall character of provincial programs in areas of exclusive provincial jurisdiction. They would have a tough time adopting a more flexible position.

I guess I look at the accord. I hear rumours about the way the Langevin meeting went, that they were sitting around the table at four o'clock in the morning or something like this and figuring

they simply could not come to an agreement. There was silence for a long time and then somebody moved forward and there was some change made. I do not know what the substance of the discussion was.

Hearing such things, and I assume the story was not just fabricated, leads me to believe that it was a very difficult process and that the participants were aware that they were operating at the very limits of what was politically possible for them. I do not see them exercising blackmail in relation to each other. That is why I think it is delicate, and it is related to the reason that I cannot really see in substance what might be terribly different if there had been that public discussion. But I would feel more comfortable with the process if there had been.

1650

**Mr. Chairman:** Could I follow up then on that? We have had it again. We have discussed it with Professor Courchene just beforehand. A number of aboriginal groups have spoken to us at some length and provided us with material that relates to companion motions, companion resolutions. Their arguments have been: "Look, we understand that there are some political problems, political realities here. So what we are suggesting is that perhaps the provinces look at approving the accord but, at the same time, bringing forward very selective companion resolutions or motions that deal with certain very clear areas where it is thought there could be agreement," and, in their case, talking in terms of—I think this is one of the suggested companion resolutions—just putting aboriginal rights back on the agenda very clearly.

That is an interesting concept because I do not think we have done that very often in Canada in terms of bringing about amendments. In looking at some ways of dealing with some of the issues, do you see that as a meaningful way to approach some of the issues that have arisen subsequent to the accord being passed and trying to carry on some of these discussions and showing people that there can be other routes to achieve their goals, or at least to get them discussed? Is that a valid option?

**Dr. Leslie:** Yes, indeed. I think there is everything to recommend that. In fact, in a sense we already have it within the accord because there is the reference to the next phase of constitutional negotiation and the specific mention of two agenda items. I think that anything that can be done to give credibility to the sense that this is part of an ongoing process and that the next stage is already starting to go forward,



although it will not be brought to completion before this process is over, is entirely salutary. Aboriginal self-government is a good illustration of that. Conceivably, new initiatives in the field of language rights would also be salutary. This would not be the particular concern of this committee but might be of particular interest to, let us say, the province of New Brunswick.

**Mr. Allen:** I appreciate very much Peter Leslie coming before us this afternoon. There is always a problem with last presenters at the end of the day and it is a good thing we have a vigorous chairman who has more questions than most of the rest of us put together to kind of fill in the gap while the rest of us get ourselves geared up.

**Mr. Chairman:** Just warming up.

**Mr. Allen:** First, I want to thank you very much for your remarks on the interregnum, or whatever, from 1982 to 1988 vis-à-vis the absence of Quebec. There have, of course, been people who have come before us who have also used the word "blackmail" around that period with respect to Quebec's refusal to participate, suggesting that somehow this was an unfortunate, ill-intentioned device to get something more out of the country. Even some scholarly people who have come from some of our university departments have tended to use that language.

I think clarifying that and making it clear that there was, in fact, implied in 1982 a very profound moral obligation to respond to the central agenda at least of Quebec's concerns as they have been articulated over quite a period of time now, is something that we all simply have as an immense burden on our backs in this country and we have to complete. Viewing the accord in that light, it is important to draw some appropriate conclusions, as you have done.

I wanted to ask you about two items. First, from your perspective with regard to intergovernmental affairs and how we best get about conducting them now in the new post-charter and presumably post-Meech era, are we likely to get ourselves hugely overencumbered with all the institutional processes that are going to be part of all that business nationally?

We are talking now, for example in this committee, of various options, not just select committees of legislatures but possibly orders of reference in a Legislature that could convene all the assemblies or legislatures across the country to concern themselves with constitutional matters: joint select committees meeting on a regular basis, joint national constitutional reform com-

mittees representing the legislatures and the House of Commons and Senate and so on.

What do you sense down the road and what dangers are there as we head into that? What are the prospects of some of those alternatives? I do not suggest all of them—I think each of those I just rhymed off are mutually exclusive—but the contemplation of any one of them is obviously a significant addition; first, to the burden of legislators, and second, to the simple functioning of legislatures vis-à-vis each other in the country.

**Dr. Leslie:** I think there is probably an important distinction to be made between constitutional issues and regular policy issues. I think we are in the process of moving to a more regular set of interactions in policy formation. We have ministerial groupings, councils or what have you, in some cases even with a bit of staff, and they are developing a practice now of reporting to the first ministers. You are getting a regularization of a process of consultation that allows for co-ordination and for provincial input into federal policies, but also for a process through which the federal government can exercise leadership on the formation of provincial policies, and let us remember that there are substantial federal powers that can be used to negotiate with the provinces in that way.

I think that is something that is a very promising development, but it is not really the kind you are referring to, which is more at the legislative level and has to do more, I think, with the constitutional questions. It might help quite a lot to have some of those mechanisms. I do not have an exact picture of them from your description. I would want to think to what extent they are mutually exclusive. You cannot just have everything all at once; I acknowledge that.

You might get out of that kind of interaction a better mutual understanding of what the concerns are. For example, you could get a feel for the perspective on these questions that have come up in the Meech Lake accord from Quebec, and to what extent the members of the Quebec National Assembly are themselves, as I put it before, operating to the limits of the political discretion they can exercise.

I think that kind of mutual understanding would help. You would still have the potential gulf between members of the legislature and other interested parties who probably would become interested only at the very last stages and mostly when they are alarmed. That is what we have seen so much of in this debate.

I do not know how that is resolved, but conceivably this kind of interprovincial action,

and I think Tom Courchene referred to this also, might be quite salutary, essentially in the sense of what the French call animation sociale, getting people together to sort of prod each other into new thoughts.

**Mr. Allen:** The other item has to do with the question of the territories and new provinces. Is it your sense that—let us put it this way—without any changes to our provisions in the Constitution as they presently stand, the federal government, by a process of devolution of powers, could quite readily bring the territories so close to provincial status that it would be very difficult for the rest of the provinces to refuse to agree to that final step; and if not, what are the provincial impediments that might still lie out there that would make that difficult?

1700

**Dr. Leslie:** I have wondered about that. Clearly, the federal government could devolve powers upon the territorial governments and leave them in a position that is similar in many respects to the position of provinces. What they would not have of course is the bargaining power against the federal government itself. You would not be able to get a territorial government relying on its constitutional powers in negotiations with the federal government, or on a general intergovernmental level involving provincial governments as well.

I do not know how that would play out as far as leading provinces to accept the territories' conversion into provincial status is concerned. I guess the reason for their interest in the subject anyway would be to do with the political weight they themselves exercise within the federation. But I do not feel my judgement on that question is good. I simply have not thought myself enough into the position of provincial governments on that question to say anything that would be reliable.

**Mr. Allen:** Asking yourself the question you did in the midst of that response was helpful and I thank you very much.

**Mr. Offer:** Thank you very much for your presentation. In the presentation, you invited a question, which I am going to pose, with respect to the whole court reference situation.

**Dr. Leslie:** Yes.

**Mr. Offer:** I know that you are most likely aware of the existence of presentations that have said there should be a court reference, the purpose of which would, or could, result in a greater certainty, greater clarity, greater understanding vis-à-vis the positions of the accord and

the charter. I am wondering, as you have indicated in your presentation, if you might indicate your concerns with respect to a court reference, because I believe that is how it was phrased in your presentation.

**Dr. Leslie:** Yes.

**Mr. Offer:** I do not want to put words in your mouth—

**Dr. Leslie:** That is quite all right.

**Mr. Offer:** —but I would like to get your feelings with respect to the purpose and whether it is achievable.

**Dr. Leslie:** In the first place, I am not a lawyer and I do not speak with great confidence on the point, but I have observed a number of cases in which there have been references. The typical form of them I think is that if we want to do X or Y, do we really have the power to do it.

This province, for example, made a reference case that eventually went to the Judicial Committee of the British Privy Council in 1896. They drafted some legislation to do with local options in the liquor trade and the four applying asked the Supreme Court of Canada, and subsequently the Judicial Committee of the British Privy Council, "Do we have the power to enact that law and to make regulations under it?" That seems to be the typical sort of pattern.

You had another interesting case in Manitoba where it wanted to challenge something Quebec had done for egg marketing. They could not refer the Quebec legislation to the Manitoba Court of Appeal, so they had to enact their own law and regulation and ask, "Is this valid?" Then by analogy they would determine whether the Quebec one was OK.

Another one would be the reference case on the Constitution and that would be the closest analogue—this was 1981—but there again you had basically the same kind of question: the federal government is purporting to do such and so; is that within its constitutional powers? It was a vaguer question because you did not have quite the same kind of details. You had to start with the question, "Does this affect federal-provincial relations, and if it does is there something Ottawa can do without provincial involvement?"

I see how those reference cases go, but they do not ask the court to imagine circumstances in which a particular regulation or a particular form of words could acquire a particular significance. This is why I wanted to stress the difference between a statute and a constitution. In a constitution, you want to set out general principles and you want the court to apply those



principles in situations that are not imagined. I agreed with what Mr. Allen said earlier this afternoon, that a constitution can acquire greater precision of meaning over time as cases come up and you get a better sense of it. But as circumstances change, those principles themselves can also come to mean something else. It is not just what the courts do with it, but also how society changes and technology changes that can give certain statements of principle a new meaning.

In a reference case that says, "Tell us whether this clause generally is going to override that one," you are in effect imagining the court to think of circumstances that are clearly unimaginable and that may occur a century down the road. I cannot see how a court could usefully respond to that kind of question. In that case, you would be asking the court to act very much like a legislature, and I guess I do not see why a legislature should ask a court to be a legislature. That is the essence of my concern about it.

**Mr. Offer:** To carry on, people have promoted the use of a court reference, wanting such a court reference to get that certainty or get clarity with respect to the positions of the accord and the charter. The court reference is not the route to go in your opinion because of the many variable fact situations that will be presented to the court over time.

**Dr. Leslie:** That is correct. That would be my view. I do not know that there is another way to get absolute certainty out of this. I think that is the difficulty of discussing this whole issue. Let us face it: everything to do with this whole case is a judgement call. One is counter-balancing various forms and degrees of risk. There is the

risk that a particular set of words will be interpreted in a particular way that one group finds undesirable, but I think one has to look to the most likely interpretation. As I think you said earlier this afternoon, it is the job of this committee and this Legislature and the other legislatures to try to think things out as fully as they can and to say whether this form of words is basically acceptable. I cannot see a court giving a useful answer to that kind of question, but I guess I have to add that I do not have legal training and there may be ways they can get to these subjects that I have not thought about.

**Mr. Chairman:** Thank you very much, Professor Leslie. We wanted to try to allow you to get out of here by 5:10 p.m. so that you can get your train and I think we will do that. I would just note that the reference you made to 1896 and local option, especially for government members around this table, causes us perhaps a momentary shudder as we find we are still dealing with some of those issues.

**Dr. Leslie:** I had not thought of it as a contemporary analogue, Mr. Chairman.

**Mr. Chairman:** That is not for this committee. We thank you very much for your paper and for the discussion we have had with you this afternoon; and we wish you a safe trip back to Kingston.

**Dr. Leslie:** Thank you very much, Mr. Chairman and members of the committee.

**Mr. Chairman:** Just before adjourning, remember tomorrow we are beginning at 9:30 a.m. with the Ontario Human Rights Commission.

The committee adjourned at 5:09 p.m.

## ERRATA

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**Witnesses:****From the Alliance for the Preservation of English in Canada:**

Leitch, Ronald P., National President

**Individual Presentation:**

Tryphonopoulos, Nicholas

**From the Income Maintenance for the Handicapped Co-ordinating Group:**

Santos, Richard

Beatty, Harry, Legal Counsel

**From the University Women's Club of North York:**

MacLeod, Jean

Carr, Betsy

**From the University Women's Club of York County:**

Towns, Maureen L., President

Vendrig, Marjorie

**Individual Presentations:**Courchene, Dr. Thomas J., Professor of Canadian Studies, Robarts Centre for Canadian Studies,  
York University

Leslie, Dr. Peter, Director, Institute of Intergovernmental Relations, Queen's University











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## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord



**First Session, 34th Parliament**  
Wednesday, March 30, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, March 30, 1988

The committee met at 9:41 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. As Mr. Offer gives us instructions to avoid traffic jams on the Queen Elizabeth Way—

**Mr. Offer:** It is a science, Mr. Chairman. It is a science.

**Mr. Chairman:** —I would like to welcome this morning the chief commissioner of the Ontario Human Rights Commission, Raj Anand, who is with us. When we begin in the morning, Mr. Anand, we sometimes have traffic problems, but I think we will begin this session and get under way. I know some of our colleagues, who are undoubtedly stuck on Highway 404, the Don Valley Parkway, Highway 401 or the QEW, will soon be with us.

We are most appreciative of your coming this morning. In fact, our first two presentations this morning are with respect to human rights, or at least those who are active in the area, and that is a perspective that will be very useful to the committee.

I will turn the microphone over to you. We have a copy of your brief and will follow it up with questions.

### ONTARIO HUMAN RIGHTS COMMISSION

**Mr. Anand:** I intend to deal with the substantive matters that are set out in my brief. It is not as daunting as it may look in its long, 8.5-by-14 inch format because a large chunk of it quotes some of the provisions of the Meech Lake accord dealing with equality rights, which I am sure all of the committee members have had imprinted indelibly on their minds by now. I certainly will not read them back to you, but I will deal with the substantive points that are set out there.

I am pleased to have this opportunity to address the Meech Lake accord from the human rights perspective. I shall begin by describing the commission's interest in the accord, then I shall address the two areas of the accord which are of particular concern to the Ontario Human Rights Commission—the Meech Lake process and the effect of the accord on rights contained in the Charter of Rights and Freedoms—and, finally, I

shall provide you with our recommendations for amendment of the accord.

First, in terms of the commission's interest, it is one of the key statutory functions of the human rights commission, and I quote from the code, "to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law."

Beyond this, the code prescribes a more specific function for the commission, "to examine and review any statute or regulation and any program or policy made by or under a statute and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of" the code.

With this mandate in mind, I wish to address the process and the substance of the Meech Lake accord with respect to its effect on the charter.

First, in terms of process, going back to the promulgation of the charter itself, in the fall of 1980 Canadians were given an opportunity to express their views on the introduction of what we then called a bill of rights into our Constitution. In large numbers, representing many divergent groups within our society, they urged that the proposed Charter of Rights and Freedoms be given constitutional status. More particularly, they urged that section 1, the general limitation clause of the proposed charter, be strengthened to avoid reference to a parliamentary system of government and to ensure that parliamentary sovereignty was put to rest.

In response to these criticisms, the federal government amended section 1. The intent of the amended language, in the words of then Justice Minister Chrétien, was that laws be "demonstrably justified in relation to this charter...since the intention of a charter is to limit the scope of the Legislature and Parliament in relation to the fundamental rights of Canadian citizens."

Despite this clear prevailing view, an override clause, section 33, was added through political compromise. The so-called "November accord" allowed no opportunity for Canadians to consider the wisdom or desirability of an override provision. On the contrary, the accord thwarted the well-considered and popular position that parliamentary sovereignty be ended and that a bill of rights be entrenched in the Constitution in

a manner which would ensure that fundamental rights and freedoms could not be changed by governments or legislatures without going through the constitutional amendment process.

It is generally accepted that the principal objective of the Meech Lake negotiations was to remedy the major shortcoming of the 1980 and 1981 constitutional process; that is, the failure to secure Quebec's approval of, and participation in, constitutional change which affected every part of the country. The Ontario Human Rights Commission most certainly endorses this objective, and we applaud the recognition of Quebec as a distinct society.

We find it disturbing, however, that in attempting to address the substantive shortcomings of those negotiations, the Meech Lake accord has repeated the unfortunate process of drafting constitutional amendments in the absence of full discussion by Canadians of the desirability of such amendments. It is not satisfactory, in our view, to assure us that amendments can always be made later. Constitutional amendment is difficult. Many different provincial concerns will be on future agendas. Such a response fails to take the views of equality-seeking groups seriously. It denies what ought to be unquestionable; namely, the importance of genuine consultation before fundamental constitutional changes are made to the supreme law of Canada.

This failure to consult takes on added importance because, in the commission's view, the proposed substantive changes embodied in the Meech Lake accord again weaken the Charter of Rights and Freedoms.

I move here to the substantive criticisms and recommendations.

The first ministers who signed the Meech Lake accord have stated that it is not intended to affect, and does not affect, the constitutionally guaranteed rights to equality contained in the charter. Nevertheless, some constitutional experts and national women's groups have argued to the contrary. Indeed, since I wrote this, there have been many further groups, representing various minority interests, which have come before this committee concerning the effect of the Meech Lake accord on the equality rights of protected groups such as women, persons with disabilities, members of ethnic minorities and the aged.

Indeed, the concern of the commission regarding the potential harm to charter equality rights applies to all of the groups who are protected against discrimination under the Ontario Human Rights Code, whether identified by race, ances-

try, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap, or the receipt of public assistance.

On pages 3 and 4 of my brief, I have set out the text of the proposed section 2 and, as I have indicated, members of the committee will be well aware of the provisions of the four subsections as well as of section 16 of the proposed resolution, which states that section 2 of the Constitution Act is not to affect the multicultural or aboriginal people's rights as set out in sections 25 or 27 of the charter, section 35 of the Constitution Act 1982 and clause 24 of section 92 of the 1867 British North America Act.

#### 0950

In addition, on page 4 I have set out the proposed new section 95b of the Constitution Act, which refers to agreements between the government of Canada and any province relating to immigration or the temporary admission of aliens into the province. This provision, subsection 95b(3), may also be relevant because it again makes clear that the charter is to apply in spite of or over any agreement relating to immigration that has the authority of section 95b. Again, it is an expressed provision giving primacy to the charter.

The equality rights which the Human Rights Commission is concerned about are set out in sections 15, 25, 27 and 28 of the charter. I will not read those, but 15 is the omnibus equality provision which is an open-ended provision; 25 is the aboriginal rights provision just referred to; 27 is the multicultural heritage interpretations section, again just referred to; and section 28 is the sexual equality section that has been the subject of many of the submissions before you.

In the commission's view, there are four ways, and four distinct ways, in which the equality rights within the charter may be harmed. The first is by exemption of legislation under section 2 of the accord from charter review. The effect of the June 25, 1987, decision of the Supreme Court of Canada in the Bill 30 reference may be to insulate legislation which pursues linguistic or "distinct society" goals from charter view or to add further weight to claims that such goals are more important than those underlying equality guarantees in the charter.

I propose to deal with each of those in turn under this section.

In the Bill 30 reference, Ontario legislation, which committee members are well aware granted equal funding to Roman Catholic denominational schools, was upheld despite a



challenge based on its violation of religious freedom and equality rights. The court held that it was unnecessary to resort to the specific guarantee of denominational schools in section 29 of the charter because there was an express grant of legislative power in section 93 of the original BNA Act.

The plurality judgement was written by Madam Justice Wilson, who said:

"I believe section 29 was put there simply to emphasize that the special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the the concept of equality embodied in the charter because not available to other schools, is nevertheless not impaired by the charter.

"It was never intended, in my opinion, that the charter could be used to invalidate other provisions of the Constitution, particularly a provision such as section 93 which represented a fundamental part of the Confederation compromise." It is that sentence that I think is of vital importance to the matter before you.

"Section 29, in my view, is present in the charter only for greater certainty, at least in so far as the province of Ontario is concerned."

Mr. Justice Estey, on behalf of himself and one other judge, stated: "Although the charter is intended to constrain the exercise of legislative power conferred under the Constitution Act, 1867, where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867." What, of course, he was referring to was section 93 of the original Constitution Act, 1867.

These brief excerpts from the two principal judgements of the court set out, in the commission's view, the two alternative ways in which section 2 can exempt legislation from the charter.

In our view, it is possible that portions of the Meech Lake accord may be considered analogous to—and this is the quote from Madam Justice Wilson—"a fundamental part of the Confederation compromise" and, therefore, take precedence over the charter. Alternatively, it is possible that section 2 of the accord will influence what constitutes "an expressly permitted distinction"—those are Justice Estey's words—and thereby widen the ambit of legislation which will prevail in spite of the charter.

The report of the special joint committee of the Senate and House of Commons issued last year took a contrary view. It stated that if section 2 of

the accord did not grant any legislative powers, then it could not be understood as analogous to section 93 of the Constitution Act, and therefore could not be considered a fundamental part of the Confederation compromise; nor, in their view, could it be understood as "expressly permitting" a distinction, in the words of Justice Estey, which would then take precedence over charter rights. We disagree with their reasoning.

First, while section 2 of the accord does not directly grant legislative powers, it can be used to enhance legislative power by assisting a government in defining the purposes of a given piece of legislation in such a way as to permit a finding of *intra vires*; that is, of constitutionality. It is possible, therefore, that legislation saved in this way through section 2 will be considered a fundamental part of the Confederation compromise and will override the charter.

This argument is strengthened by the similarity between the language of clause 2(1)(a) itself, stating that duality constitutes "a fundamental characteristic of Canada," and the words of Madam Justice Wilson I just read, which insulated from the charter provisions which represented a fundamental part of the Confederation compromise.

Second, even as an interpretative provision, section 2 of the accord can assist in determining whether a power-granting provision of the Constitution Act expressly permits a distinction which, according to Justice Estey, would then render it immune from charter review. I use as an example the well-known *Lavell* case in the Supreme Court of Canada in which the appellant *Lavell* argued that the legislation depriving her of Indian status when she married a non-Indian discriminated against her on the basis of sex, because males in similar circumstances retained their Indian status. The Supreme Court decided that the legislation was concerned with a distinction on the basis of race, and was therefore expressly permitted by subsection 91(24) of the original BNA Act.

Hence, determination of whether a distinction is expressly permitted by a constitutional head of power is not uncontroversial; moreover, it can be influenced by an interpretative provision such as section 2 of the accord. A court may be more inclined to find that a distinction enacted under subsection 2(1) of the Meech Lake accord—in other words, one whose purpose was to preserve a fundamental Canadian characteristic or to promote the distinct identity of Quebec—was one expressly permitted by the Constitution Act and was, therefore, beyond the reach of the charter.

Let me deal with the other ways in which the commission believes the accord can impinge on the charter by, second, permitting substantive encroachment on the charter. Here I do not rely upon the characterization of section 2 as analogous to section 93 of the BNA Act. Nevertheless, section 2 may well permit substantive encroachment upon charter rights.

#### 1000

Our reasons are these: Subsection 2(1) states that the Constitution "shall be interpreted in a manner consistent with" the recognition of a "fundamental characteristic of Canada" as well as the recognition of Quebec as a "distinct society." Subsections 2 and 3 suggest that there is a grant of legislative power in section 2, and the existence of subsection 4 reinforces this possibility. That is the provision, as you will recall, which states that section 2 is not to derogate from the powers of the legislatures or of a Parliament or of the governments of the provinces or of Canada.

Subsection 2(4) leaves open the possibility that while the powers are not to be diminished, they may be increased. Since they cannot be increased at the expense of either government, because of subsection 2(4), they must be increased at the expense of the rights and freedoms of individual Canadians and minority groups. A government could seek to defend legislation that adversely affects the equality rights of a minority group or women on the basis that the law furthers the goals specified in clauses (a) and (b).

In resolving a dispute about legislation where section 2 is relied upon as a defence, a court would undoubtedly examine the wording of the Constitution Amendment, 1987, as a whole and the historical setting in which it was created. Section 16 of the act—I know this point has been made before you earlier—expressly states that section 2 does not affect sections 25 and 27 of the charter. This selective approach gives rise to the inference that other provisions of the charter, including sections 15 and 28, are to be affected. Those are the principal equality rights provisions in the charter.

The same point applies with respect to section 95B, which I mentioned earlier. It states that the charter applies with respect to any agreement on immigration entered into under that section. The absence of a similar express provision with regard to other parts of the Meech Lake accord again leads to the inference that these provisions are to be unaffected by the charter.

The third point in terms of the harm that can be caused by the accord to equality rights is by the creation of a hierarchy among charter provisions.

The combined effect of sections 2, 16 and 95b of the accord may be to create a hierarchy among charter rights. The language of these sections as currently drafted obviously creates a hierarchy among interpretative charter provisions and throws into question the respective weight to be given to the equality rights when they are in danger of being diminished.

For example, sections 25 and 27 will become, in some respects, more important than section 28. In considering whether legislation violates section 15 of the charter or is sanctioned by section 1 as a reasonable limit, the preservation and enhancement of multiculturalism and the rights of aboriginal peoples will be afforded more weight than the equality of male and female persons. The "notwithstanding" provision in section 28 will not be of assistance, since it refers only to anything in the charter and not to anything in the Constitution, as does the accord; nor is section 28 recognized and protected within the accord, as are sections 25 and 27.

In considering the groups that cannot be argued in any sense to be covered by sections 25 and 27, comparable concerns to those of women arise. By the application of similar reasoning, groups identified by the following grounds may find their equality rights diminished as a result of a hierarchical ranking: creed, which is a ground in our code that has been interpreted to include religion, and citizenship, sexual orientation, age, marital status, handicap, receipt of public assistance and family status.

Indeed, in exempting from this list the groups specifically identified by race, colour, national origin and so on, I am assuming something which is quite controversial; that is, that the rights of such multiculturally identified groups are protected adequately by section 27, by the reference in section 16 to section 27 of the code. I know that a number of organizations have appeared before you and I share their concerns to the effect that the reference in section 16 itself, apart from creating problems with respect to other groups, may not have the desired effect itself with respect to these ethnically identified groups.

My fourth point relates to the accord providing a constitutionally stated justification for limiting equality rights and the key here is section 1 of the charter, the "reasonable limits" section.

Section 2 of the accord can affect a court's interpretation of section 1 of the charter. In determining whether legislation constitutes a



reasonable limit, the court will consider the purpose of the law. In the case of *Regina versus Oakes*, the Supreme Court stated that the legislative objective must be of "sufficient importance" in order for the test to be satisfied. The legislative purposes set out in section 2 of the Meech Lake will be very influential in the determination of whether a given legislative purpose is of sufficient importance. In instances where the purpose of the legislation is to promote the "distinct identity of Quebec" or to preserve a "fundamental characteristic of Canada," it may be more likely to pass the test as a reasonable limit "demonstrably justified in a free and democratic society."

Moreover, *Oakes* permits the evidentiary burden of section 1 to vary with the facts of the case. Where the legislation pursues an objective under section 2 of the accord, the court may choose to lessen the evidentiary burden which is necessary to discharge the requirements of section 1.

This is possible because section 2 of the accord, in affirming the role of Parliament and the legislatures, stresses governmental responsibility for preserving the stated "fundamental characteristic of Canada" and promoting the "distinct identity of Quebec." The emphasis on the action of governments as opposed to courts encourages the application of a concept used by the European Court of Human Rights called "margin of appreciation" in relation to legislation passed in pursuit of the purposes of the accord.

This concept emphasizes a deference to government and to a government's view that a limitation on rights is reasonable or justified. Section 2 encourages courts to defer to what a government may view as reasonable measures to preserve, for example, the linguistic duality contained in clause 2(1)(a). As governmental perspectives and priorities change, this adds an additional element of uncertainty to the weight to be given to the rights contained in the charter when these rights collide with such measures.

By way of conclusion and recommendation, the Ontario Human Rights Commission fully supports the promotion and enhancement of bilingualism and is sensitive to the need for other Canadians to accommodate the legitimate concerns of Quebec within our constitutional framework. Nevertheless, we consider that the starting point for negotiation and constitutional amendment must be a secure Charter of Rights and Freedoms. Without exaggerating the effect of the Meech Lake accord on the charter, in our view there is sufficient evidence to indicate that

security has been shaken and must be re-established.

Our recommendation, in form and in terms of legal drafting, is a simple one. We recommend that a provision be inserted in the Meech Lake accord to make clear that nothing therein is intended to affect the Charter of Rights and Freedoms. It is, if you like, the broadest of the proposals with respect to equality rights that I believe you have heard about. You have heard about providing specifically for the exemption of section 28 which has been, of course, sanctioned by the Quebec francophone women's groups. You have heard about exempting sections 15 and 28. In our view, rights should not be the subject of further hierarchies. We simply say that the charter itself should be made clear to be exempted from the Meech Lake accord. This result could be achieved through a simple amendment to section 16 which presently provides for a couple of sections to override the accord, or alternatively, through the addition of a new subsection to section 2 of the proposed accord.

#### 1010

Given the widespread assurances by first ministers that this is the intended effect of the accord—that is, the charter is to prevail—an amendment of this kind should be noncontroversial and unlikely to upset the delicate political balance that is embodied in the Meech Lake accord.

That is the submission on behalf of the commission, Mr. Chairman. I would be happy to answer any questions you and the committee members may have.

**Mr. Chairman:** Thank you very much. That is an extremely thoughtful, pertinent and specific presentation. I think you raise a number of very critical questions that, as you note, have perhaps been raised in other respects by other groups, but I think you have put them together in a way that absolutely demands consideration and an answer. We are most grateful to you and to the commission for focusing very clearly on the charter and the relationship to the accord. We will start our questioning with Mr. Allen.

**Mr. Allen:** I appreciate Mr. Anand's coming before us and reflecting, out of both his legal experience and his work at the Ontario Human Rights Commission, views, perspectives and critiques of the Meech Lake accord that I think we have to take very seriously. I want to ask you a fairly simple question first off and then go to something that perhaps is more frontal.

In your last comment in your conclusion, you state that something should be entered in the accord which indicates that nothing in the accord is intended to affect the Canadian Charter of Rights and Freedoms. Do I take it that when you speak that way, you use the word "charter" as a code word for section 15 of the charter, or do you refer to the charter as a whole? I ask that because, as we all know, the charter itself contains "notwithstandings" and alternative routes and other possibilities with respect to the balance between legislative power, the courts and what have you.

I want to know, first of all, whether by using "charter" you really mean section 15 or whether you really intend at that point to include, in your reference, section 1, section 33, the second part of section 15 which deals with affirmative action and so on.

**Mr. Anand:** Your question is anything but simple, but I will attempt to answer it. You have raised a fundamental issue here, which perhaps lies beneath the surface of our submission; that is, the charter itself provides a balancing process between various rights. You mentioned section 1, section 33, section 15 and section 28. There has also been reference to sections 25, 26 and 27 and so on.

The short answer, and perhaps the simple answer, to your question is that the intent of our recommendation is that the charter itself be exempted in the sense that it be made clear that the accord is not to affect the charter in the way that has been done in a piecemeal fashion in section 16 and subsection 95B(3), which I referred to, of the accord. The task would then be to undertake the balancing process in the context of the charter itself. Our view is that the charter provides a well thought out and comprehensive way of undertaking that balance, and into that balance can be put "distinct society" and "fundamental characteristic" concerns. The short answer is that the entire charter is intended to be exempted and not simply section 15.

**Mr. Allen:** I asked that because, as you know, that makes the issue much more subtle than it is to most of the groups that come before us and want charter pre-eminence. I think they have a sense that what is being referred to is section 15, the defence of women's rights pure and simple, or aboriginal rights or multicultural rights, as the case may be, rather than a device which really does still leave a lot of room for balancing and for interplay between various collective rights and individual rights and what have you.

I guess what concerns me most is that I am not quite sure, in responding to that public concern, whether we are really doing it by doing what you are suggesting we do, because it does provide all those options, alternatives, notwithstandings, etc. What is your response to that?

**Mr. Anand:** The existence of the options and alternatives is something I alluded to briefly at the outset. For example, section 1 and its strengthening was a byproduct of the public consultation in 1980-81. The addition of section 33, as I noted, was not the product of any consultation; it was the November accord. If we had to revisit the manner in which the charter is drafted, I am sure that I, and constitutional scholars much more qualified than I, would have a shopping list of ways in which the charter itself could be improved and enhanced.

That is not something I attempted to address here. The assumption here is that the charter provides for protection that is adequate, for present purposes, to a variety of groups, and a variety of rights that do not necessarily pertain to specific groups—freedom of speech, freedom of religion and so on—and that the most comprehensive and fairest approach is to simply leave the status quo in terms of charter protection as it is.

Part of the reason I advocate this approach, as opposed to a piecemeal shopping-list kind of approach, which you have heard about from some other groups, is that the Ontario Human Rights Commission has a responsibility to represent a diversity of groups. Indeed, many of the cases and many of the activities that come before us involve a balancing of different interests of different groups. Human rights often collide, and in this context the charter is seen as the best way to resolve that, rather than by giving precedence to women's rights over others, or giving precedence to multicultural rights over others or aboriginal rights over others.

Our approach is to simply recognize what, as I say, has been stated by first ministers, which is that the intent was not to diminish the charter or the effect of the charter in any way.

**Mr. Allen:** I must say I am considerably sympathetic to your proposal, given that explanation, but I want to ask you: When I look, for example, at Madam Justice Bertha Wilson's judgement on the Bill 30 case and the question of the collision of section 93 in the 1867 document with the charter, I guess I do not personally find there so much a cause for anxiety as some reassurance that the court is able to deal with the interplay and interaction of different rights that



do exist, collectively and individually, in our Confederation.

I would be much more concerned if there had simply been a straight and kind of fundamentalist assertion that equality absolutely overrides anything in the 1867 agreement, because I do think there are such things as historic rights attached to given communities that are important over time and that we do fundamentally threaten Confederation when we easily put them to one side in the name of perhaps some forms of individual right.

1020

Equally, I have problems, for example, with some ways in which the charter is currently being used by some with more power, influence and resources to establish their individual rights over against some other individual rights—for example, the Lavigne case, where you have the collective right of an entity like a trade union to pursue certain goals and then members on an individual exemption basis using the charter to get out of responsibilities they should themselves accept as part of a normally functioning social or economic group. That can very easily undermine some very fundamental rights which are attached to groups and organizations in the community.

I want to come back to my question, which is, how seriously should we look upon judgements like that one as a matter that should concern us, as distinct from, in a certain sense, a matter which should reassure us that careful balancing is going on?

**Mr. Anand:** From my submission, you will see I do not share the view that it is a matter which is not of concern to us. The commission believes that the decision in the Bill 30 reference—and my intention here is not to cast doubt on that decision or to criticize it in any way, but rather to draw, I suppose in the legalistic way that is familiar to me from my former life, from the rationale of the two major judgements to the effect on the accord itself.

What I draw with respect to Madam Justice Wilson's judgement, as opposed to Mr. Justice Estey's, is that there was no balancing done in the Bill 30 case. If the court wished to balance, if Madam Justice Wilson wished to undertake a balancing process, she would have said, and I am paraphrasing obviously, that there is a right in the charter to freedom of religion and an equality right in section 15 relating to religion and other grounds and, on the other hand, we have this express provision, section 93 in the British North America Act.

How do we balance and resolve that concern? Madam Justice Wilson indeed said that separate

school funding sits uncomfortably with the equality rights provisions but she found that she did not have to undertake the balancing that would otherwise take place because the fundamental compromise of Confederation was not intended to be limited in any way by the charter in 1982.

The balancing process, if it had occurred, would have been to say we have these rights: freedom of religion in section 2 and equality rights with respect to religion in section 15. On the other hand, we have section 93. Is it a reasonable limitation within the meaning of section 1 to provide a separate funding of separate schools? The conclusion may well have been the same—that it is a reasonable limitation on equality rights in the religious context and therefore the Ontario legislation, Bill 30, should be upheld—but that was not the balancing process which went into the exercise.

What I am saying in this context is that I thought, both in the legal sense and in the popular sense, that what happened when the first ministers spent that night together was a fundamental compromise, using the English language in its broadest sense. So it might well, since it is fitted into the Constitution Act, be seen as a fundamental compromise of Confederation and be used to exempt such rights from the balancing process.

What I am advocating is that the balancing process take place within the charter because you have all the tools available within the charter to carry it out. Just to use an example, the promotion and the preservation of bilingualism, which is, as I have indicated, a principle we wholeheartedly support, is one which can be accommodated within the meaning of the charter because the charter refers to equality on the basis of ethnic origin and has other equality rights in it which are used and can be used by linguistic minorities to further their case. So the charter provides the tools that are necessary.

**Mr. Allen:** If one were to apply section 2, the "distinct society" clause, in the same way to one aspect of the current linguistic crisis in Quebec, namely, the sign question, would you consider that the minority had been abused if the resolution of the question by the Legislature of Quebec were to permit only lower-case English or other language inscriptions on signs that were upper-case French? Obviously they are being treated differently and the "distinct society" clause would say that this is a community which is principally French but also has a minority in the other official language. Some other groups

may coattail on that a little bit in a multicultural sense, but is that the kind of judgement that you would be speaking of and would that be offensive?

**Mr. Anand:** Frankly, I am not sure of the answer to your specific question with respect to lower-case and upper-case language in signs. In coming forward on behalf of the Ontario Human Rights Commission, I leave it to Quebecers to advocate and to resolve concerns of that kind within Quebec. Let me just say it is a classic example of different rights colliding: freedom of expression; multiculturalism to the extent that section 27 provides a right; equality on the basis of ethnic origin, and I am sure there are others which come together in a case such as this.

Our concern is not that that balancing will come out in one way or the other, whether it is by way of a compromise solution with upper-case and lower-case letters or something else. But it seems clear to me, and indeed the statements from the government of Quebec seem to back this up, that the "distinct society" clause would and should pre-empt that balancing process altogether. This would be a specific example of a situation where, if the accord were to override charter rights, you would never get into that balancing process because this would presumably be one of the flagship policies of a distinct society.

**Mr. Allen:** Can I then ask a final simple question, which is not so simple I suppose, but it asks for a fairly brief reply. Do I gather from your response to my first question that you are reasonably happy with a political constitutional situation in which both the courts and legislatures are equally involved in the question of the defence of rights and the application of those principles?

**Mr. Anand:** I am certainly happy with the situation in which they are both involved. I would hesitate to use the word "equally" because I am not sure how one gauges that. Apart from section 33, the courts have an override power, if you like. On the other hand, it is clear that the vast majority of citizens will be protected more by the legislatures than by the courts because that is the nature of the functions. Legislators such as yourselves are much better equipped in a comprehensive way to protect rights. I am certainly happy with the situation, generally speaking, that resulted from the charter, which was that pure parliamentary sovereignty was ended.

1030

**Mr. Chairman:** Thank you very much. Before moving to Mr. Offer, if I could just note to the committee members, as well as to those who are going to be appearing before us this morning, we did get off to a somewhat later start than intended, and we are hoping that one of the groups that is to come at the end of the morning will come in the afternoon. That is just to assure everyone that you will have a full time before the committee. We will move to our last question, Mr. Offer.

**Mr. Offer:** Thank you very much for your presentation. My question is a follow-up to one of the questions Mr. Allen asked, with respect to the analogy between the matter at hand and the Bill 30 case. I think you put the problem well and with some degree of clarity in your submission. The problem I personally have is, as I see the Bill 30 case, it seemed that the argument of some was that there was an attempt to use one provision of the Constitution to nullify another provision of the Constitution vis-à-vis section 15 and section 19, which would have resulted in the nullification of the specific grant of power.

I am not going to talk about the interplay of section 29 at all. I believe that is an important section but I want to leave that aside because, if that is a fair characterization of Bill 30, the problem that I have in using that as an analogy to this matter at hand, where one takes into account the question of the accord, and specifically section 2 of the accord and its impact on some of the rights given in the charter, is that whereas in the Bill 30 case we were dealing with—and without question—specific rights, specific grants of powers, we are, in the analogy you put forward, dealing with, on one hand, rights but, on the other hand, clearly, interpretative provisions.

That is where I have a problem in appreciating the analogy. There is, on one hand, a comparison of right-to-right and in fact a provision, section 29, which comes into play, such as the Bill 30 case—and, on the other hand, an interpretative provision as contained in the Meech Lake accord to right as contained in the Charter of Rights. I have a difficulty in fully appreciating how that is in many ways an example on all fours that should be used in our deliberation. I am wondering if you can help me out on that.

**Mr. Anand:** Let me say two things. First of all, with respect to the characterization of section 2 as an interpretative provision, I think in one sense that is true because it begins, "The Constitution of Canada shall be interpreted in a manner." In one sense that is true, but in another



sense it is quite misleading because a provision that dictates how other parts of the Constitution are to be interpreted has very substantive effects.

To use an example, a provision that said, "In any dispute between the government and an individual as to whether the charter has been breached, the court shall decide in favour of the government," would be an interpretative provision. But it would have the most far-reaching and damaging effect, and certainly no one here would suggest that such a provision should be enacted. I do not readily adopt the dichotomy between a comparison of right to right and a comparison of right to interpretative provision.

My second point is that there is a fundamental principle of interpretation of constitutions or of laws that provisions are to be given meaning if at all possible. So the question becomes: What is the meaning of an interpretative provision if we accept section 2 as being that?

As I have stated at page 6 of the brief—I have read it and I will not read it again—there is not a direct grant of legislative powers, although when you go through the sections and by process of elimination, since one level of government cannot impinge on the other, it can only impinge on the charter so as to give effect to the Meech Lake interpretative powers. So what you have is effectively an enlargement of the rights given to government.

Certainly, if I were in the position of arguing on behalf of a government in defending a piece of legislation, I would first write the legislation in such a way that the preamble says it is designed to preserve a fundamental characteristic of Canada. I would not do that facetiously or in a colourable way, but in an appropriate sense. Then, when I got to court, I would say, "There is a provision that is expressly permitted by a constitutional interpretative provision."

Then we would fall within at least the Estey reasoning. Indeed, the Wilson reasoning is even looser than that, in the sense that all that is required is "a part of the fundamental compromise." As I have said earlier, I would have thought a persuasive argument can be made that what the first ministers did was to reach a fundamental compromise in order to achieve a laudable goal; that is, the bringing of Quebec into the Constitution.

In both of those senses, I see an analogy to the Bill 30 case.

**Mr. Offer:** If I may carry on with this for just a moment, it brings into play another section you talked about with respect to the whole question of the nonderogation clause. You indicated that it is

clear that the wording of subsection 2(4) indicates no derogation from the powers of the legislatures or the government of Canada, but it follows that they can be increased and, if they are to be increased, it would be at the expense of some of the personal types of rights with respect to the charter.

If I recall correctly, it is interesting that Professor Hogg has used absolutely the same argument but does not stop there. He takes it to the next step, saying we have to take a look at this in its totality. Once you reach that point, it is not the end point, it is just a next point. Then you must take a look at it in terms of the charter, in terms of section 1, in terms of these particular sections being used as an interpretative aid in areas where there is uncertainty or vagueness, keeping in mind the whole question of section 1.

It is only then that you will appreciate the proper protections or the protections which will be afforded through the charter. It is not a matter of an interpretative section conveying rights. They by themselves stand alone. They do not convey any rights, but certainly in their interpretation can alter rights. There is no question about that either. But you cannot just stop there. You have to take a look at the charter and all of the sections and certainly the use of section 1, which has already been argued a number of times.

I am wondering if you have any comment with respect to your position on the nonderogation, stopping where you did, actually.

**1040**

**Mr. Anand:** It is at the further step that Professor Hogg takes that he and the others who participated in the drafting of these provisions are on the horns of a dilemma, it seems to me. Quebec and the other governments, in the first subsections of section 2, were given empty rights in the sense that they did not expand powers and did not do anything legal by recognizing the distinct society and the fundamental characteristics of Canada. In other words, either these provisions which we have all expended so much hot air and paper over have no meaning, or, if they have meaning, they have to take away from something else. They cannot take away from each other's level of authority so they must take away from the charter.

When you put those two together, logically, it seems to me, the premiers and the Prime Minister cannot say (a) "We have done something significant and substantive in enacting these new principles"—distinct society and fundamental characteristic—and (b) "We have not touched the charter." Those two are inconsistent logically

and collide with one another. It is that further step that, as I say, Professor Hogg and the others who participated in the drafting of these provisions and subsequently got into the authorship enterprise have something of a dilemma. That is where I would disagree with them.

**Mr. Chairman:** Thank you and I apologize. I will make sure to put you first on the next list.

I think we could spend a great deal more time this morning reviewing other areas of your presentation. I am sorry to have to cut off the discussion at this point. We are most appreciative for your submission and for the answers to our questions. I think we will undoubtedly want to look at the various points that you have raised here in an extremely serious fashion. We thank you for coming.

**Mr. Anand:** Thank you very much for the opportunity.

**Mr. Chairman:** Then, if I might, I will call upon our next witnesses, the representatives from the League for Human Rights of B'nai Brith Canada: Simon Adler, the Ontario chairman, and Alan Shefman, the national director. If you would please come forward, gentlemen. So as not to cause further time problems, I will turn the floor over to you. If you would like to lead us through your brief, we will follow up with questions.

#### LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

**Mr. Shefman:** Thank you very much. First, I would like to thank the committee for allowing us to make this presentation. I will be introducing our brief. My name is Alan Shefman. I am the national director of the League for Human Rights. Simon Adler is the Ontario chairman of the League for Human Rights. Simon will be presenting the substantive aspects of our brief. It is fairly lengthy. We will not be reading it. We will be presenting some of the highlights to you.

First, I would like to give you an insight into what the League for Human Rights is. The league is a national agency dedicated to combating racism and bigotry. Established in 1970 by B'nai Brith Canada, the league's objectives include striving for human rights for all Canadians, improving intercommunity relations and combating racial discrimination and preventing anti-semitism.

B'nai Brith, the league's parent organization, is the world's largest and oldest international Jewish service organization. Founded in 1843 in the United States and established in Canada in 1875, its membership exceeds 500,000 men,

women and youth. Today, there are over 10,000 Canadian Jewish families involved with B'nai Brith Canada.

The league's work can be divided into four general areas: education, community relations, legal-legislative, and public information and research. Within each of these categories, the league is involved in a wide range of issues and programs encompassing broadcasting, communication policy, legislative control of hate propaganda, religion in public schools, affirmative action, the use of the Charter of Rights, cross-cultural training materials, Holocaust education and awards programs for the Canadian media.

We are presenting here today for a number of reasons, because we believe it is our responsibility as a human rights agency to comment on such matters and because of our support for the Charter of Rights. Last week we presented to the Senate task force on the Meech Lake constitutional accord and the Yukon and the Northwest Territories.

Overall, we are supportive of an accord that would bring Quebec into the constitutional arrangement. We are, in fact, supportive of the concepts identified in the present document. At the same time, we have significant reservations about the wording and arrangements, as well as the omissions in the present document. We will be touching on immigration, multiculturalism, aboriginal rights and the primacy of the charter.

**Mr. Adler:** The purpose of being in front of you today is not in any way to suggest the scrapping of the accord, nor in any way to suggest that an accommodation with Quebec is not necessary. Of course it is necessary, and our suggestions here today are intended to try to provide some constructive criticism and to outline some changes which could be made to achieve, more effectively, in our opinion, the goals that the accord is intended to achieve.

As Mr. Shefman mentioned, I am not going to read the entire brief; rather, I would like to highlight some of our positions to you. I would like to begin with the immigration question.

The accord as such—and this is apart from the part of it referred to as the constitutional amendment—provides that agreements can be entered into between the government of Canada and the government of Quebec relating to immigration. Effectively, what is provided for by these agreements is that Quebec will be entitled to actually receive a number of immigrants equal to its proportional share on the basis of population, plus five per cent of the objective



of immigrants set by the federal government. This comparison between actual immigrant bodies, as it were, and a projected number of immigrants creates a number of very severe and significant problems.

First, there is an obvious problem in the sense that the possibility exists that each and every province could negotiate an equivalent agreement. That is provided for explicitly in the accord. You would thus have the possibility of the federal government's being obligated to physically supply, as it were, one and a half times the number of immigrants who actually wanted to come to Canada.

Second, and of significant concern to the league, the provision as set up at present may well necessitate a reduction of immigration to other parts of the country. I hasten to add that in our view if Quebec, for whatever reason, wished to increase immigration to Quebec, not only is it perfectly entitled to do so, not only is that a perfectly justifiable aim of the province, but at present all of the legal background necessary to achieve that end exists in the Cullen-Couture agreement.

What we have is that historically Canada has received physically less than its target in terms of immigrants year after year. Typically also, the number of immigrants choosing to go to Quebec seemed to have been less than what its proportional share would normally be. My understanding is that the number of immigrants typically choosing Quebec has run around 16 per cent, whereas under this agreement, depending on how you analyse it, Quebec would be entitled to 20 per cent to 25 per cent.

The only way that the agreement can be complied with, given a physical shortage of bodies, is to limit the number of bodies going to places other than Quebec. This, I suggest and the league suggests, is an inappropriate response to the justifiable desire of Quebec to increase its population. Moreover, it is our view that a very significant distortion in immigration patterns may be achieved as a result of this provision.

## 1050

Immigrants seem to come to Canada for, call it one of three definable reasons: one may be as refugees, one may be for family reunification and the third may be for economic reasons. None of those reasons is necessarily linked or in any way logically consistent with the pattern of immigration the accord seems to set up. Thus, you may find the situation that economics may dictate a need for immigrants somewhere other than Quebec, family reunification may dictate a

choice by immigrants of a place other than Quebec, and perhaps the only group of immigrants who might be totally unconcerned as to where in Canada they might live would be refugees, which typically would be the smallest group, and even they would not necessarily always be totally unconcerned about where in Canada they would live.

Again, Quebec has, and may legally have, different requirements as to what immigrants are going to be accepted and not accepted, requirements differing from those of Canada. Canada is entitled, notwithstanding whatever Quebec wants, to require certain very minimal categories or certain very minimal characteristics to be met by a prospective immigrant, but beyond that, Quebec is entitled under the Cullen-Couture agreement to set up its own requirements.

This then adds to the reduction of flow of immigrants into Canada as a whole. If, first of all, in order to maintain the necessary numbers, immigrants are directed to Quebec, the first question then becomes, are they acceptable to Quebec? A person who says, "I want to come to Canada because I have family in Manitoba," or British Columbia or the territories, for example, is obviously going to be less desirable as an immigrant in Quebec than a person who says, "Yes, I wish to come to Quebec because that's where my family is."

We thus see a pattern of potential distortion of immigration as a result of the accord.

In the final analysis, the point which I wish to make is that, in the view of the league, the Cullen-Couture agreement provides all necessary and sufficient power to Quebec to encourage as much immigration as Quebec can handle. Where the problem arises is in an attempt to link the numbers coming into Quebec with the numbers going elsewhere, especially where the relative proportion is calculated by comparing apples and oranges.

That is the fundamental error or the fundamental flaw that the accord has. They are comparing the Quebec entitlement, which is in terms of actual bodies, if I can be slightly facetious, with a proposed target. Quebec is entitled to a certain number of bodies, calculated as a percentage of a proposed target which historically has not been reached. It would seem that this element of the accord would have built within it seeds of failure.

The next area which I would like to touch upon and talk about is the area of multiculturalism. The accord does indicate that it does not affect multiculturalism as dealt with or referred to in the charter, but as did our previous speaker—and I am

going to endeavour from here on in my submission not to repeat unduly what Mr. Anand said, because, essentially, our positions are on all fours. Essentially, with respect to his legal analysis of the interplay between the accord and the charter, the league is in complete agreement with his eloquently stated position.

The charter itself indicates that it is to be interpreted in such a way as to foster multiculturalism. The constitutional amendment portion of the accord indicates that the Constitution, which by definition includes the charter, is to be interpreted in a manner consistent with something which is not necessarily, but potentially, in direct conflict with multiculturalism.

Again, we need to go into a slightly hypothetical situation. The amendment as set out in paragraph 2—and I am referring specifically to subsection 2(1)—characterizes Canada as being, in a sense, of two characters. On the one hand, you have a primarily English-speaking population with a substantial French-speaking minority, and on the other hand you have a primarily French-speaking population with a substantial English-speaking minority. In that second characterization, there is the notion of distinctness, which is considered constitutionally relevant. How can those characterizations co-exist with the characterization that Canada is multicultural?

I cut the sentence off deliberately. The charter indicates, in section 27, that it is to be interpreted to foster the multicultural heritage of Canada. The constitutional amendment, in paragraph 2, ignores that heritage. I am not suggesting any sort of deliberate ignoring; I am not suggesting any sort of hidden agenda to change Canada from multiculturalism. I am suggesting probably nothing much more than a drafting error. But drafting errors have a habit of coming back to haunt nations later on, once matters come to be determined in the courts, as inevitably they would.

Let me just throw a hypothetical example at you. Let us assume for a moment that it was determined by a government of a province that in order to foster its particular nature, it wished to deliberately reinforce or promote the characteristics of its majority, even perhaps at the expense of a minority. One could think of this in terms of language; one could think of this in terms of religion. In the worst possible scenario, one could think of it in terms of voting rights. One could think of it in terms of choice of immigrants. There are any number of scenarios in which a government decision to affirmatively promote what it perceives as its provincial character could

conflict with ideas that we have linked directly to multiculturalism.

The framework of the present amendment, as Mr. Anand said so well, is such that the court would have extreme difficulty in promoting multiculturalism at the expense of what the province indicated was its aim to promote its character consistent with section 2 of the amendment. I have used the word "province." Exactly the same argument would apply to the government of Canada. It could determine, for example, that in areas outside of Quebec preference should be given to English people and French people should be kept as a minority, because that is the recognized situation that the amendment seems to suggest.

I would hope that this issue would never arise, but we do not deal with constitutions on the assumption that they will never be put to the test. The Constitution exists, in a sense, out of a recognition that it may have to be put to the test.

The position of the league is that the recognition of multiculturalism should come squarely within subsection 2(1) of the amendment. That is, there should be, in some form, an explicit incorporation of section 27 into the amendment.

#### 1100

Now I believe, if I recall correctly, that Mr. Allen asked Mr. Anand if the constitutional amendment should deal with the charter on a shopping-list basis or if the relationship between the amendment and the charter should be dealt with on a macro level, let us call it, in the sense that the entire charter is referred to. I echo and join Mr. Anand's answer to that question.

Our criticism of the amendment on this level implies or, in a sense, is founded upon a belief that we are implicitly amending the charter. To select provisions out of the charter that are to be dealt with in the amendment specifically is to compound that problem in our view. If the charter needs amendment, and there have some very cogent arguments made to that end, that is something which should not be dealt with in the form of consideration of this present amendment.

This amendment should deal with the charter as it exists. The reason I focused on multiculturalism in section 27 is that my reading of the charter does suggest, not in so many words, that what the charter has done is elevate multiculturalism as a principle in the same way, but not in the same phrasing, as this amendment elevates the distinct nature of Quebec, for example. So that specific, and perhaps only that one, might be dealt with separately. Far better would be the addition of a very simple phrase to this amendment. The



simple phrase need say nothing more than, "Any legislation or any regulation or any action of any government in purported compliance with this amendment must also comply with the charter."

Let me throw you a hypothetical example. Again, I hope that such an example would never come to pass, but if the charter and the amendment cannot deal with the example, then we have a drafting flaw which must be corrected. The example I suggest is that the province of Quebec, for example, being concerned about a falling birth rate and perhaps a reduction of immigration, might pass a law simply saying that it is not accepting immigration from the rest of Canada. They might begin that law, as Mr. Anand suggested, by saying, "This is absolutely critical in order to maintain the distinct society which Quebec represents."

Let us be honest. What is that distinct society? That distinct society is a society which is primarily French-speaking—primarily, we might call it, of French origin, with a number of very substantial minorities. But we could envision a circumstance where, for example, the James Bay hydroelectric project and other economic and political developments might make Quebec a peculiarly attractive place within Canada in which to live.

As we have seen, for example, with immigration from Alberta to Ontario while the oil industry was having difficulties, there might be mass immigration from the rest of Canada generally to Quebec. The Quebec government might very legitimately be very concerned about what effect that immigration would have on its distinct society. It might say: "We've got to just simply stop it. We can't allow it because we can't maintain our distinct society."

If we look at subsection 2(3) of the proposed amendment, of the Constitution Amendment, 1867—it is actually in section 1 of the amendment bill—"The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed." I want to focus on the word "role," because I think Mr. Anand did not emphasize that word and I think he might have found it a little bit easier to answer some of the questions that were posed to him. A role presupposes the ability to act. It is not necessary for that ability to act that it be mentioned specifically in section 91, or in this particular case, in section 92 of the 1867 act.

The courts, since 1867, have said that any government power conceivable must fall either at the federal level or at the provincial level. We do

not need for today's purposes to assign a specific category under section 92 for it.

The underlying power is there. If they have a role to preserve their distinct society, then quite apart from the effect of the charter, this law I am proposing would be quite valid. It would be a valid law preventing immigration into Quebec. It would also appear to contravene section 6 of the charter, on its face. How do we resolve that question? I do not necessarily have an answer.

What concerns me is that an answer that might develop is the answer Mr. Anand, and incidentally the League for Human Rights of B'nai Brith Canada and myself, read as having been given in the Bill 30 reference case, that because a constitutional element—if we might call it that, a constitutional provision—permits legislative activity that is dependent upon and has inherent within it distinctions contrary to the charter, which in effect cannot be employed without contravening the charter, the charter simply will not apply. It cannot apply because then, reading the Bill 30 case as I think it should properly be read, you would have the strange situation of one part of the Constitution contravening another part. Since the very beginning of the courts' review of statutes, and in particular of constitutions, it has been the rule that wherever possible you avoid that result. The court is to strive to achieve an interpretation of the two parts that does not result in repugnancy.

Therefore, the decision reached in the Bill 30 case may well, given the present drafting of the amendment, achieve the result that Quebec could simply prevent immigration from the rest of Canada, or a smaller province like New Brunswick or Prince Edward Island or Nova Scotia, for example, might prevent immigration from Quebec. That surely, I think, is not an intended objective.

I think surely it indicates nothing more significant or serious than a drafting error, but it is a drafting error which really must be addressed and must be dealt with.

This same problem with multiculturalism, in the view of the league, may be faced with respect to native Canadians and women, both of whom seem to be treated specifically in the charter. Why specific treatment in the charter was included may be an interesting question for speculation, but the answer is not really very important, to my mind. The fact is that there was specific treatment in the charter and no specific treatment in the amendment. This seems to create, again, the possibility of decisions by the court which would remove any effect or any

consequence to the charter provisions in those specific cases.

I am getting very close to concluding and I wish to stress that the objective of recognizing Quebec's distinct and unique nature within the Canadian federation is one that is wholeheartedly endorsed by the league. The fact that there may be, in connection with the promotion of that distinct position, the necessity of balancing group against individual rights or group rights against group rights, is also something which is inevitable and recognized, and not in and of itself to be feared or any matter of concern.

What is a concern is that, in the present setup of the legislative proposal, in the way the Constitution Amendment is drafted, that balancing process may not take place. It may not be reached.

**1110**

I think that if any one of us were to ask any of the persons who were involved in the creation of this document, "Are you trying to do away with the charter?" of course they would say no. If we were to ask them, "Do you foresee circumstances where it may be appropriate to balance what you are trying to do in the promotion of your distinct society or in the promotion of Canada as you see it with rights under the charter?" I think any thoughtful member would have said yes.

There may be circumstances where we do need to balance. There may be some steps in promotion of a distinct role or a distinct society that go too far, and there may be others which, although they nominally contravene what is considered to be a right, do not go so far as to say they should be prevented. The concern the League for Human Rights of B'nai Brith Canada shares with Mr. Anand, who preceded me, is that this balancing procedure may well be forestalled, with the result that under the guise of promoting the objectives contained in section 2 as proposed, no reference will need to be taken to the charter.

The solution to this problem that seems most obvious is the one I have already suggested. We need do no more whatsoever than to say that the derivative action, whether it be legislation, regulation, policy, whatever, need comply with the charter. A simple phrase like that would, I think, eliminate the perceived problem. I suspect, and I do not think we will ever know, that this may have been what was behind the framers' intention when they put section 16 of the proposal in, thinking that all they needed to do was to approach two or three specific sections and they would adequately involve the charter in the process.

My submission and the reason I specifically chose that example is that you cannot achieve the involvement of the charter appropriately unless you involve the entire charter.

I thank you very much for this opportunity. Should you have any questions, I would be very pleased to try to address them.

**Mr. Chairman:** Thank you very much both for your comments and also for the brief which goes into more detail on those and other points. I think it is useful that, as it happens, our first two submissions this morning focus on rights. That helps perhaps to clarify some of the issues we are trying to deal with. We will begin the questioning with Mr. Breaugh.

**Mr. Breaugh:** I want to pursue a couple of areas with you. One is that most of us are now looking for some way to make the determination whether the charter is ruined by this accord.

I understand and appreciate the concerns many people have about this, but I struggle with the notion that the Charter of Rights is eliminated, put out of business or ruined or whatever term people want, simply because I see the charter still standing. What I am trying to assess now is whether there was an attempt in the formulation of the Meech Lake accord to water it down somewhat or to accommodate other needs.

One of the things many people struggle with is the notion, and I believe it is true, that every time we pass a law of any kind we eliminate some rights for someone out there somewhere, and they always tell us about it. That, in essence, is the political judgement call that is made. When we set a speed limit, somebody always asks me: "Why did you do that? I am a perfectly competent driver. I can drive 150 kilometres now anywhere and you have eliminated my rights."

When we did the seatbelt law, I certainly heard a lot about, "Why in the world would you guys be interested in invading my privacy in my car?" So it is a very real political argument.

I have a little difficulty with the suggestion a number of groups have made now that this was done by accident. The process, I think, is a wrong one, and we have discussed that at some length, but it is rather hard to believe that there were accidents in this process. There may have only been 11 very tired men in the room, but we all know that outside the room there is a phalanx of others who draft these things for a living. Most of what is in the Meech Lake accord had been discussed for some time so there were not really a lot of surprises. If there were surprises, they may be in how these things were put together.



It strikes me, too, that it does not do us a lot of good to try to prognosticate on what a future Supreme Court decision will be. We do not know that. One of the agonies of politics is that when you draft the law and you pass it, it is embarrassing, but those damned courts do have a right to hold sessions and eminent people make rulings on the laws you pass.

I am really wondering, does it get down to the nut that somehow we ought to affirm that we all believe, that the Charter of Rights and Freedoms stands and is not taken apart by the Meech Lake accord, and let it go at that?

**Mr. Adler:** I am sure this committee will have heard and will continue to hear during the course of its proceedings a lot of rhetoric. I think you used phrases like the charter being "torn apart," "trashed," and such like. I certainly would not in any way join in the use of that rhetoric.

I would not say that the charter would become a spent force or irrelevant if the amendment is passed in its present form. What I am saying is that in one visible area we would have a great degree of uncertainty as to what the ultimate decision will be later on, and uncertainty, in and of itself, is a bad thing. There is going to be, as a matter of life, a certain amount of uncertainty. You, sir, referred to some in the sense that the Legislature passes the law and then loses control over what the courts do with it.

But there seem to be two approaches that could be taken with respect to this amendment at this time in order to totally eliminate the uncertainty. All one would need to do is either of what I advocated before: just simply state that the derivative legislation is subject to the charter, or simply say the charter does not apply to what we may do in furtherance of these objectives. I would argue strongly against that approach on a political basis, but in a sense it is open to you to do it.

The present circumstance is one where the question is up in the air. Even if members of this committee, members of the Legislature in the House, all of the provinces, Parliament, the Prime Minister, everybody said, "We believe the charter is going to apply to anything done in furtherance of the Meech Lake accord," that could all be meaningless unless you take that belief and put it into the Meech Lake accord.

An example I will give to you of that problem relates to section 7 of the charter. It was always believed, and it was stated, I would think, virtually unanimously at the time of the passing and enactment of the charter, that section 7 was to ensure fair trials only, to ensure rights like the

right to a fair trial and all that means—what are called, by lawyers, procedural rights.

But in fact section 7 gets to the Supreme Court of Canada in a case involving section 94 of the Motor Vehicle Act of British Columbia. There the Supreme Court said: "No, we are not limited to procedural rights, as you have defined them. We can do something that you would call substantive," speaking to lawyers before the court. The court went so far as to say explicitly that it was not bound by expressions of intention, belief or predictions which were not contained within the very document itself.

If you, sir, believe that the charter is going to remain unaffected by this amendment, if you believe I am mistaken in my view that we have a potentially very serious problem of conflict, then all I am saying to you is, for heaven's sake, say so. Then put it in the document itself so that the court cannot adopt an alternative position.

1120

**Mr. Breaugh:** Yes. Politicians are in hot water on this one, and I tend to agree we should all just find the words and stick it in there.

The problem is that for once politicians, especially people on the joint committee, got caught, I believe, for being too honest with people, for admitting publicly, maybe for the first time, that they could put whatever they want in here. The truth is that at some time a court will take whatever words we draft and interpret it as it sees fit. Even if we put in large type on the front of the Meech Lake accord, "The Charter of Rights is unaffected by this agreement," at some point in time someone will maintain the legal right to go to court and say, "Well, that's what it says, but here are the 95 reasons it doesn't apply to me." None of us ever thought that Manitoba would translate all of its laws into French because somebody got a traffic ticket in English, but that is precisely how it came about. So we are admitting this agreement to the process, and any law will be subjected to it.

Let me try to get to one other thing with you, because this is the difficult part, I think, for many of us really to speak with much certainty on. We have not had a Constitution in this country for very long, so a lot of what it means is new to us.

I, for one, would say that constitutions work well when you write it all down and you leave it alone for half a century and let the courts kind of decide and get the precedents out there. Then you can review with some certainty whether the Charter of Rights and Freedoms was really a good thing or a bad thing. Many of the people I

know now have different opinions on whether the charter is really hot stuff or not so hot.

We struggle with the idea that a constitutional right is basically something that is there for a minority. If you put this to a popular vote, the rest of the country is going to say, "That's not a problem; we don't need that," but for a small percentage of your population, they need a legal right. It is that legal right which very often makes critical decisions in their lives.

What we, as politicians, try to do is sort out where this makes sense and where it does not, so some of the problems in the accord are in the political sorting process.

If you want Quebec to be a distinct society, it will have to do some things which will be seen by some people as being an infringement on their rights. The three or four clauses that are in the current Canadian Constitution that do that, in my judgement anyway, have not been exercised a lot, but if governments across Canada decided to exercise "notwithstanding" clauses and all that kind of stuff regularly, there would be a lot of screaming. There is a balancing here. How do you do that? How do you go through that?

The wonderful irony that I thought of this morning is that there is a group of people before us with a long, distinguished record in Canada for human rights and discrimination cases that I could not join. You would have the good sense to exclude me, I am sure, but it is true that we have a number of organizations that have very distinguished records of protecting minority rights that, for example, a woman could not join, that a Catholic could not join, that a number of other minority groups would have trouble getting into. The other irony that struck me this morning is that there are other groups with not quite so noble a history that have come to exactly the same conclusion on this accord as you have. I must admit it is causing me to think carefully about what is going on here.

I would like to hear your rationale about minority rights and how you handle that, how you handle the judgement calls when you try to do something as noble as an affirmative action program which excludes another minority. Men are excluded by law from a lot of affirmative action programs, and we are not going to take it too much longer. Another three centuries and we will rebel.

**Miss Roberts:** We are giving you five.

**Mr. Adler:** At the time the repatriation of the Constitution, as it was then called, was under discussion back in 1981 and 1982, in a personal capacity only I submitted a brief arguing

passionately that there should be no charter at all and that some issues ought to be left to the political marketplace. However, the nation, in its larger wisdom, decided that I was wrong and chose not to follow my advice, and that is critical. We have a charter, it exists and it has very much in it that is extremely positive. Every tool, whether it be the tool of democracy itself, can be used for appropriate ends and it can be used for inappropriate ends.

I have heard an extremely cogent argument made, for example, to say that one of the biggest beneficiaries under the charter is huge corporations. They are having a field day, according to some. They point to the Big M Drug Mart decision and the Hunter-Southam decision and say, "Look at what is happening to the corporations, and on the other hand, look at how the unions are being treated." Look at the Dolphin Delivery case, for example, and any number of cases that say you can belong to a union but it cannot do anything for you. Like every tool, it has potential for appropriate use and inappropriate use. You can bang a nail with a hammer; you can also bang your thumb.

Bringing it back to our present situation and what is before us today, I emphasize both from my personal conviction, which arose out of saying originally there should be no charter, and from the position of the league that this balancing is absolutely critical. It must be allowed to take place.

We have a mechanism which may be flawed, and arguments are made that the charter ought to be amended. We have a mechanism which does that balancing; it does allow that balancing. It directs the legislatures to the issues which ought to be considered and, maybe unfortunately from the position of the legislatures, it then gives the court the chance to second-guess. None the less, it is an educative and functional instrument at both the legislative and the judicial levels.

The position that the league is taking, which I understand to be identical on this point to the position that the Ontario Human Rights Commission was taking in the voice of Mr. Anand earlier, is that it is critical that the balancing be allowed to exist. Under the present circumstances, there is great confusion as to whether balancing will take place in the future. If we are confused now, the question arises, why gamble on getting the right answer? Why do we not address the confusion now and try to prevent the wrong answer?

You can never be 100 per cent certain that any words you put down on paper are going to be interpreted by somebody else at a later stage in



different circumstances in exactly the same way that you have intended, but you can try. That is what the Constitution is all about. Nobody guarantees success, but it is the attempt to lay down the parameters which are going to be relevant in the future. Of course, when the court goes off too far into the deep end, there is recourse: section 33, which I think you mentioned.

To come back again to our present situation, one of the processes that the court must follow if it perceives that the charter does apply, if we get over the first hurdle, is to ascertain whether there has been a breach of the charter. Let us assume that in some example, such as my section 6 example prohibiting immigration, a breach is found. Then the court enters into the balancing, properly speaking.

The first consideration that the court must enter into is, what is the purpose of this law that we are considering? The court is determining only whether the ends justify the means. That is what section 1 of the charter is really all about. In the Oakes case, which is laid out in Mr. Anand's submission in detail, the court sets out how you go about deciding whether the ends justify the means.

Our view is that the present drafting of the constitutional amendment distorts that consideration by seeming to emphasize particular ends at the expense of other ends, in effect saying that the Constitution of Canada shall be interpreted with respect to A, B and C, leaving D, E, F and G out in the cold, so to speak.

I do not suggest that it is possible to list in any document every consideration which ought to be taken into account, but we can have a very good start at it by, in effect, incorporating the considerations which were already laid out in the charter.

1130

I sympathize—and I think that is really all I can offer you with respect to the problem you have addressed—with the feeling that legislators must feel, in a sense, this ability to be second-guessed at a time when you cannot answer back. But none the less it does exist and it was the legislators who chose it in the first place by enacting the charter. The advice and request that, in a sense, the population of Canada makes of you then is to ask you, to the best of human ability, to say what you mean and make it explicit in the very document that is under discussion.

**Mr. Offer:** I want to carry on with this line of questioning. I sense that you are asking for a certainty or a clarity in certain provisions of the

accord which I do not think is achievable in the way in which you are asking. You are holding up the charter as meeting that type of objective.

I do not think as we sit here that we fully appreciate how the charter is going to be interpreted. You are asking for something in the accord in terms of its not affecting other areas. I do not think—and it is a personal feeling—that is what the Constitution ought to be. I do not think we should have an appendix to a Constitution outlining all of the different fact situations, all of the different variables. We are not going to do it. You know it is an impossibility. That is not what a Constitution is.

I think a Constitution is to provide, in many ways, a framework not only for courts; and it seems that we are always taking the position that it is how the courts are going to interpret. I think it provides a framework in many ways for us as legislators in dealing with legislation. We take the first look; we are the ones who talk about particular provincial laws, determine how we are going to vote, determine changes, and we are the ones who take that first look with respect to its role vis-à-vis the Constitution.

I wonder if you could just comment on that type of certainty that you are asking for in this accord and on using it as a reason against the accord, which is not there in the charter or, in many ways, in the Constitution.

**Mr. Adler:** There are a couple of points to make. The first point is that, while ideally I would like to see certainty, I agree with you that it is not achievable. I think I indicated to Mr. Breaugh that it is just not achievable. What is achievable, however, is clarification, an approach towards certainty.

The important point that I tried to make is that we have two areas of uncertainty at the moment, two areas which we can clearly define, in which we can clearly say we do not know what the courts should do, and they could do something we do not want. The first area is whether anything done in purportedly following the amendment is reviewable under the charter at all. The first question in my section 6 example is, can the court consider at all whether a law prohibiting immigration into a province is a contravention of section 6? That problem can be cured very easily. The problem of not knowing what the answer is can be cured very easily by simply indicating within the amendment that any derivative action has to comply with the terms of the charter.

The second problem is, assuming that the court does review the act in the light of the charter, what is the outcome of the balancing

going to be? I do not for a moment suggest that we need to know, or can know at this time, what that answer is going to be in every conceivable circumstance. I would not even try; I will not even try with respect to my section 6 example. What I think we need to do, though, is to look clearly at the kinds of criteria that the courts are going to consider and ensure that we give appropriate weight to the criteria. We may want to weigh some as more important than others or we may want to weigh them all equally.

In the specific example of multiculturalism, in the light of what section 2 says, we do not know, I would suggest, what weight is intended to be given to what. For example, is multiculturalism to be treated as as important an end, as important a principle, as the idea of a distinct Quebec society, or is it less important?

I would think that, regardless of what the outcome of the application of the balancing will be to a particular fact situation, it should be well within the power of the appropriate legislatures, Parliament, provinces and governments to make that choice and to make it explicit: We want multiculturalism treated as being as important as the distinct society, or the distinct society as more important. But at present we just simply cannot know what that answer is, because we cannot know what the relationship between the amendment and the charter is and because of the fact that you are dealing, in a sense, with the left hand on one issue and with the right hand on the other issue. They are not on the same scales, let alone being weighed together. It is a clarification I am asking for, not certainty.

**Mr. Shefman:** On page 5 of our brief we say specifically in relation to immigration:

"The Constitution should be a document of principle drafted in clear and simple language accessible to all. It is the basic document of the country. It should speak to citizens of the country about what Canada is. When the Constitution becomes cluttered with a whole series of detailed technical," and we have an example here, "immigration agreements, the Constitution becomes trivialized. The value of the Constitution as a unifying symbol of Canada, an articulation of what Canada is, is lost when the Constitution becomes a litter bin of federal-provincial agreements."

That is our overriding interest in clarification.

**Mr. Offer:** As a follow-up—and I know that we are coming to the end; I can see the chairman looking at me with pleading eyes—I will just say that I am not certain in my mind that that particular certainty, as you have explained it, is

achievable or ought to be achievable, or that we should in many ways amend or scrap the accord on that basis. We have heard from others that to do that is the same thing as rejection.

**Mr. Adler:** Let me be perfectly clear. We are not suggesting in any way that there should be any consideration of scrapping the accord in total. That is just not on the agenda. What we are suggesting is that the wording might be tidied up a little bit to achieve certain objectives.

Again, let me just simply reinforce it. I can do no more than restate it. Certainty is not within the ball park. We cannot achieve certainty. I am not asking for certainty. I am suggesting only that we strive for clarification. Even that is never going to be absolutely perfect, but if you do not make the attempt, the suggestion we are making here today is that you are going to walk into problems and a number of people are going to be surprised by the result. That should not necessarily be the case.

**Mr. Shefman:** It was said earlier that many of the items that are in the accord in fact were well known before they were actually put down on paper. The concern we and, I am sure, many of the groups have is that when it was finally put down on paper, it was acted on quickly, drafted quickly and there it was. We are concerned that we would be absolutely tied to that document of the work that went on at that particular moment, when there is a tremendous amount of interest across the country, a tremendous amount of skill and intelligence that is reviewing what was drafted at that moment, and I think we can come up with a better document.

1140

**Mr. Chairman:** Thank you very much. Again, we could spend a great deal more time and I am only sorry, with all the presentations and briefs, that we cannot go even further. I think it has been extremely useful to the committee having you here this morning, as was the juxtaposition, as I said before, of the two presentations around similar questions and issues. We thank you very much for joining us.

Next, I will call upon the Women of Halton Action Movement and the two representatives, Bev LeFrançois and Karen Thompson. We want to welcome you to the hearing. We have the copy of your presentation. I appreciate your patience. I hope you found it as interesting as I and other members of the committee did. I introduced two people but I see there are four. If you would be good enough to introduce the members of the group, then I will turn the microphone over to you and we will follow up with questions.



## WOMEN OF HALTON ACTION MOVEMENT

**Ms. LeFrançois:** Yes, I will do that.

Thank you for allowing us to come and speak with you today. After having the opportunity to sit and listen to the different delegations that have come before us, we realize perhaps the dilemma that the Meech Lake accord has put a lot of us in, and particularly this group. We certainly wish you well in looking at all the information that has been given to you.

I would also like to introduce myself. My name is Bev LeFrançois. Beside me is Karen Thompson. Karen and I will be giving the presentation, I the introduction and Karen the body. To my left is Kathy Mason, another member of the Women of Halton Action Movement, and to my right is Barbara Glover. Sitting behind us are nine other members of the Women of Halton Action Movement who have come to give us some support this morning.

I see on your committee Walt Elliot. You do not know this, but when WHAM first formed, you were the first person we ever lobbied.

**Mr. Elliot:** And the last.

**Ms. LeFrançois:** You were running for office, I believe, in 1981. We lobbied you on women's issues and then wrote your answers in the local paper.

**Mr. Offer:** A copy I wish you had today.

**Mr. Chairman:** We hope you will keep that testimony so we can see just where Mr. Elliot is.

**Ms. LeFrançois:** The Women of Halton Action Movement, WHAM, started in 1980 over a common concern for the Constitution of Canada and the rights of women. The group consists of approximately 60 women of varied ages, educational backgrounds, politics and socioeconomic status who have joined together to lobby on local and national issues that will improve the status of women in Canada. WHAM is a member of the National Action Committee on the Status of Women and supports the lobbying efforts of this strong feminist network. WHAM is also a member group of Voice of Women.

Some of WHAM's lobbying activities have included: Mother's Day peace walks; a Father's Day peace festival; a submission to the Fraser committee on pornography; a submission to the Task Force on the Implementation of Midwifery in Ontario; all-candidates meetings to address election issues; letter lobbies on gender bias in the judiciary; revisions to the Criminal Code regarding abortion and pornography; changes to

the Indian Act; pay equity; violence against women; homemakers' pensions; affirmative action, and free trade.

Noting our activities, you will be able to understand well why we feel it is our responsibility to meet before this body, as we believe that we exist in order to try to influence the government and the laws of our country.

WHAM is very concerned at this time about the impact that the Meech Lake accord will have on the future of all Canadians, particularly women. Our group was formed around the issue of ensuring that women's rights were entrenched in the Charter of Rights and Freedoms in 1982. Once again, we see the need to speak out to ensure that those rights are not eroded by amendments to the Constitution in the well-founded effort to bring Quebec into the Constitution.

WHAM is also concerned about the process that has been followed to bring about this major amendment to the Constitution. Not only have women been left out but so has a major portion of the country, the Yukon and the Northwest Territories. This represents, in our opinion, an offence to all Canadians to ignore the democratic process so fully.

**Ms. Thompson:** First, I will talk about rights. I recognize that we may be repeating ourselves but we feel it is worth one more time with feeling.

Women in Canada fought and won the inclusion of specific sections in the Charter of Rights and Freedoms which protect equality and forbid discrimination. We do not have to remind you of the large number of women who converged upon Ottawa when it became clear that equality for women was going to be overlooked by the all-male drafters of the charter. Following that experience, it is difficult to understand why the Meech Lake accord has been drafted in the way it has in sections 1 and 16.

Section 1 specifically recognizes the role of the Parliament of Canada and all provincial legislatures to preserve linguistic duality and the government of Quebec to preserve and promote the distinct society. In addition, section 16 states that native and multicultural rights are not affected by the accord amendments. In combination, these amendments form a very powerful force for moulding the rights that currently exist in the charter.

By specifically enumerating the native and multicultural rights, the drafters of the accord have set up a hierarchy of rights starting with linguistic rights at the top, followed by native and

multicultural rights equally on the next lower level. Below that fall the rights enumerated in section 15 of the Charter of Rights and Freedoms. This leaves the issue of rights based on sex, religion, age, mental or physical disability on a lower level than those of language, native or multicultural rights.

Experience has demonstrated that the judiciary is very explicit in its interpretation of the charter. They will not consult transcripts or parliamentary reports to try to determine what legislative drafters meant by specific passages. They will look at the words as written and judge their weight. The only possible interpretation that they can give to the accord amendments as they stand today is that the rights of some take precedence over others. Those that are enumerated stand out as the more important ones.

We recognize fully that this was not the intention of the drafters. However, we also recognize that intention will not be interpreted by parliamentarians who want to cancel programs or redirect funding to other programs. The power of the words in sections 1 and 16 combined with the opting-out provisions of section 7 of the accord give the provinces the power to deny services to some Canadians. The recent controversy over what are provincial responsibilities to pay for abortions in the face of the Morgentaler decision is an example of the type of injustice that could become commonplace in Canada if the accord is allowed to stand as it is today. Courts as well will have to read the words as written, not as intended.

We believe that in the effort to persuade Quebec to enter into the signing of the Constitution, the drafters were hasty and have made glaring errors that should now be amended. The desire to have Quebec included in the Constitution is one that we applaud and fully support, but not at the expense of the rights of millions of other Canadians.

I would like to point out that we have chosen to address a couple of issues. We are aware there are a lot of things and a half hour does not allow us to address all of those. The next one we would like to talk about is the process.

We are honoured to be able to make this presentation to you today. It is a credit to the government of Ontario and to all three political parties that Ontarians have an opportunity to express themselves and to engage in a dialogue that will improve the constitutional amendment process in the future. We are concerned for the long-range plans for Canada and not for short-range, quick-fix solutions to complex problems.

As a result, we have great concerns that this process today not be used simply as a way to appease the public and as window-dressing. If these hearings are just for show and will not lead to any serious reconsideration of the flaws in the Meech Lake accord, then all three political parties must shoulder the blame for that failure. It is a serious mistake to leave out the Yukon and Northwest Territories in the process while drafting a document that could threaten their existence. The lack of consultation with the far north and with other groups in Canadian society, such as women, has led to serious drafting flaws in many areas.

If Quebec will accept the accord only as it is written today, what is the purpose of these hearings? Is the accord so fragile that amendments to make it more equitable will not even be considered? We suggest to you that if this is the case, the accord has no place in Canadian history and should be discarded.

#### 1150

We recommend that the accord should be redrafted to ensure that the hierarchy of rights created by the current wording is removed. The redrafted version should be given to all provincial parliaments and to the Yukon and Northwest Territories for consideration and approval. The public should be allowed the time and opportunity to comment on the contents of the proposals before they are voted upon in the various legislatures. The future of Canada as a nation, not as a union of separate provinces and territories, rests on the reassessment of the process that has occurred in this document.

In the Honourable Ian Scott's remarks to this committee on November 25, 1987, he urged us to keep in mind that the accord "cannot be analysed against some purely hypothetical or abstract alternative...it is not sufficient to ask whether there is an alternative set of proposals which might theoretically be superior to the accord as written." With respect to Mr. Scott, we remind him and you that all is theory until put into practice.

It has been stated theoretically that women are wrong to be concerned about the wording of the accord and that their rights are entrenched in the charter. However, experience has shown that words will be interpreted strictly as they are written and thus our concerns are not theoretical but are based upon very real experience. As time passes and people have an opportunity to study the words in the accord, opposition to it is mounting. You do not need to read anything more than one local paper to realize there are



various groups, including the federal Liberal Party which has just had a conference, where there are a lot of people who are very concerned about the accord.

Why the rush to implement the accord? Important issues such as the Constitution, equality rights, the future of the Yukon and the Northwest Territories, federal-provincial relationships and national social programs deserve more time for critical examination and comment by all Canadians. The politicians of Ontario have a historic opportunity today to use their influence to ensure that this process is done correctly so that in another generation we may look back and feel confident that decisions regarding the accord were well thought out and equitable to all Canadians.

Thank you for this opportunity to share our opinions and concerns.

**Mr. Chairman:** Thank you. Let me just note that while you may well have touched on points that have been made before, as they say, repetition never hurts. It is fair to say at this juncture, I suppose, that we have probably heard, in terms of various groups, more women's organizations and groups than any other single area. Certainly your concerns and comments fit very securely into that whole discussion. It does not hurt to have those underlined again. I begin the questioning with Mr. Eves and Miss Roberts.

**Mr. Eves:** It is a pleasure to have you before the committee today, and I think some of your points are very well taken. At the top of page 3 of your brief you make the comment that, "The only possible interpretation that they can give to the accord amendments as they stand today is that the rights of some take precedence over others." You may or may not take heart from the fact that Morris Manning, whether you always agree with him or not, is of a similar interpretation and, of course, he appears before the Supreme Court of Canada on a regular basis about numerous matters on behalf of his clients.

We have had, it is fair to say, though, constitutional lawyers and experts who have argued on the other side. I am sure you are well aware of those arguments, that section 16 is merely an interpretative section and will have no real weight. There is, at the very least, some ambiguity there, and groups before you have made the same point. If there is some ambiguity, then why not clear it up?

If everybody really intends that everybody's rights under the Charter of Rights and Freedoms supersede the Meech Lake accord, then why not just state that in a very simple, one-and-a-half-

line amendment? That has been suggested to the federal joint committee and it may well be suggested again to this committee. I take it that is the position you are taking with respect to section 16, that you would like to see it amended to protect those rights.

**Ms. Thompson:** Our statement that the accord should be discarded is made from the point of view that, if there are no amendments to it, then we question the validity of this and the process. However, we do feel strongly that, with the number of comments you have had, an amendment could be made to say that we have protected the rights in the charter as they are originally written. We realize that by putting emphasis—

[Interruption]

**Ms. Thompson:** There is a concert going on.

**Mr. Chairman:** I apologize. It appears that there will be a band which, at the present time, is rehearsing and then is going to be playing. I think if we keep the door firmly closed, we can proceed through it. I apologize. I am afraid the Meech Lake committee has no authority over bands playing in the Legislature.

**Ms. Thompson:** We recognize that.

**Mr. Eves:** I wondered if that was some sort of musical interlude accompanying the Sergeant at Arms.

**Ms. Thompson:** We hired them.

We really are concerned that when you start segmenting out particular—I think we would be concerned the same as if they had said women's rights would be protected and would take more precedence and had left out all the rest of them. We are looking at it from the point of view that the charter has a history now, that there is an interpretation process beginning in terms of the judiciary and that, to lay this on top, then you start reinventing the judicial process of interpreting what section 16 means.

They cannot help but overlay this and say: "Why did these people pick on these three particular aspects? In picking on those, they obviously intended to mean something in the writing of them." The judges are not going to look at it and say: "This has no meaning. It is the same thing as it was before the charter." There was a very specific purpose in writing the accord and they are going to have to figure out what that was.

**Mr. Eves:** Mr. Manning and others quite agree with you. Assuming that no amendment is made to the charter by this committee or this Legislature for whatever reason and the majority of members decide not to entertain the idea of any

amendment, would you be satisfied with a reference to the Ontario Court of Appeal to determine what the effect of section 16, as it is drafted in the accord now, has on the Charter of Rights? That has been suggested by many witnesses who have appeared before the committee.

**Ms. Thompson:** I think that is a second-rate solution to it. My concern is with the process, that we see that even though there are a lot of concerns, we would have to make references to them. Are you going to refer the entire accord?

**Mr. Eves:** No. They are only talking about—

**Ms. Thompson:** Equality rights: are you going to refer all the points? That would be a problem. We could be in the courts for years referring every specific clause that was a problem and asking for judicial interpretation; and then going back through the drafting process of changing it if the judges decide to do that.

**Mr. Eves:** That argument, of course, is only a legitimate argument if you think the only thing that needs to be amended in the accord is section 16 and where people's rights under the Charter of Rights and Freedoms stand. Are they affected or are they not affected? That is a fairly simple reference and it has been suggested by my colleague Mr. Braugh and by several witnesses who have appeared before the committee. In fact, one of the very first who appeared before us, Professor Beverley Baines from Queen's, suggested that.

That leads me to my next question. Assuming that problem with section 16 could be solved to your satisfaction one way or another, by amendment or by court reference, are you still concerned about other areas? You mentioned the problems with the territories in regard to their ability to become provinces and their ability to nominate people to sit in the Canadian Senate or on the Supreme Court of Canada. Are there other areas that you think have to be addressed in the accord, so even if section 16 problems were resolved you would still like to see other amendments; or would you be happy in your own mind if section 16 problems were resolved?

**Ms. LeFrançois:** We have other concerns with the Meech Lake accord and, as we were saying, we have been aware that there have been many other groups coming before you, speaking of their particular interests, so we have been more or less focused. The fact that there was no representation from the Yukon or the Northwest Territories in the discussions in the very beginning—and I believe they were there and not

allowed into the room at the Meech Lake discussions.

We all want this to happen. We want to have Quebec in the Constitution. Because that is so important, are we going to be willing to change the Charter of Rights and Freedoms? We know that everybody really does not want to do that. It seems to me that a great mistake was made when they closed the doors and decided they were going to make decisions in one night, but these really affect the future of Canada.

## 1200

If we say we want more changes, and we see that changes are needed in every area, it almost seems that we are saying we do not care about Quebec being in the Constitution. We almost feel a little bit blackmailed because we do care. It just seemed that that weekend was unfortunate for Canada.

**Mr. Eves:** It is somewhat similar to the fact that everybody is supposed to have until June 2, 1990, to make up his mind, but some premiers and some prime ministers want the matter resolved by June 30, 1988.

**Ms. Thompson:** One other comment we would like to make about it is—it is funny saying this to your provincial Legislature—the fact that it does give a lot of power; it decentralizes power. I think, with the problem that was addressed by the previous group about immigration with some selection, there are a lot of these things that concern me. The abortion issue is a particular one, considering the behaviour of some of the provincial parliaments, which we will not name, in terms of paying for services.

I think Canada has formed itself into a nation where we have certain socialistic types of programs where we ensure that we have good health care for all Canadians, not just for some who can pay for it. This is a real problem. I see this segmenting off according to what particular group happens to be in power in what particular province. We will have less and less of these Canadian programs and there will be certain things happening—people will have to go on the immigration list, what is available in each province. It seems that we are setting up not a nation but just a group of economically associated provinces.

Who knows what happens to the Yukon and the Northwest Territories. They may blend into all the provinces that are bordering them. It is unfortunate that in the haste to get this thing together—I understand the pressure that politicians are under when they are in a room and they are saying, "We have to come out of here with an



accord; if not, Quebec is going to walk"—you start putting things on paper and maybe the words are not the best by three or four in the morning. That is what we have ended up with here, something with a lot of good intentions but the wording has really failed to meet the needs of what was specifically needed to build a stronger federation.

The federation of provinces was to be made stronger by the inclusion of Quebec. I think that was the intention. The fact that Quebec was holding out was a big problem for us that left many of the federal politicians feeling very concerned that Quebec would end up leaving. The idea was that with a new politician there they had to make something happen and I think it is unfortunate that it has turned out in the particular wording that it has.

**Mr. Eves:** Thank you. Your presentation this morning has been a most sincere one. I would quite agree that there is no doubt that the 11 first ministers all entered into this discussion with the best of intentions, but I still do not see any reason why, if there are ambiguities in the accord the way it is currently drafted and we have until 1990 to ratify it, we do not avail ourselves of that time properly and perhaps improve upon the accord, if that is possible or even desired.

**Ms. Thompson:** That is what we are specifically recommending, that we not take it as it was originally written that night and cast it in stone. I have the unfortunate feeling, from what I have been following in the press and from talking to other groups, that it is cast in stone; and that, to me, is a major problem.

**Mr. Chairman:** Before turning the mike over to Miss Roberts, I would just note that the clerk has signed an agreement with the band and it is not going to play until we are finished. I assume if we can do that, perhaps we can make sure that we can rectify the mistakes in Meech Lake as well.

**Miss Roberts:** That was certainly an excellent idea.

**Mr. Offer:** They played through your presentation.

**Miss Roberts:** I would like to add to my colleagues' comments and thank you for coming and for your presentation. I think, although you have said you are dealing with section 16, my reading of your presentation is that it is one that deals basically with the process. You are saying the process was so wrong, no matter what came out of it is wrong. Looking at it now, you can see that you find problems with it. Even your

comments today have indicated that the process is what you are concerned about; the process was not correct.

We are told by many experts, and I think Mr. Manning would agree with us as well, that there is nothing wrong with that process. It is what has been happening in Canada. It is the type of democratic process that has been in existence; and I emphasize the word "has." I think the development of the process that we see right now is something that is extremely new. The fact that we have the charter and the Constitution has just come to pass, and the process by which the present Constitution came into existence was perhaps not as democratic as one would like.

You are asking on page 2 of your brief for a democratic process. We all want that. You have heard and you will hear many times that this committee is committed to making that process. Meech Lake, you may consider, does not occur. There are many things that may occur in the next two years or in the next two months in which a Meech Lake will not occur, but we all know that something must be done to develop our Constitution and to involve all the known provinces as well as all other groups and all others concerned.

There has to be a process put in place that is going to do that. Have you thought about that and developed what you would consider to be an appropriate democratic process?

**Ms. LeFrançois:** May I say something about the process? I think in some ways the Meech Lake weekend was a little different in some way, just because when we brought in the Constitution in 1982 there was a huge uproar from women across Canada because we were not included. I think this is part of why we feel what has happened is undemocratic. It is because they cannot believe that the people who were involved did not take into consideration what had happened in the past.

There are people who have always spoken against these kinds of processes because we had been left out before. I think that is one of the reasons we are all here today. As far as stopping that from happening in the future or having better processes in the future, I think we should have been consulted. Certainly, the Ad Hoc Committee of Women on the Constitution should have been consulted before.

**Miss Roberts:** By whom?

**Ms. LeFrançois:** Certainly by those 11 men, as far as I am concerned, who were there, and by the people who represent them. But the very fact that there was no consultation is just a way of saying the same old thing that was said to us

before. It is not new. It is easy to consult with us. We are ready to consult at any time. A lot of us wait to be asked.

**Ms. Mason:** By way of a suggestion for another process perhaps the hearings could have been conducted first before it was cast in stone.

**Miss Roberts:** Basically, what you are saying is that Meech Lake should occur, then there would be hearings and it could be dealt with.

**Ms. Mason:** A draft and then hearings, then a final copy; a good copy.

**Miss Roberts:** That would satisfy you as a process. I am sorry, Mr. Chairman, for taking up time. You do not want a referendum, etc. You are just looking for a consultative process and somewhere down the road 12 men get together and sign that.

**Ms. Thompson:** I think the problem we feel very strongly about with the Meech Lake accord was that it was issued as a final document. I know that is the difficulty that you as a committee have; that this is the final document. The fact that the Premier of New Brunswick is now not accepting it as a final document is causing a lot of consternation federally.

We would have preferred it to have been issued as a draft document, if Quebec had been willing to entertain amendments to it and consult about amendments to it. But there was that whole boiler sort of thing—people staying together in a room, making sure the words were put on the paper and then we have got it. What we are saying is that that process in itself does leave out major groups in Canada. I think taking every issue individually it seems very minor but if you look at the whole accord, you can see the process has led to many problems. What we are saying is that as Canadians we do not feel that is a satisfactory way of amending the Constitution.

1210

**Miss Roberts:** Just one additional comment, very briefly: you always say Quebec. I think there are many other premiers who do not want to have a change. Quebec might be the easiest one to deal with.

**Ms. LeFrançois:** I think that is the one that is pointed out. Premier Bourassa is the person who is pointed out in the newspapers.

**Miss Roberts:** I know, but I would like to make it very clear that there are many other premiers who might be much stronger about changing anything in that than Quebec.

**Ms. Thompson:** Yes, we recognize that.

**Miss Roberts:** It is not just one.

**Mr. Chairman:** A final short, sharp question from Mr. Offer.

**Mr. Offer:** The chairman always says that. If you are the first person to ask the question, he will say that.

**Mr. Chairman:** It is because you always set such a good example for all the other questioners that I want to underline it.

**Mr. Offer:** That will not help you today.

One thing I want to ask, in fact the only thing I want to ask, is something that is not contained in this submission. Yes, I fully appreciate your concerns with respect to the question of section 16 not including women's rights, as you have indicated here. I am sure you are very well aware of the other arguments and the other positions and the other interventions that have been made that the multicultural concerns are not rights but rather merely interpretive provisions; that where women's rights are indicated in section 28 of the charter, they are, at the very worst, either rights or a combination of right and interpretation; that there is section 15 in the charter, which deals with rights; that interpretation clauses sitting by themselves neither give nor take away rights, they are just merely used, where there are areas of vagueness or imprecision, as an aid to the courts.

One thing I want to do, though, is get your impression with respect to the whole question of your concerns in the reconciliation of Quebec now being part of Canada. The courts have said that yes, they have always been subject to the Constitution and they have indeed used the "notwithstanding" clause of section 33. We are aware of that, but I would like to get your impression with respect to the import of having Quebec a signing partner in our Constitution, where from coast to coast to coast we now have everyone part of this Constitution.

**Ms. Thompson:** We think it is very important that Quebec be part of the Constitution and that it signs this agreement in some form. We are not recommending this form. I think it gets back to the whole process and the way that what was put together was done. You can tell there was a thinking process going on in that room or why would they have not put in multicultural and native rights? Obviously, there were interest groups being represented by some of the premiers in that room as they were going through the process of, "How can we put these words together?"



I think it is incredibly important that Quebec be included, but I think the process has to be in terms of a consultation where, in including them, we do not therefore jeopardize—and I say “jeopardize” because we do not know for certain that the courts will interpret anything in a particular way; that is one of the great things about the judiciary, that you cannot predict what any decision is going to be in advance and that you are going to end up with the possibility for great problems developing from the way the wording is today.

**Mr. Offer:** I just wanted to get your impression on the whole question of the national reconciliation.

**Mr. Chairman:** Given that you are going to present us with a copy of Mr. Elliot's answers to your 1981 questionnaire, I feel I must allow him the last word.

**Mr. Elliot:** I gave the chairman the nod that I really wanted to have the last word today. I apologize for not being more involved in the questioning, because I have been fighting a cold.

Having the last word, I would like to compliment your group on its sustained effort now for almost a decade. In particular, the emphasis on process that you have brought to the committee is very valuable because in the 250-odd briefs that we have heard or had submitted to us now, it is becoming very obvious that the process that was used in this particular accord is not acceptable.

My concluding remark would be to encourage you to continue your efforts, because I know you have been consistent and logical for almost a decade now in your efforts in things like commenting on the Meech Lake accord. I cannot help but believe that because of your reasoned approach, because of your involvement, large numbers of other groups now have the same kind of intent, so that the famous 11 are going to have to pay attention.

Whatever happens by way of constitutional amendment from this point on is going to be enhanced by your input, so I would like to thank you very much on behalf of the committee for coming. Keep up the good work.

**Ms. LeFrançois:** Thank you.

**Mr. Chairman:** I will now call upon representatives of the Liberal Women's Perspective Advisory Committee, Patricia Herdman, chairman; Gloria Pollock, vice-chairman; and Mari-lou McPhedran, adviser. Please come forward.

If I have given a name that does not apply, perhaps someone can clarify the record. I would

like to welcome you this morning. I guess we are now sneaking into the early afternoon. You have given us a copy of your submission and that has been circulated. I will turn the mike over to you. Please proceed, and we will follow up with questions.

#### LIBERAL WOMEN'S PERSPECTIVE ADVISORY COMMITTEE

**Ms. Pollock:** On behalf of the Liberal Women's Perspective Advisory Committee, I would like to thank the committee for this opportunity to share our views on the Meech Lake accord.

The mandate of the Liberal Women's Advisory Committee is divided into two major areas, those of advising the provincial government on current issues and of encouraging women to participate in the political process. Since its inception, the committee has encouraged women across party lines to join in the discussion on current issues, to conduct comprehensive studies of those issues and to present the resulting briefs. Since 1982, the Liberal Women's Perspective Advisory Committee has presented briefs on pornography and censorship, midwifery, pension reform, family law reform, delivery of health services, child care and pay equity. Although we transcend party lines as a group, we sponsor and arrange the yearly Margaret Campbell Dinner, which raised \$40,000 last year for Liberal women candidates running in the past provincial election.

That tells you a little bit about us, and I am going to turn it over to our chairman.

**Ms. Herdman:** Thank you. I have handed copies of the brief to the clerk, and I am going to read our brief for the record. I would like, first, to provide you with our executive summary.

The Women's Perspective Advisory Committee believes that the Meech Lake accord is seriously flawed in such a way as to impede the growth of Canada as a nation and to put Canada at risk with respect to individual and equality rights.

Although we are concerned about a great number of provisions within the accord, we have focused on the five issues which are of gravest concern to our membership. Our concerns and recommendations can be summarized as follows:

1. The “distinct society” clause weakens the Charter of Rights and Freedoms. We propose that an amendment be made to ensure that all provisions within the accord be made subject to the Charter of Rights and Freedoms.

2. The provincial veto will militate against future constitutional amendments. We propose that the current amending formula be retained throughout all of the Constitution.

3. Canada's ability to provide national cost-shared programs is weakened by the opting-out provision. We encourage the federal government to actively support local and regional initiatives with respect to social, economic and environmental issues. However, we also believe that the federal government must retain the power to introduce and enforce national programs where necessary. We recommend that the accord be amended to ensure that the federal government retains its authority.

4. Our elected leaders must include, rather than exclude, Canadians from the constitutional process. Women's Perspective maintains that Canadians must be actively encouraged to participate in the design and amendment of their Constitution before they can understand, protect and defend the foundation of this very privileged nation. We propose that this discussion be encouraged and expanded throughout Ontario and Canada and that the Constitution require such participation before these or any future amendments are ratified.

#### 1220

Finally, members of the Ontario Legislature must be allowed to vote freely on the Meech Lake accord.

We request that each party leader ask his members to vote freely when the motion to ratify the Meech Lake accord is placed on the floor of the Ontario Legislature.

To give you more detail on our recommendations, the members of Liberal Women's Perspective Advisory Committee intend to add our voice to those who have already expressed concern over the accord in order to encourage the Ontario government to reconsider its position with respect to the proposed changes in our Constitution.

With respect to point 1, that the "distinct society" clause weakens the Charter of Rights and Freedoms, our members recognize that Canada enjoys a linguistic duality and that Quebec is a distinct society with respect to the province's strong French culture and language. We do not, however, accept that the Canadian Constitution and Charter of Rights and Freedoms, except the provisions on multiculturalism and aborigines, be interpreted in this context.

While defenders of the accord reassure us that the "distinct society" clause is only an interpretative clause, the report by the joint committee

states: "These principles (duality and the 'distinct society') are more than merely preamble. They must in future be taken into account by the courts, along with other rules of interpretation, in arriving at a balanced understanding of the whole of our Constitution including the charter."

Indeed, there are many officials, including Mr. Bourassa and Mr. Rémillard, who are convinced that, combined with section 16, the "distinct society" clause gives the government and Legislature of Quebec power to override everything in the charter and Constitution except multiculturalism and provisions for the aborigines. Mr. Bourassa does not think that the "distinct society" clause is merely a principle of interpretation, but states "Quebec is winning one of the greatest political victories of its history."

Constitutional experts have a variety of opinions about the impact of the "distinct society" clause on the Charter of Rights. Some say that it may "tip the balance" in appeals made to the courts. Others reassure us that the courts will find a "compromise or balance between society and the law."

The members of Women's Perspective find such reassurances unacceptable. We are opposed to any provisions which may detract from the strength of our charter.

We are also concerned that our elected leaders are adding interpretative principles to the Constitution when the ink has barely dried on the equality provisions of the document. Equality-seeking groups have fought for many years to have those provisions included in the charter and will not see them compromised.

But it is not only the equality rights that concern us. The charter also guarantees legal rights, democratic rights and mobility and language rights. All of these are weakened if the charter must be interpreted according to the "distinct society" clause. The price of this compromise is too high.

We understand that the joint committee has rejected the idea of exempting the charter from the effect of the "distinct society" clause for fear that this would mean the death of the Meech Lake accord. We believe this is mere speculation. The members of Women's Perspective expect that all the men who signed the accord will bring a fresh perspective to the document, given the significant public concern that has been expressed about their first draft.

We would like to re-emphasize that we propose an amendment be made to ensure that all provisions in the accord be made subject to the Charter of Rights and Freedoms.



With respect to point 2, that the provincial veto will mitigate against future constitutional amendments, the veto power granted to each province will ensure that future amendments made to certain areas of the Constitution will be very difficult to obtain. This is unacceptable, given the rapidly changing social, ethnic and economic fabric of Canada.

The requirement for consensus also violates a basic principle of democracy. Since every province will have a veto on certain future changes, Prince Edward Island with a population of 128,000 will have as strong a voice as all the residents of Ontario. Meech Lake has introduced a new idea to Canada, that of one person-40 votes, compared to the Ontario voting number.

The federal government will lose its power to ensure that a national perspective prevails in certain areas. Again—leaving out the Northwest Territories and the Yukon—the consensus provision ensures that future discussions on the Constitution can turn into bartering sessions among the provinces. One province will be able to argue for more fishing rights before it agrees to amendments and another can insist on the right to extra-bill before offering support.

The amending formula is particularly offensive to the residents of the Yukon and the Northwest Territories. Northerners were excluded from the discussion that led to the accord and their aspirations to gain provincial status are thwarted by the proposed amending formula.

The veto provisions of the accord also ensure that the provinces must agree to a proposed Senate reform package. The members of Women's Perspective are very concerned that this will mitigate against or at least delay this much-needed reform.

Women's Perspective asserts that nations are built through strong democratic leadership, not the abrogation of leadership through consensus. We propose that the present amending formula be retained to ensure broad participation in constitutional change without the limitations and inequities of consensus.

The third point is that Canada's ability to provide national cost-shared programs is weakened by the opting-out provision.

Under the present Constitution, the federal government has the authority to introduce cost-shared programs such as medical care, hospital care, higher education and transportation, and to require the provinces to administer these programs according to nationally established standards or principles.

The accord now allows the provinces to argue for reasonable compensation from the federal treasury, provided the province introduces a program or initiative that is "compatible with the national objectives." The terms "initiative," "compatible" and "national objectives" are relatively vague compared to the present requirement to meet standards.

The members of Women's Perspective appreciate the value of local and regional initiatives and would encourage the federal government to continue to support such initiatives, but we find it unacceptable that our federal representatives would agree to give away their powers and responsibilities so completely with respect to cost-shared programs.

Women's Perspective believes that strong federal programs are necessary to provide equality of opportunity and services across Canada. Canadians must continue to enjoy uniform health care, unemployment benefits and pension benefits across the nation. These programs must not be negotiable.

The federal government must retain the power to introduce strong national programs where further discussion and experimentation is no longer warranted. A province should not be allowed to choose further research as a means of dealing with a problem such as acid rain rather than introducing technological controls, nor should it be able to choose extra billing as a means of administering its health care program.

We also believe that it is necessary to provide a common thread of programs and services in order to sustain a sense of nationhood. Canada is not merely a patchwork of provinces. We must be, and be perceived as being, a nation with a common identity.

We recommend that the accord be amended to ensure that the federal government retain the power to introduce and protect national programs, where necessary, in order to provide equality of opportunity to all Canadians, to create a sense of nationhood and to deal with matters of social, environmental and economic urgency.

Point 4 is that our elected leaders must include rather than exclude Canadians from the constitutional process.

In isolation, 11 men chose to make significant changes to the Canadian Constitution. Since then, elected officials have hesitated to express their views on the accord because of loyalty to their respective political parties. A sense of inevitability has limited discussion of the accord among the general public. The report of a federal joint committee did little to reassure Canadians

that their opinions would influence the decisions of their elected leaders.

Women's Perspective maintains that Canadians must be actively encouraged to participate in the design and amendment of their Constitution before they can understand, protect and defend the foundations of our very privileged nation. This is particularly important in the case of our native people, who have been overlooked in the present amendment process. Their future exclusion has also been guaranteed through the consensus requirement when designing the agenda for the first ministers' meeting.

The executive federalism introduced through the design of the accord and the institutionalization of annual first ministers' meetings is totally unacceptable to Women's Perspective. This exclusivity has prevented participation of women, natives and other minorities in Canada. It also promises to ensure future exclusion.

We propose that participation in present and future amendments to the Constitution be encouraged and expanded throughout Ontario and Canada. We further recommend that the Constitution require such participation before amendments are ratified.

Finally, point 5, members of the Ontario Legislature must be allowed to vote freely on the Meech Lake accord.

Women's Perspective asserts that the best decision on Meech Lake will be made only if each elected member is genuinely free to express his or her vision for Canada. We request, therefore, that the Premier of Ontario and the leader of each party encourage the free expression of both concern about and support for the accord prior to the vote in the Legislature. We also request that each leader encourage his members to vote freely when the motion is placed on the floor of the Ontario Legislature.

1230

**Mr. Chairman:** Thank you very much for your brief and for the specific recommendations you make. I think it speaks for itself in that sense and we will move right into questions.

**Mr. Offer:** Thank you for your presentation. You have touched on some very important points, which I know that you know have been approached in the past, but I really want to zero in on one particular aspect of your presentation. It has to do with national cost-shared programs and the whole question of the amendment, section 106A.

I ask you this because your particular organization has presented briefs with respect to different provincial issues, such as midwifery,

pension reforms, pay equity and others. I would like to get your impression as to the reasons you find it unacceptable that federal representatives would agree to give away their powers and responsibilities, when section 106A really does talk about only things within exclusive provincial jurisdiction. It does not talk about jurisdiction which is exclusively federal, but only about that which is exclusively provincial. In fact, it has been argued that this is the constitutionalization of the federal government's being able to enter into such programs.

What I would like to get is your perspective on this portion of your brief, especially because of the work you do with both levels of government in the presentation of briefs. I think it is extremely important to hear your sense of how this will impact.

**Ms. Herdman:** It ties in, in that they are cost-shared programs. The federal government says to the provincial governments, "We will share these costs with you provided certain standards are met." For example, in health care, as you know, one of the standards the federal government chose to implement was that it would withhold certain funds for every dollar extra-billed by the physicians. Therefore, Ontario's coffers had fewer and fewer dollars coming in, and finally the Liberals of Ontario managed to put through the ban on extra billing. That prompting from the federal government earlier on was what helped us towards our goal.

As we know, Alberta still allows extra billing. The federal government retaining its right to exercise control over the expenditure of its dollars is what we are asking for now. Every province is handled differently by the federal government, given regional disparities. None the less, as the bottom line in times of crisis, the federal government has that power to intercede in certain provincial exercises when there is a federal cost-shared program. That is where we are concerned. We are not saying the federal government has to be involved in every provincial decision, but in time of crisis or in time of incorrect interpretation of the spending of the dollars, the federal government still maintains that control.

If we get into a situation where all across Canada, for example, we decide we are going to ban acid rain and really implement programs whereby we are going to have clean air and clean lakes and live lakes, we can see the federal government perhaps coming up with cost-shared programs where suddenly—pick a province—Saskatchewan decides that with its umpteen



million dollars it is going to study acid rain towards meeting the national objective of reducing acid rain, as opposed to Ontario which decides it is going to put in technological solutions, that this is how it is going to spend its money.

We have watched the United States study the issue for ever. We do not have control over that, of course, but it is the same idea, the same concern. "National objectives" is a bit too big for us.

**Mr. Offer:** I understand that part of your response on the basis of national objectives. I must say I am still not clear how the federal government loses powers. I do not think it does. I think that in many ways they have been strengthened.

If I can just carry on about your perspective, I believe that when all is said and done, section 106A will allow the federal government to introduce a national program that is within provincial jurisdiction. That will be constitutionally OK. It is now going to give the right to the province to either go ahead with that program or opt out and provide a similar type of program.

Carrying it on, I think that provides a flexibility to provincial governments to meet, if they wish, the particular demands of their provinces, certainly in terms of child care and things of that nature. There are differences from province to province. The stresses on the systems are different, there is no denying that; in fact, within provinces there are differences.

I just do not see the real difficulty in giving the federal government the constitutional power to enter into these programs, as well as giving the provinces the flexibility to either adhere to the program or, if they want to implement their own programs, to do so with compensation so that in a very real sense they can meet the needs of the people of their provinces. I would like to get your thoughts on that because of the work you have done in the past, and I trust will do in the future, on so many issues. The pay equity issue, I know, is one and so is pension reform. Does this not give groups like yourselves more of a flexibility in terms of presenting briefs and lobbying and things of this nature?

**Ms. Herdman:** The clarity is the problem we are talking about. I think you have heard that all—I do not know how many weeks this has been going on, but it is clarity. Let us give the example of child care. Let us say that Canadians say, "We want to finally provide Canadians with adequate child care." We are finding there are a lot of crises in child care from about four months to the

first two years, until children are typically out of diapers. That is a really hard space for which to find child care for most women and families.

Let us say now that the federal program says, "The national objective is to provide child care facilities and assistance to families." Meeting a national objective of providing child care, we could see one province decide to provide child care from the ages of eight to 15 because that is the cheapest it can provide; it can get the most out of the funds for that process. Another province could decide to provide it from five to 10. We have quite a disparity, not necessarily meeting the needs of Canadians as a whole or even of a region, but maybe because it is the least expensive way out, especially if it is a cost-shared program and the choice is not to provide funds from the provincial coffers for it.

Perhaps the federal government says: "Look, we want child care from four months or two months, little people, to the age of 10. That is our national standard. You have to meet it and then you get the dollars. That is meeting it." Then the province can use the dollars in whatever way it wants once it gets it, and it can use it creatively, as long as the national standard and principle has been met, providing it for little babies straight through age 10. That is where our area of concern is. It is not clear. We can find provinces providing services to families in really vastly different ways and not necessarily meeting the needs of those people.

**Mr. Offer:** Just as a final summation—I can see the Chairman looking at me.

**Ms. Herdman:** I know everyone is hungry for lunch.

**Mr. Offer:** You want to use the word "standard," or something other than "objective"—

**Ms. Herdman:** That is right.

**Mr. Offer:** —so that there will be more of a specificity, and take away a flexibility on the part of the province.

**Ms. McPhedran:** May I just quickly add to that.

**Mr. Offer:** Sure.

**Ms. McPhedran:** I think the clarity issue is addressed well by having the kind of basic criteria specified the way they were, for example in the Canada Health Act. The principles are so clearly enunciated that you can measure almost any program against those basic principles, and when they are met you have a program that addresses the reality of the daily lives of women and children in this country.

1240

**Mr. Harris:** I just wanted to zero in on the same section, following up on Mr. Offer's comments. Let me first say that, being a little critical of what you are saying in that section, I agree with you on the others. I am not taking exception to those.

I do not want to belabour the point on the Canada Health Act, when you talked about the specificity of withholding money. I do not think that particular principle is one which is held up, because we save \$50 million and it has cost us \$500 million; but it was the principle, I accept that is what was there.

With your example of the environment, for instance, environment is not an exclusive provincial responsibility. There is nothing to stop the federal government having a say on any program it wants at any time on the environment. I do not see that example as being a problem, at least in my understanding of what is exclusive provincial responsibility.

What it has stated, you have said, is "relatively vague compared to the present requirement to meet standards." There is no present requirement. There is nothing in the Constitution that talks about allowing the federal government to come in and tell the province what it is going to do in its own exclusive jurisdiction. There is nothing. So this is a step forward, and many groups have acknowledged that this is a major step forward.

Provinces are acknowledging: "Yes, you can come into our domain. Yes, you can become involved. The only thing we ask is that if, in our province, we can come up with a program which will meet and be compatible with your national objectives and deliver it ourselves, then we will ask for our share of the money we would ordinarily get to do it."

Everybody is playing with words. If your day care example was used, if you are going to be compatible with the national objectives and the federal government says you must provide day care for infants from four months to two years, I do not see any way a province can say our program is compatible if we are not doing that.

**Ms. McPhedran:** We agree. You are not disagreeing with the point Ms. Herdman made.

**Mr. Harris:** I am saying Meech covers that point. The argument is going to come down to the case of the federal government saying, "This is what we want you to do," and the province saying, "We're delivering program B and we're doing it ourselves;" and they cannot resolve it. Meech only kicks in when somebody goes to the

courts and says: "You're into our responsibility. We do have a program we think is compatible with your objectives." You are going to have to go to court to decide whether that is the case.

**Ms. Herdman:** And there they play with the word "objectives." We are talking about playing with the words. The word "objectives" is much more vague than "standards" or "principles." An objective, to me, is often just a one-sentence objective: "Our objective is to finish the complete program." That can be one sentence. Standards and principles generally go on for pages and pages. That is more detailed and ties people more closely to the common goal.

**Ms. McPhedran:** The two operative phrases in the Meech Lake accord in this area would probably be considered to be "national objectives" and "compatible." They are not principles that this organization is arguing with at all. The problem is with the lack of clarity. There is a great deal of room for a province to define for itself meeting a national objective and something that is compatible, but which does not truly address the needs of the women and children that program is supposed to be serving. Without greater clarity, you will have an agreement in the abstract and a failure to deliver the service and to really affect the daily lives of the citizens we are talking about.

**Mr. Harris:** Quite frankly, I totally disagree with you and all those who say this will not work. Again, I use the term "mean-spirited," which I used with another group. You are assuming there is going to be some mean-spirited premier who is going to be able to pull the wool over the eyes of the federal government, pull the wool over the eyes of the court and sneak this money and do something else with it. For the life of me, if that is going to happen, no Constitution is going to solve that problem. I do not see it.

Anyway, I will pass it on. I know your time is limited.

**Mr. Allen:** I am afraid I have a caucus meeting in 15 minutes so I am not going to—

**Mr. Chairman:** We also have a band concert.

**Mr. Allen:** Other things are calling, obviously, and I regret that, because it would be nice to spend some time over some of the points. I appreciate the concerns that you bring. I think it is fair for us to give you our reactions the way Mr. Harris has just done. We have been going through this, and our sense is emerging in one way or another on a number of these questions. Without expanding on the point, I have to say



that I pretty well concur with what he has just said.

There is at present in the Constitution no authority to introduce cost-shared programs as such. There is spending power, in so many words, and that is all. There are powers that are exclusive between the two levels of government. At the moment, we have certain negotiated ways of doing things around that impediment in the Constitution, so we do not have any language that tells us anything about standards or compatibilities or any of that stuff; it is just not there. What we have in Meech Lake is some language that requires some minimum terms of reference.

The Canadian Council for Social Development, for example, gave us a long presentation in Ottawa. They said that their reading of "national objectives" was that it could include all the things you are referring to. They gave us four major points with substantial paragraphs indicating how that can be spelled out. Frankly, the fact that we got the Canada assistance plan, the Canada Health Act and a whole lot of other cost-shared programs without any language at all, leaves me reasonably hopeful that with a somewhat better formulation than we have had in the past, some indication that there is such a thing as spending power that can intrude on exclusive provincial jurisdiction, which would have been a major court battle in the past, that now you will not have a court battle over that.

There is new strength in this document. That is why I have some difficulty in accepting your first premise, which is that it really is badly flawed and will put Canada at risk. I do not personally, after all these weeks, really accept that. I think it is important to be just a little bit more discreet in the language one uses.

I know you are engaged in a significant debate within your own party about how you are going to position yourselves around this. We will have some dialogue in our party, and Mr. Harris will too, around many of these points. But it is not quite fair to the document, under the veto amendments for example, to give the impression that all amendments to the Constitution are not going to be under the veto principle. That is not true.

**Ms. Herdman:** Actually, I agree with you. I tried to change my wording as I was reading the brief, because only in the past day has it been better clarified. I understand that. None the less, it sets a dangerous precedent by permitting a veto within the constitutional process. I still feel it sets a dangerous precedent and so do the members of our committee.

**Mr. Allen:** But you see, that is at least a reasonable, arguable proposition from the items that it does refer to, because it does not talk about the possibility of vetoing the Canada Health Act or an unemployment insurance transfer.

**Ms. Herdman:** No. That is right, exactly.

**Mr. Allen:** It does have to do with federal institutions. We have had the point strongly made to us by people very much involved in these kinds of concerns that it is precisely the smaller, the poorer and the weaker provinces that need protection under the question of amending federal institutions. They are the ones that are going to be most dramatically impacted.

Whatever happens in the Constitution, Ontario is going to make out all right, thank you. Quebec will not do too badly. British Columbia will be OK. But by golly, in Prince Edward Island, New Brunswick and Saskatchewan, life can be pretty dicey with some of those big players around. If one is going to say that Quebec or any other province has some significant concerns with regard to a veto and if it is limited to federal institutions, then presumably those smaller provinces ought to have their say at that point in time.

#### 1250

There is something inherently reasonable about that. We are not at that point just talking about voting practices where we would like representation by population and so on. We are talking about the big, principal structures under which we live, day in and day out; the Parliament of Canada, the Senate, the Supreme Court and items like that.

If Supreme Court decisions are going to be tilted one way or another against each of the provinces equally—they will all go in and go head to head with the federal government on this, that or another thing—then they ought to have their veto under any significant change that would change the rules of the game. Do you not think that is fair and reasonable?

**Ms. Herdman:** No. I do not think it is unfair to have small provinces having a voice in government, but we have also left out the territories and the people of the territories. By allowing the smaller provinces and the weaker provinces, as you phrased it, to have a veto power, we have effectively excluded the people of the north.

**Mr. Allen:** You say we have left them out. They were never in in the way the other provinces were. The other provinces historically had a kind of veto, because every time you went to Westminster the question was asked, "Are all the

provinces on side?" The federal government would have to say, "No, they're not." Then they would say: "Goodbye, thanks. Come back when they all are." At that point in time and at present the territories have exactly the same status. I would argue more on their behalf, but at least that much is true; they have exactly the same status. They are represented in those discussions through the federal government.

The federal government may, in turn, as it has in the last year or two, devolve significant powers on the territories in such a way as to make them virtual provinces. At that point in time it would be very difficult, I think, for other provinces to reject the fact that they virtually were and now should be. I do not think that the road has been cut off and blockaded as far as the territories are concerned and I certainly would not turn down reintegrating Quebec into the Constitution on a matter quite so hypothetical as that.

**Ms. Herdman:** I read the briefs by the Northwest Territories and I know they feel that they have been somewhat betrayed.

**Mr. Allen:** Certainly.

**Ms. Herdman:** They had to go through the degrading process of presenting to another voice of government because they could not be heard through their own avenues. I feel it was a betrayal of trust to the people of the Yukon and the Northwest Territories. As a Canadian citizen, it is very conceivable I might live up there some time myself. I do not like the snow but I could be living up there at any time. We seem to feel that once in Ontario, always in Ontario. I am talking as a Canadian citizen. I could live anywhere in this country, hopefully, and have the rights and freedoms that we hope to protect.

To summarize, I think it was a betrayal of trust not to have the people of the Yukon represented fairly.

**Mr. Allen:** You are not saying that the charter does not apply or the Canada Health Act does not apply or all the rest. What we are talking about is participation in a specific question of the future of the Northwest Territories in terms of whether they become or do not become provinces. That is an important question. I do not think Meech Lake precludes dealing with that. It just has not been included in this round. Is that not true?

**Ms. Herdman:** My understanding is that the veto powers to change government processes exclude the Yukon and Northwest Territories from being able to have a voice in their possible provincehood. They have made that concern

fairly clear themselves, so I do not have to do that for them, but all of that brings us to the concern that we have. We feel that the voices of Canadian people have not been heard fairly.

**Mr. Allen:** I would just submit to you that in the scales of balance, that may or may not be the biggest ticket item at the moment, but there is another route for them with respect to provincehood. It is quite realizable, I do not think that the gate has been closed—that is what I am trying to say—and I think that one should at least be aware of that when one uses the argument of provincial veto with respect to new provinces.

**Miss Roberts:** Thank you, ladies, for your presentation and for the well-laid-out four or five points that you are concerned about. Your last comment, in which you just indicated that the voice of the Canadian people has not been heard fairly, seems to summarize everything you have said in your brief. You feel that the Canadian people have not been heard fairly.

If your interpretation of the Meech Lake accord is true, that the provincial governments are gaining so much and the federal government has lost so much and that it will fractionalize and cause many problems, if that indeed is true, then one would have to question just exactly how your recommendation of a free vote in the provincial legislatures across Canada is going to help. How are you going to make Meech Lake fair if you have Ontario have a free vote or New Brunswick have a free vote?

I do not think the free vote will legitimize a document you say is bad. A free vote may, indeed, guarantee that we, as provincial legislatures, are going to say, if indeed what you are saying is right: "This is the best possible deal. We, as provinces, are gaining so much." Why on earth would anybody in any party turn it down on a provincial basis. A free vote in a legislature may destroy what you are trying to do. I think there might be a better—

**Ms. Herdman:** We know it is very hard to find a genuinely free vote anywhere in Canada. We all have parties and we support them. But I think we have asked that MPPs vote with their conscience.

**Miss Roberts:** That is what you are asking me.

**Ms. Herdman:** While maybe it works for provinces—is this not great for our little province or our big province—is it good for Canada? They have to think now in terms of Canada. We are talking about the Meech Lake accord which affects Canada as a whole. That is what we are



asking for. We do not say it naïvely. We know the reality of politics.

**Miss Roberts:** I am not talking about the reality of politics. I am saying that if your interpretation of the accord is right, a free vote in a provincial parliament is going to go for the accord.

**Ms. Herdman:** When we asked for that, we thought at the time, if it was a genuinely free vote and not one tomorrow, so people did not have a chance to lobby and call their MPP, if there was a free vote at some point in the future, then people could actively voice their concerns to their elected representatives who are there to represent us.

**Ms. McPhedran:** It is a question of focus. At this point in time, you have every major party leader, with the exception of a very courageous one in New Brunswick, saying very clearly to his followers, "You must follow the commitment that was made behind closed doors by 11 men in the early hours of the morning on a weekend." The shift in focus comes when, instead, they are freed from that obligation and they must turn to the people who voted for them and enter into a dialogue before they cast their vote and hear truly what Canadian people feel.

**Miss Roberts:** OK. That is your process for Constitution-building, that each legislature would have a free vote—

**Ms. Herdman:** Actually, it is not.

**Miss Roberts:** —or is this your process of dealing with Meech Lake?

**Ms. Herdman:** It is our process of dealing with Meech Lake. We think strongly that a royal commission should be struck to find out from the Canadian people how to do this right.

**Miss Roberts:** A royal commission with respect to procedure and process?

**Ms. Herdman:** That is right. We do not have quick answers for that but we are trying to quickly answer Meech Lake right now.

**Ms. McPhedran:** If ever there was something appropriate for a royal commission, it must be how we build our Constitution.

**Mr. Chairman:** Thank you very much. I suspect, as we get close to one o'clock and to the band, that one has some appreciation perhaps of what first ministers were feeling like at four or five in the morning. Breakfast seems like an eternity ago and our constitutions are compelling us to go off to lunch. We want to thank you very much for coming here today, for your presentation, for your responses to our questions. We appreciate the time you have taken to do that.

The committee recessed at 12:59 p.m.

## AFTERNOON SITTING

The committee resumed at 2:11 p.m. in room 151.

**Mr. Chairman:** Good afternoon, ladies and gentlemen. Perhaps we could begin our afternoon session. I would like to call Garry Levman, who is our first witness for the afternoon.

I want to welcome you to the committee this afternoon, Mr. Levman. We appreciate your taking the time and effort to come before us as a private citizen. Please have a seat. We often note that we get representations made by a number of groups and organizations, but I think committees are always keen to get views from various individuals. In fact, this afternoon we have a number of private citizens who are going to be appearing before us. I once again say welcome. We have a copy of your submission, so if you would like to make your presentation, we will follow up with questions.

DR. GARRY LEVMAN

**Dr. Levman:** My remarks will basically follow the copy you have in front of you, but I have shortened it slightly.

Let me begin by saying that I oppose the constitutional settlement as it is now proposed because it gives insufficient protection to minorities and individuals. It grants the provinces too much power to hinder or prevent future constitutional reform, which is badly needed.

Every nation has its poor, its ill, its handicapped; its religious, ethnic and linguistic minorities; its dissidents, political and social. Government is required not only to provide services needed by all but also to protect individuals and groups vulnerable to social or economic pressures.

Sectarian violence is found today in many nations of the world. There is an enormous catalogue of unhappy places of woe, places like Northern Ireland, the Basque provinces of Spain, Cyprus, Lebanon, Palestine, India, Sri Lanka, South Africa, Armenia and Tibet, among others.

Not all of these countries are or were dictatorships. Some even were or are considered to be free and equitable societies. Why do serious problems arise even in democracies? Is Canada immune? No one doubts that Canada today is among the freest countries, but wounds from unfairness and injustice, allowed to fester, can lead to civil discontent and unrest. Goodwill alone is not enough. A country's leadership must move forcefully to address grievances and to

redress wrongs. Only then do people believe that government is truly caring, responsive and responsible.

A chief cause, if not the chief cause, of the turmoil seen worldwide is the refusal of majority government to respect vulnerable minorities. Of course, in a democracy, majority rule should decide questions of general policy. However, it must always adhere scrupulously to natural and democratic rights, such as those embodied in Canada's Charter of Rights and Freedoms. But an additional and important stipulation is often overlooked: No law should grant an individual or groups rights or privileges not granted to all. Such a law discriminates automatically against those denied and divides the citizenry into invidious classes.

Does any group need special protection or privileges in a democratic society? Certainly not pluralities or majorities. They have the weight of numbers and the incumbent political and economic power that comes with representative government. If a nation is to single out individuals or groups for special favour, then it has a moral responsibility to choose those who are suffering. Naturally, as conditions ameliorate, special privileges are surrendered—willingly, one hopes. History is no excuse for continuing them.

Unfortunately, majorities often attempt to ensure for themselves privileges or even simple conveniences through implicit if not explicit discrimination. Bad laws of this kind are often justified by being called "reasonable," despite the fact they are unfair. Usually it is just as reasonable not to have unfair laws, but this is often overlooked under political pressure.

A simple example from Ontario demonstrates this. Boxing Day is not a holy day to any Canadian. It exists solely because of Christmas. In fact, not even all Christians celebrate Christmas on December 25. The Orthodox, for instance, follow the Julian rather than the Gregorian calendar. Yet in Ontario, not only is December 25 set aside as a holiday, but Boxing Day is too.

Now, it is certainly reasonable that Boxing Day be a holiday, or Good Friday, or even Easter Monday for that matter. But it is also reasonable that it not be a holiday. Many small wrongs can add to a considerable burden. Individual and minority rights should be strictly respected by all laws and all levels of government unless an unreasonable situation arises otherwise. This



basic principle of social justice must be firmly embedded in any constitution.

The situation in Ontario and Canada: Fear and jealousy exist in all societies, and human nature is such that they are difficult to eliminate. So long as mankind is imperfect, individuals and minorities will suffer from prejudice and discrimination. Everybody should be assured, however, that government, at least, is free from bias and prejudice. In this regard, it is important to realize that a government which prefers some individuals or groups over others discriminates. Only those suffering from social or economic disadvantages should ever be singled out for special protection, aid or privilege. Moral government protects the weak from the strong.

In Canada, both the English and French cultures are very healthy. Even without any support from the Canadian government, our European-heritage multiculturalism would be in no danger and would suffer no great disadvantage. On the other hand, other cultural groups are not so fortunate. In particular, aboriginal Canadian culture is in an extremely precarious position. Its sole base is here in Canada, and even with the vigorous support of the native peoples themselves, its continued survival is in doubt. As a nation, we have a moral responsibility towards Canadian Indians and Inuit, whom no other nation can be expected to nurture. Do Ontario and Canada live up to their obligations to cultural minorities?

In any society, people must communicate with one another. The need for official languages for use in government, in courts, in the military, in public institutions and places is a hard reality. Despite the inconvenience and even hardship it might cause to some, it is clearly impossible to treat all languages equivalently. Nevertheless, when a large percentage of the population speaks a language, it should be an official language of government. This does not imply that everyone must speak that language. It only means that government and publicly funded institutions and organizations are obliged to provide services in that language.

Whenever an official language exists within a political jurisdiction, all governments within that jurisdiction should honour it. Doing otherwise creates inequality. Unfortunately, in Quebec, the provincial government humiliates speakers of English, or so I hear from the language commissioner, and in the rest of Canada this is reversed. This situation breeds discontent. That private citizens display bigotry based on lan-

guage is bad enough. Much worse is government itself doing so.

The constitutional development of Canada began in an intolerant age, but even in the 18th century, the evil of religious intolerance was recognized. In the Constitution of the United States, the establishment of a state religion was strictly prohibited. Later, in France during the Revolution, an attempt was made to found government solely on secular principles. When Canada was founded, Britain had an established state church with the monarch as its head. It still does.

In order to protect Roman Catholics, who formed the majority of the French-speaking community, the Constitution granted them certain privileges and rights, especially in language and education. Today religious toleration is no longer an issue, and privileges designed to prevent abuse have turned into preferential treatment which discriminates against other religious minorities who are as worthy or even more worthy of protection. Continuing discriminatory privilege granted to a majority or plurality solely on historical grounds comes dangerously close to the establishment of a religion.

#### 1420

Ontario has offended by its refusal to grant all religious minorities the same rights and privileges in education that it grants to Catholics. Recently it has even extended support for Catholic education while at the same time denying support to Moslems, Hindus, Jews, Christian Evangelicals and others. The government justifies this action because of historical injustices to the Catholic community. However, it overlooks that Catholics now form a plurality in the province and so no longer need protection, and it ignores the worse injustices to other religious minorities who were completely excluded from consideration in the past.

One cannot right wrongs to the dead by discriminating against the living, especially when the living are the descendants of those most wronged. The granting or extension of privileges to one religious group, to the exclusion of others who are in need of the same or more protection, is the worst kind of unfairness. Privileges must be granted to all or else completely withdrawn, unless it is patently clear that they are needed to protect people from abuse. Of course, citizens must accept historical realities. Age-old privilege often cannot be withdrawn without causing severe social and political dislocations. But government must work to decrease disparities

and to lessen the effect of special privilege where it causes inequality.

A similar insensitivity is found in the establishment of provincial holidays and also in the rules governing business on Sundays. Good Friday, Christmas and Boxing Day are all religious holidays honoured by only a segment of the population. Sunday is a common day of rest in Canada, but it too is special only to a part of the populace. Nevertheless, these days are enmeshed in discriminatory government regulations. No one should be forced to work; no one should be forced not to work. Too many people—Orthodox Christians, Seventh-Day Adventists, Buddhists, Moslems, Hindus, Jews, atheists or others—who simply want to work or shop are injured by laws designed blatantly for the convenience of a particular religious group, whether it be large or small. The recent plan in Ontario to allow municipalities to decide rules for Sunday shopping abrogates provincial responsibilities and allows local governments to continue or extend existing discrimination.

In view of such problems, individuals and minorities need stronger protection in the Constitution. Because of existing political pressures, one cannot expect that Parliament or legislative assemblies will also rectify wrongs and injustices, especially where the action required, though correct, fair and moral, is inconvenient or unpopular.

The Constitution of Canada: In the constitutional settlement as it now stands, a remarkable condition exists which is symptomatic of all its deficiencies. The most protected institution in Canada is its least democratic: the monarchy. All the provinces must agree to any change in the status of the monarch, the Governor General, the Lieutenant Governors. Yet by invoking the infamous "notwithstanding" clause of the charter, Parliament could rescind any of the natural or democratic rights that individual Canadians possess. Only language rights are inviolate. This situation is the exact opposite of what is required in a fair, equitable democracy. Natural and democratic rights should be the most difficult to remove. Changes made to make a country fairer, more equitable, more democratic should be easy to accomplish.

So long as a province follows the democratic guidelines laid out in the charter, it should be free to reorganize its internal government without interference from other provinces. In this matter the great disparity of population between the various provinces must be kept in mind. It is unfair that any one province possess a veto power

over reforms that promote democratic and egalitarian aims. It is completely just that the people of the territories decide for themselves when to establish provincial governments. But veto powers granted to the provinces are too extensive and will greatly interfere with future constitutional reforms needed to improve our democracy and to eliminate the irritating inequalities which still exist in Canada.

The Canadian Charter of Rights and Freedoms is the most important pillar of the Constitution and the strongest buttress of our individual liberties. It proclaims the fundamental natural and democratic principles which limit the powers of government and so is the chief statutory protector of the citizens of Canada from governmental abuse. Any constitutional reform must be subject to it and it must be very clearly stated that it is subject to it. Although far-reaching, it has its weaknesses. There is no clear statement in the charter prohibiting government from granting privileges, favours or preferences to individuals or groups which could not be reasonably granted to all or reasonably withdrawn. The acceptance of this prohibition by Canadians and its enshrinement in the Constitution will close an important back door to discrimination and injustice.

By allowing Parliament to supersede the provisions of the charter, section 33 of the charter, the "notwithstanding" clause, casts disrepute on Parliament's commitment to the principles enunciated therein. In times of peace and economic wellbeing, there is no need for such a clause. One expects and hopes that it will only be in times of crisis that that clause would be used. However, exactly then is the charter most needed to protect individuals and minorities.

The mere existence of an escape clause is an invitation to use it. Why does Canada need protection from strict adherence to the charter? Section 1 allows reasonable limits to rights and freedoms. This limitation is itself too strong. What is reasonable to one may be unreasonable to another. Laws and regulations should adhere strictly to the charter unless it would be unreasonable to do otherwise.

Both section 1 and section 33 should be excised from the charter. A limitation in applicability of the charter is not required. If one is insisted upon, then it should be phrased so that government must adhere strictly and scrupulously to the Charter of Rights and Freedoms whenever it is reasonable to do so.

Conclusion: The Meech Lake accord should not be ratified by Ontario unless:



1. The veto power of the provinces is reduced and mechanisms are provided to facilitate democratic change to the structure of Canada and the provinces.

2. A clear statement is added to the Constitution prohibiting privileges or preferences possessed by some but not all citizens if it is reasonable that either all or none possess them.

3. The "notwithstanding" clause, section 33 of the Charter of Rights and Freedoms, is rescinded.

4. The "reasonable limits" clause, section 1, is modified so that government is limited by the charter whenever strict adherence to the charter is reasonable.

**Mr. Chairman:** Thank you very much for your comments, I think I would be fair in saying not only on the Meech Lake accord, but you raise also a number of questions with respect to the charter itself apart from the accord.

One of the interesting threads through some of the testimony we have had is the fact that, in a sense, we do not know yet how the charter will be interpreted in all its provisions, because it is a relatively new entity. We may very well—say, after another three or four years—want to be looking very substantively at the charter in terms of whether all the various rights that have been set out there have done the things we had initially intended them to do.

I find your presentation interesting from those two aspects: first, your concerns about the accord, but equally, issues that you raise around the charter, even without the Meech Lake accord, with respect to section 33 and section 1.

**Dr. Levman:** With the changes to the charter that I ask for, that I suggest, and with the provision that the charter is paramount in the Canadian Constitution, I have ultimate faith that individuals and all minorities will be well protected. However, if the charter is allowed to be weak, then that is not true. As long as all the provinces bind themselves to follow the charter scrupulously and honestly and fairly, then I see no reason to worry, because then all citizens could be guaranteed that they will be treated properly and correctly.

However, as I tried to point out, I think there are many problems. Even with the charter as it now exists, there are still many problems here in Canada, and in Ontario in particular. I live here in Ontario, so that is why I worry mainly about Ontario.

I think the charter needs strengthening, and I think that if it is strengthened, then there is no reason for any worry, but as it stands now I

believe there are serious problems. One can always look to the courts and hope that the courts will uphold the provisions of the charter, but I believe it is much better for Parliament and the legislative assemblies to commit themselves first, and then you do not have to have a court of last appeal. Courts of last appeal should be used only rarely.

#### 1430

One of the reasons we have a charter is so that every citizen, including all members of Parliament and all members of the Legislative Assembly, can clearly understand what the rights of individuals and minorities are and what the obligations of the citizenry are so that they will draft laws that do not need to be appealed. A great deal of political effort goes into appealing these laws and a great deal of emotion is involved around them. It is better to have good laws first and for citizens to understand why the laws are like that—because they have to be like that in order to be fair—than it is, after the fact, to run to the courts.

**Mr. Chairman:** So that we are not just making laws to provide lawyers with work.

**Dr. Levman:** Yes. I am dissatisfied with the way the Constitution is written because it is so difficult for any citizen to read it. It is not a very simple document with all the rights and obligations of the citizenry well set out.

**Mr. Breagh:** Yes. This is kind of an interesting approach to it all. One of the things that I think is true is that if one looks at the current Constitution, and particularly the clauses that you have pointed out, the "notwithstanding" clauses, etc., one does get the indication that that is a kind of unreasonable way to proceed, that you either have a right under the Charter of Rights and Freedoms or you do not, and, as long as it is reasonable, the courts will make the judgement call as to whether a provincial law is a reasonable way to proceed and reasonably protects the individuals in that province against the violation of their rights.

I think the truth is that when we drafted this Constitution the first time around there was considerable apprehension and considerable knowledge among the politicians who did the drafting that this could get untenable in a hurry, that the basis of our parliamentary system is that there is a group upstairs here of 130 reasonable people who will not pass laws that are unreasonable. The charter should be there and people should have that protection, but the "notwith-

standing" clause was basically kind of an insurance.

Until we are clear how the courts will react to this and until we have had some experience with challenges under the charter, the provincial governments needed some measure of protection almost, because it literally is true now that you really could undermine the whole governmental process of a nation by means of challenges. I would be interested in your comments on that balancing that has been done. You obviously are not happy with the "notwithstanding" clauses, but I would put to you that they have not been used extensively.

**Dr. Levman:** No, I agree. I think that is a hopeful point, that they have not been used. But my point is that if there is to be a limitation on the Charter of Rights, it should be phrased negatively in that the Charter of Rights should be followed scrupulously unless it is unreasonable to do otherwise. It is always possible to convince oneself that one is doing something reasonable even if one is doing something that is unfair, unjust or even discriminatory. It is much more difficult to convince oneself that if one did not do it, that would be unreasonable.

In other words, Good Friday is a provincial holiday, right? That is very reasonable because the majority of the population takes Good Friday as a holy day, although there is a large and substantial portion of the population that considers it just like any other day. So that is reasonable. On the other hand, it is just as reasonable that it not be a holiday. It is not a holiday in the United States, even though a large percentage of US citizens also consider it to be a holy day.

For instance, take Easter Monday. People may say, "We are taking Good Friday off. Perhaps even Easter Monday should be a provincial holiday. That way people will get a full four days off." In Germany, it is a common practice to have very long weekends. It would certainly be reasonable that Easter Monday be a holiday, but it is also reasonable that it not be a holiday. The only reason for making Easter Monday a holiday would be because Good Friday exists, and Good Friday exists only because it is convenient for the majority of the population.

If you establish a structure that if a law or a limitation of the charter is reasonable, and it can be upheld, then you are allowing for injustice. This is the back door to discrimination. What one must insist upon is that there be no discriminatory laws unless it is unreasonable to do otherwise.

We do not allow 16-year-olds to vote. To allow children to vote would be unreasonable. You cannot allow a two-year-old or a three-year-old the opportunity to vote. You have to set some limits. It is unreasonable to allow all children to vote, so it is clear that you have to set some limit to it and so you restrict people's rights. It is a trivial point but it illustrates the difference between doing something when it is unreasonable not to have a law or a regulation and when it is reasonable to have it. Have I made myself clear?

**Mr. Breagh:** One of the things where I might disagree a bit with you is that a lot of people in my neighbourhood are Seventh-Day Adventists, so their holy day is Saturday, but it does not bother any of the rest of us that they all go off to church and we go to Steinbergs. It is no big deal. It would be equally unreasonable for me to argue that Good Friday is seen by most of my neighbours as a holy day. Most of them do not go to church, so holiness has nothing to do with it. Holiday maybe, but holy day nothing to do with it.

**Dr. Levman:** Yes.

**Mr. Breagh:** Our traditions are kind of changing. For most people, I think their assessment is, holy day or holiday, so what? We are used to having Good Friday off so we get it off. That is it. There is no big deal about religious discrimination here. No one sees it in that light. No one talks to me about that kind of stuff. They have accustomed themselves to that, much in the way that what you have referred to as a kind of veto power of the provinces would be unreal.

Every other province of Canada came into being not because it decided it wanted to form a province but because some other elected group of folks decided it was time it became a province. Even with the people from the Northwest Territories and the Yukon, you could make them really unhappy today by saying, "We want you to be provinces tomorrow. You have that right. Not only that, you also have that obligation." They would say: "Wait a minute. We have some programs under way here that have to go on for a while and we are a little short of people. We are not quite ready for that yet. We will tell you when we are ready and we want some participation in the process."

What they are nervous and apprehensive about, in private conversation and when they were here, is not necessarily that they are afraid of all the provinces saying: "Nuts to you. You are not ever going to be a province." What they are concerned about is the practical application.



They have lost their place at a bargaining table, and if they could get that back, they might be able to handle this. They have different perspectives on it and they do not quite see it in the way you do.

**Dr. Levman:** My point of view, for the territories at least, is that they should decide for themselves when to establish provincial governments, of course, along with the federal government. The provinces should have no say in whether the territories become provinces or not. The citizens in the Northwest Territories and the Yukon must decide for themselves about the internal structure of the territories.

**Mr. Breugh:** Most of them, in private and public conversations, have argued that they want to do it the way everybody else did; that is, they did not decide for themselves, they negotiated with the federal government. That is kind of between you and me.

**Dr. Levman:** They should negotiate with the federal government, of course, because they are territories. But whether the provincial assembly of Ontario should have a say in what goes on, whether the Yukon becomes a province or not, I think is irrelevant. I think it is not right.

**Mr. Chairman:** I would like to thank you very much, Dr. Levman, for your presentation. As I mentioned earlier, I think you have come at it from a slightly different perspective, which is one of the nice things about hearing from many different people as we go through this.

Your focus on rights, which in a sense has been, I suppose, the issue of the day, has raised a number of questions that really have not been brought up in quite that fashion, as well as some concerns that you have about the strength of the charter and where we want to go or where we ought to go with that over and above Meech Lake.

We thank you very much for the time you took for joining us this afternoon.

If I could then call upon our next witnesses, Bill Charnetski and Tracey-Anne Pearce. We have a couple of submissions.

**Ms. Pearce:** Light reading.

1440

**Mr. Chairman:** Some light reading. Good, now all is clear. We have a copy of your written submission as well as the oral presentation you are going to make. We are pleased to accept both. Let me say welcome. Please proceed with your presentation and we will follow up with questions when you have finished.

WILLIAM CHARNETSKI  
TRACEY-ANNE PEARCE

**Mr. Charnetski:** Thank you, ladies and gentlemen. My name is Bill Charnetski. Both my copresenter, Ms. Tracey-Anne Pearce and I are students at the constitution litigation seminar at the University of Toronto law school. We are appearing before you here as private citizens.

On behalf of Ms. Pearce and myself, I would like to thank you for giving us the opportunity to appear before you here today. We hope that as students we may be able to offer a unique perspective on the issues before this committee as we approach these questions without cynicism and preconceptions.

I believe you have received copies of both our written presentation and a copy of the oral presentation that we will be making. We will now address a couple of the most important issues discussed in our written paper.

In the full written submission, we undertook a legal analysis of the effect of the "distinct society" clause, and of section 16 of the accord on women's equality rights. In addition, we offered a legal critique of the joint committee report prepared last fall.

We feel that everything we addressed in that written paper is important and should be considered by the committee. Due to the time constraints we face today, however, we will limit our oral submissions to three points which we believe we covered in a detailed and unique fashion.

First, I will outline the legal critique of what we see as an unacceptable joint committee report on the Meech Lake accord. Second, I will submit that the effect of the recent Supreme Court of Canada decision in the separate school reference may be to infringe women's equality rights guaranteed by the charter. Third, Ms. Pearce will be discussing the negative impact of section 2 and section 16 on future attempts to define equality.

First, the joint committee report. In our minds, the report of the joint committee and, in fact, the whole hearing process is unacceptable. At the federal level, the nature of the hearing process has hampered public understanding in input in many ways. The timing of the hearings in midsummer, the short time given to groups to prepare their briefs, the seeming fait accompli those groups confronted, and the unworthy suggestions that those who criticized the accord were really anti-Quebec, were factors that led to the complete frustration of many people with the public process.

The actions of some of the committee members indicated that they had no intention of listening to the offered testimony with open minds. Their attitudes indicated that in their minds the standard of proof faced by those who opposed the accord was even higher than the requirement of egregious error set by the first ministers.

The report was even more disconcerting than the hearings. In it, the committee seemed to obliterate the line between political and legal analysis. In addition, the committee seemed to ignore completely the fact that there are no black-and-white answers to legal questions.

The committee heard relatively little true legal opinion—that is, legal opinion from lawyers—and, furthermore, the report cites with approval only that opinion that supports its conclusions and dismisses those experts, such as Eugene Forsey, John Whyte and Mary Eberts, who disagree with those conclusions, without reasons.

Our view as to the appropriateness of the political ramifications of the accord are irrelevant to our presentation. Our concern is the effect in law the enactment of these provisions will have on women's equality rights.

I would like to note as well that the public need for understanding has also been ill served by the unity of leadership of government of both national opposition parties behind the accord.

One of our biggest concerns with regard to the "distinct society" clause arises out of the recent decision in the separate school reference. Our fundamental concern is that the decision, particularly the judgement of Madam Justice Wilson, creates a hierarchy of constitutional documents so that some portions of the Constitution are clearly superior to others. We are worried that in the light of that development, legislation enacted pursuant to that provision may be immune from charter challenge.

Even if the "distinct society" clause is not held to be a power-granting clause, it will have more importance attached to it than other interpretive clauses influencing the section 1 "reasonable limitations" analysis because the clause will become part of the Constitution Act, 1867.

At this point, I would like to note that neither the drafters of the accord nor any of the first ministers have offered any rationale for the inclusion of the "distinct society" clause in the earlier constitutional document. In the minds of many, the superficial attempt by the drafters to rewrite history is symptomatic of an underlying failure by those involved to consider fully the

ramifications of their decisions. The drafters' negligence in not considering the effects of their actions on parties who were unrepresented at the negotiations, such as women's groups, is as offensive as the actual end result of those negotiations.

I do not have time to analyse in detail the arguments arising out of the separate school reference, so I will touch only on a couple of points which I believe are crucial.

First, please keep in mind that the language used by Madam Justice Wilson can encompass the immunization of any power-granting provision within the Constitution, and therein lies its uncertainty. I would be very interested to discuss with you the efforts of the federal government lawyers in the case of Penikett, the Yukon challenge to the accord. In that case, the lawyers argued that after the separate school reference, constitutional amendments cannot be subject to the charter. The lower circuit continued to pursue this argument in the Yukon Court of Appeal.

Second, the committee felt that it had heard enough testimony to justify its conclusion, which I submit is incorrect, that as a matter of law the clauses neither grant new powers nor derogate from existing powers. It is their belief that the "distinct society" clause is clearly an interpretive clause. However, not only did the committee ignore the testimony of many other legal experts, such as Beverley Baines, Marilou McPhedran, Mary Eberts and other people whom I have mentioned earlier, but it also ignored the statements by Quebec leaders such as Premier Bourassa, which indicates that its members would be very surprised to learn that they had obtained no new powers under the accord.

Third, I would like to highlight our example involving abortion, showing how the "distinct society" clause could be used to infringe women's rights. A declining birth rate or the belief by a government that the majority of citizens viewed abortion as wrong could prompt legislation restricting women's access to abortions on the basis of preserving or promoting a distinct society.

This is not some kind of fairytale offered by women's groups merely to scare committee members. Since the Morgentaler decision, British Columbia Premier Vander Zalm has blatantly disregarded the law and charter rights in his attempts to prohibit abortions. If he were to attempt in the future to justify his tactics using the "distinct society" clause or if a future Quebec Premier were to use similar methods to arrest a



declining birth rate, the women's fears would be realized.

**Ms. Pearce:** The third issue we would like to address is the negative impact of section 2 and section 16 on the definition of equality.

The aspect of the accord which has the potential for the most far-reaching and devastating effects to equality was one which received virtually no recognition in the joint committee's report. The aspect of which we are speaking is the influence the failure to safeguard equality rights in the accord will have on the judicial definition of equality.

The charter is a relatively young document, and while the concept of equality has received some judicial attention, it has by no means been conclusively defined. Undoubtedly, cases involving equality will arise after the accord is incorporated into the Constitution. It is our submission that as the courts consider the Canadian concept of equality, they will examine the Constitution itself for clues as to its meaning. The lack of regard given to equality rights in section 2 and section 16 of the accord will impact on the scope and weight accorded the notion of equality, and this impact will extend beyond those cases simply considering sections of the accord.

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The Meech Lake accord makes a symbolic statement which has negative implications with respect to the importance of gender equality as a value in Canadian society. Professor Lynn Smith, in a paper presented at the University of Toronto conference on Meech Lake, states:

"Symbolism can be important in the context of constitutional formation, as the example of the Meech Lake accord itself illustrates—while Quebec was legally subject to the provisions of the Constitution Act, 1982, including the Canadian Charter of Rights and Freedoms from April 17, 1985, onward, the symbolic importance of its exclusion from the final stages of formation of that constitutional amendment, led to a strong (and quite understandable) push to 'bring Quebec into the constitutional family' at the symbolic level.

"The symbolic statement made by the failure to mention women's equality rights in the Meech Lake accord, while mentioning other similar rights, and in a context in which women's rights along with equality rights for minorities could be seen as relegated to secondary status, is that the goal of achieving equality for those groups is secondary to other goals."

The task of defining equality is a rigorous one. The meaning is not self-evident, nor is it defined in the charter. The opportunity to develop a uniquely Canadian conception of equality is a tremendous chance to further the cause of social equity.

We recognize that many considerations will factor into the judicial formulation of what constitutes equality. Of primary importance are the messages, both explicit and implicit, that the legislatures send to the courts. It is our submission that the accord is one such message. By denying protection to equality rights from the operation of section 2, the accord says that equality is not highly valued and that other considerations may take precedence over equality considerations.

Certainly the possibility that the accord may affect future attempts to define equality is evidence that the impact of the "distinct society" clause will be felt beyond the borders of Quebec and that its significance is not confined to section 1 charter analysis.

We appear before you today not simply as two students of constitutional law interested in the legal impact of the Meech Lake accord. We also stand here as young Canadians concerned about the process of Meech Lake, a process which we suggest to you has disillusioned and disenfranchised much of the Canadian public. There is a feeling of futility among those attempting to offer constructive criticism.

This committee has been given an opportunity similar to that of the federal joint committee. It is our earnest hope that those of you here today will achieve what they could not, that you will look beyond your party obligations and realize the profound responsibility all of us have in ensuring a lasting and equitable Constitution.

I would like to quote a classmate of ours. Laurence Grafstein wrote in a recent edition of the University of Toronto Faculty of Law Review:

"Future generations will look back at the joint committee's report in anger. They will be angered by the report's inability to support even its most elementary positions without lapsing into inconsistency, angered by its obscurity, by its denial of plain reality, by the way it verges on outright duplicity. Further, historians will not be impressed by the intellectual rigour of Canada's leading constitutional experts. For a nation that so recently achieved full independence, a nation so obsessed by its Constitution, a nation where individual rights are so fragile, it is the careless

attitude of the political and legal élites that prompts the greatest anger of all."

Our final recommendation to this committee is that sections 15 and 28 should be included in clause 16 of the accord. This would ensure that women's rights, those most threatened by the "distinct society" clause, are sufficiently protected.

Alternatively, if no changes are to be made at this time, we believe it is imperative that the Ontario government refer the accord, or at least the "distinct society" and "linguistic duality" provision, to the Ontario Court of Appeal. At the very least, both sides in the debate will then understand more clearly the ramifications of these provisions.

**Mr. Chairman:** Thank you very much for your oral submission. We certainly will have an opportunity to go through the written brief, which clearly adds a great deal more to the arguments you have set forward. I also want to thank you for taking the time to put all of this together. It is interesting to me that today there has been a certain focus on the charter in particular and the question of charter rights. That was not done by any reasoned process, because we did not know exactly what people would be talking about, but it is very useful, I think, as we go through it, really looking at specific charter questions today.

We will start questioning with Mr. Eves.

**Mr. Eves:** I missed the opening part of your presentation, but I have thumbed through your brief. I think it is a very well prepared document indeed. Of course, the fact that I happen to agree with your conclusion might have something to do with my objective thinking on the matter.

On page 29, I gather your recommendation is, as you say, that sections 15 and 28 should be included in section 16 of the accord. People such as Professor Baines and others to whom you refer in your comments have indicated that perhaps all rights granted under the Charter of Rights and Freedoms should be protected in section 16. Would you concur?

**Mr. Charnetski:** In our minds, as our recommendation sets out, we want only sections 15 and 28 included, because we feel that those are the two rights—it is women's equality rights that are being threatened by the accord as it now reads.

**Mr. Chairman:** Excuse me. Would you mind just moving forward? We are having trouble picking your voice up for Hansard.

**Mr. Charnetski:** I think we would stay with that submission. There is a certain amount of

strength in focusing on one's equality rights, and we believe that to open up the entire charter as being unprotected is perhaps inconsistent with the notion that permeates the Constitution that those charter rights are not unlimited. We do have a section 1 limitation and there is the section 33 "notwithstanding" clause. Somehow, to say that the charter is entirely immune from the Meech Lake provisions, I think, would be inconsistent.

**Mr. Eves:** You disagree with Professor Baines on that one particular point?

**Mr. Charnetski:** Yes.

**Mr. Eves:** She does agree with your bottom-line suggestion that if the committee is unwilling or unable to suggest any amendments or come to any agreement about it, the very least it should do is refer those specific provisions to the Ontario Court of Appeal. Obviously, you agree with that.

**Mr. Charnetski:** Yes I do. I understand from reading some of the previous testimony that that has been recommended by a number of the people who have appeared before you. While in our minds that certainly is not the ideal suggestion, we think it is important that there be some examination of the actual effect of the "distinct society" clause, because to us, it is the uncertainty of the clause, while perhaps necessary in drafting any legislative document, that still must be examined when it is as important as this "distinct society" clause will be.

**Mr. Allen:** This is the first brief we have had from a group of law students, is it not? I am glad to have you come along near the end of our proceedings, when we have the opportunity of weighing your recommendations against those of so many others.

I wonder if I could ask you about a couple of items. You talk about the disillusionment and disenfranchisement with respect to the process. I think I know what you are saying, that the appearance of the charter, with its democratic, egalitarian emphasis, led many people to expect that the process of constitutional reform would follow that same kind of route, in spirit at least, and I would certainly be the first to observe that it did not do that. Are you also saying that the present process is less democratic than what we have been used to?

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**Ms. Pearce:** What are you referring to when you say, "what we have been used to"?

**Mr. Allen:** My understanding of the process in the past is that in order to get a constitutional amendment we have had, first of all, to call a



meeting of the premiers in order to see if there could be some unanimity, because we knew that when we went to Westminster we would be asked whether everybody was in agreement. If everybody was not in agreement, we would be sent back home. There was never, at any point in all of that, any public participation, no process; whereas now we at least appear to be in a situation where, while we do not have to have unanimity on most things, we can have 50 per cent of the population and seven provinces. There is much more room at least for the process to open up to select committees and so on, depending upon how you do it.

The way it has happened has been somewhat unfortunate, but is not a method that is inherent in the Constitution. One could almost suggest it was against the spirit of the charter, but certainly it is not a method that is necessary in terms of the actual words and clauses of the constitutional document as we have it or even what is proposed in Meech Lake.

**Ms. Pearce:** I think it is certainly true that this is an improvement over trotting over to England. I would also agree with you that the public hearing process does not necessarily have to work in the negative manner that I feel it has worked as far as Meech Lake is concerned. I think it is important that something not only be fair but appear to be fair. I do not think we have achieved either of those things in the Meech Lake hearings. To say that it is better than what we had and that the structure is not inherently faulty I do not think addresses the fact that it did not work this time. I think it is important to say publicly, "It did not work this time," if only to avoid in the future the errors that we made this time.

**Mr. Allen:** Yes. I quite agree with that. I just wondered whether I should hear you also saying that what is written in documents at this point in time has somehow taken away an enfranchisement that we did have.

**Ms. Pearce:** No.

**Mr. Allen:** Which is not the case, OK. Thank you very much on that point.

Will you explain to me an argument that has appeared recently in some of the presentations? It has to do with the connection between what is happening around the abortion issue in Canada and Meech Lake. I am very puzzled by the argument. If I can just explain my puzzlement, as I understand it, the Supreme Court of Canada looked at rights under the charter for equality of access to health services, etc., across the country and said that the present federal law respecting abortion and the terms of its availability do not

provide equal access for women across the country; therefore, the law is no longer considered of effect in that sense.

In the wake of that and in the light of the fact the federal government has not had in its hip pocket a substitute piece of legislation to bounce out for everybody to organize their lives around again, we are in a very interim, somewhat chaotic, situation. It is easy for the Vander Zalm of this world to go off half-cocked and let their own private dispositions appear to rule the legislation and the patterns of delivery of that service in a province. Of course, we have seen that already the courts have begun to take hold to start reining that sort of reaction in, but it is very interim. To take that as an example of what will happen under Meech Lake if we do not somehow reinforce the equality rights provision of the charter—I am having a hard time getting them from here to there. Do you see what I mean?

**Ms. Pearce:** Sure.

**Mr. Allen:** Maybe you can explain it to me, because I have not asked this question of anybody yet. I have just been waiting for the opportunity, and you are the first ones I have dumped it on.

**Ms. Pearce:** I think there are two ideas operating here. The first idea is that somehow there is a possibility that laws relating to abortion could be enacted under a "distinct society" provision and that these laws would impact on women's equality rights. The second idea is, why are we talking about Premier Vander Zalm in British Columbia when the "distinct society" clause has to do with Quebec?

To address the first, we present a sort of hypothetical abortion example simply as a suggestion that this may be an area where women's equality rights and this "distinct society" clause could come into conflict. There is a possibility that the Quebec government may use the "distinct society" clause to justify some sort of abortion legislation, not necessarily what we used to have but something, and that may be ruled to be against the equality provision safeguarding women's rights.

Would you like me to address the second issue of why we are talking about British Columbia when it is a "distinct society" clause?

**Mr. Allen:** If you feel you have something more to add to your answer, certainly.

**Ms. Pearce:** I think that a lot of the dismissal of the importance of the "distinct society" clause is to suggest something to the effect that we are only talking about Quebec here, and if the

Quebec women's groups do not have a problem with it then why do we have a problem with it? We have several responses to that. It is around page 25 in our written submission, if I am correct.

I think Eugene Forsey put it well in his comment on the joint committee report. He quotes the women's groups from Quebec and he sort of says, "encouraging but hardly conclusive." That is our first point.

The second point—why raise it in addition to this abortion issue?—is that we believe there are two ways that the "distinct society" clause may have an impact beyond Quebec. The first is what we already touched upon in our oral submission: that is, the overall definition of "equality," done at the Supreme Court level, necessarily impacts across the country.

Third, and this has been talked about in several legal professors' papers, is the idea that "distinct society" necessarily is a relative term. In other words, you define a society as distinct from something, so there is the opportunity that other communities in Canada, perhaps provincially defined, could state that they are distinct and, as such, they have some right to pass laws under some kind of twist on the "distinct society" clause. That is why we bring up the example of Premier Vander Zalm.

**Mr. Charnetski:** If I may just add one thing to that answer, the major way that the abortion idea ties into Quebec's actions in the future is that there now has been highlighted a major problem with the declining birth rate in Quebec. As that problem gets worse in the coming years, it is not inconceivable that a future Quebec Premier will decide that abortion is somehow to be prohibited purely because of the declining birth rate. This is the danger that we see.

There is no guarantee that a future federal government will not change the abortion law. If the Supreme Court were to decide that the most important characteristic of a valid abortion law were to be equal access, then once again it is not inconceivable that a federal government would change the law in the future and leave the door open for a future Quebec Premier to prohibit abortion or to limit it dramatically in the hope of arresting the declining birth rate.

**1510**

**Mr. Allen:** If I can respond to that: in the first instance, it seems to me that to use the circumstances around this particular instance as though the immediate repercussions are exactly the kind of thing that will happen if and when Meech Lake is passed, as though the analogous

situation is in place, when in fact we are in the midst of a process that has not completed itself and where the end result is not known, and to say, "Look at what has happened under the repeal or the undermining of the abortion law; that is what is going to happen vis-à-vis the equality rights if the equality rights in the accord are left pretty much as they stand now," is really stretching it for me.

There is a point that can be argued under the "distinct society" clause in the way in which you are using it. Given the language that is there, which says only that "Quebec constitutes...a distinct society," obviously that marks it off from something else; but it does not seem to me to give any other provincial government the right to say, "Because we have said that about Quebec, therefore all the elements that attach to that attribution to Quebec automatically will attribute to us," and if it got through a Legislature could sustain court examination. I think that is really reaching beyond the bounds of possibility.

Some people have said: "You have to prepare for the worst-case scenario. Do not assume anybody has goodwill. Assume everything is going to go bad. That is the way we should perhaps approach this." I take that counsel to heart, but I sometimes wonder about the emotional tone and the impact of some lines of argument.

Can one really imagine that in Quebec, in a future we can foresee, there will be a Premier who will risk the political, electoral opposition of such a large group of women, who would be affected, who would be denied rights they have come to expect in Quebec more than in any other province, where there is a charter in place that gives women more rights than they have in other provinces and where there are other options available to the government?

The government might well in that circumstance say, "Yes, we will put in an incentive plan that might encourage more families to have more children," but that does not obligate anybody to do so. It does not require them to do so. There is no impact on rights. To actually imagine that a provincial government, a provincial leader is going to use that as a weapon somehow to promote the distinct society is rather far-fetched. Maybe your political assessment is very different from mine, but certainly that is not one I see as a possibility on the realistic electoral, political landscape.

**Ms. Pearce:** You are certainly not alone in that assessment. I think our best rebuttal to that argument is in our written submission. I



will read what we have to say. We point out that we believe: "It is somewhat astonishing that the criteria for judging the impact of constitutional drafting is 'foreseeable rights diminishment.' Undoubtedly, the fathers of the 1867 Confederation would be shocked to learn some of the constitutional challenges launched since their drafting of the BNA Act. The groups concerned with equality rights have certainly provided a myriad of scenarios in which the 'distinct society' clause could limit equality rights. The fact that the committee and the proponents of the accord find it difficult to imagine such situations arising in the present or near future does not strike us as an appropriate guide to evaluating something as lasting as a Constitution."

**Mr. Harris:** To follow up on two points that have already been raised, it is strange but I too have said to myself that I am going to ask the abortion question because it has come up a few times and inevitably Vander Zalm is used as the tyrant, I suppose, although I have not considered him as such. If I understand it correctly, I do not think Quebec or any province has any power, any authority, in the abortion question, save and except the health care provision or who is going to pay for it. It is a Criminal Code matter, or was; that was what was struck down.

Maybe you know of some legal mechanism, other than who is going to pay for it, by which a province could assume authority. I would be interested in hearing what that is.

**Mr. Charnetski:** I guess the first thing that strikes me about your question is that you somehow trivialize who is going to pay for it. Is that not a fundamental question as to the actual effectiveness of any provision in the health care system? You are right, you are correct, it is a Criminal Code—

**Mr. Harris:** Let us just zero in on that. Let us not argue about whether it is trivializing it.

**Mr. Charnetski:** OK.

**Mr. Harris:** But is that the only aspect? There is no other provincial jurisdiction you are aware of?

**Mr. Charnetski:** Legally, at this point, it has been decided to be a Criminal Code issue. If you do not want to argue on the triviality of the money aspect, then we should—

**Mr. Harris:** I do not mind you arguing, but I am not sure it is going to be helpful in the overall debate, the one here anyway. Maybe it is under social services, if you want, or everything being universally the same across this country.

As I understand Premier Vander Zalm, he said, "The Canada Health Act says I have to provide medically necessary procedures to everybody at no cost, and I have defined this as not medically necessary." I assume that is the function he is operating under, which presumably allows him to say he will not fund abortions.

**Mr. Charnetski:** I agree.

**Mr. Harris:** I am not sure he is treating anybody any differently. I think he is treating everybody the same.

**Mr. Charnetski:** The question is women. Our concern is the effect this has on women. While he is not treating anyone differently, the overall effect, people would argue, is that by denying abortions to women, not treating any single woman differently, it has the effect of treating women in an inferior manner. I think that is where the heart of the issue lies.

We use abortion, particularly Premier Vander Zalm's and Premier Devine's positions on this, to show that it is not some sort of hypothetical, crazy fancy we put before you. Part of the beauty of law is to find a justification for any position. If the "distinct society" has the potential to be used as a justification for a position which will inherently hurt women, it is dangerous.

**Mr. Harris:** OK. Let me go on to the second point. I am not convinced there is anything pre-Meech Lake or post-Meech Lake that is going to change what can happen there, but I understand the point you make.

Mr. Allen started to touch on this. The "distinct society," other than what you have said, is that Quebec is a "distinct society"; therefore, somebody may be able to argue that it is distinct from what? They are distinct from us; therefore, we are distinct, and therefore we argue. I think that is a pretty long way around arguing. Is there anything else in clause 2(1)(b) recognizing minority rights, other than "distinct society," which gives you any cause for concern? Is it section 1 or section 2? I am losing my marbles.

**Mr. Charnetski:** It is the proposed section 2 of the Constitution Act, 1867. I think the most important part of that section is the "distinct society" and linguistic duality part. I could touch on the fact that we do not believe subsection 2(4) in any way guarantees that there is no derogation of power, but I am not sure that addresses your question. I think my quickest answer would be no. Our concern is with the "distinct society" provision.

**Mr. Harris:** So if you are concerned about women's rights or equality rights, it really is in the province of Quebec?

**Mr. Charnetski:** I would disagree with that.

**Mr. Harris:** You would argue that you could argue the original argument I gave.

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**Mr. Charnetski:** I would go even further, because something fundamental that Quebec women seem to forget is that a Supreme Court decision does not affect just women in Quebec. It has authority for courts all across the country. As Ms. Pearce touched on, this has a number of levels of effect for us. The "distinct society" provision may not be subject to charter challenge. It may have a negative impact even as just an interpretation clause and it may go even further to somehow affect the general definition of "equality" as a whole.

**Mr. Harris:** So if a Supreme Court decision is based on a case in Quebec—the "distinct society" versus an equality right—the decision that comes out of that then, because we are all equal in Canada, would be applicable and be able to be used as an example on a similar rights basis across the country?

**Mr. Charnetski:** Yes.

**Mr. Harris:** Others have come before us and argued that, for different reasons mind you. They have come to argue that whatever result "distinct society" for Quebec gives Quebec, it will give everybody else too.

**Mr. Charnetski:** Bear in mind many justices only look for a hook to hang their hats on.

**Mr. Harris:** Which reinforces your argument.

**Mr. Charnetski:** Yes.

**Miss Roberts:** I appreciated your brief. I would just like to point out something with respect to abortion, just a comment. When you are talking about the abortion issue, you are also looking at equality rights and legal rights and therefore that is the problem with respect to that. It really does not make any difference about Meech Lake or something like that, because if Meech Lake affects equality rights, it will also affect legal rights. The abortion issue is an issue that is between two rights already entrenched in the charter, and that is something else you have to look at. It is not just the "distinct society" that is going to impinge upon that equality right for women. The charter itself will do it maybe more damage.

**Mr. Chairman:** Before we settle the abortion issue and allow the federal and provincial Attorneys General to get away from their responsibilities, can I, perhaps as a last question, turn to a totally different aspect of the issue? I

have no answer to this, but I would really appreciate your thoughts.

I have been sitting here listening to you. I go back to a couple of points in your brief you noted as young Canadians at university. I was thinking back to when I was younger and not quite so middle-aged and at university, in terms of some of the compelling issues at that time.

I think there is absolutely no question that one of the really interesting developments in this country, and one does not see it just in young people, but young people at university are clearly one group that really feels this, has been the whole elaboration of the charter, individual rights, and group rights to a certain extent if we define women as a group. None the less, the focus has come from a kind of individual rights perspective.

I go back to my experience. There were a number of issues, but one very definite one in the early 1960s was the relationship between French and English Canadians, what Quebec's role was in Canada and so on. I suppose for many of us, from that point there has been a kind of handprint on us that will be with us for our entire lives. It was not that one never thought about individual rights, but at that time the consciousness was not there around that particular issue.

I suppose as a younger person, as I went through the 1960s and happened to be involved in some of the early constitutional discussions, I considered questions of collective rights, and in particular the rights of Quebec society, defined in its French language and French cultural aspect. What were the rights that society had or ought to have in terms of protecting itself? Certainly, it represented a minority within Canada and an even greater minority within North America.

As we come forward and look at the charter, I share and I think everyone on the committee shares that this is very important to all of us for a whole host of reasons. But I also have this voice that is coming back to me from the University of Toronto and Université Laval in the 1960s saying, "OK, but look, I can envisage some worst-case scenarios where the protection of individual rights in Quebec could lead to the extinction of French-speaking Quebec."

I do not think that is likely to happen. I am just saying that there is a line of argument. As I look at the charter itself, regardless of Meech Lake, and then look at Meech Lake and at least at the initial intent, which was to bring Quebec in and provide some protection along the lines it has been advocating, I am trying to find a balance.



In my understanding of "distinct society," I do not want to see it causing all of these various scenarios we have been discussing. By the same token, I think that realistically one recognizes that it is within the geographic boundaries of Quebec that French Canada thrives in its most fulsome way and we play around with the ability of the Quebec provincial government to somehow protect that.

The federal government is obviously important, but the Quebec government's role there is also very critical. As one approaches the "distinct society," in a sense because we are here in Ontario and are an Ontario committee, we do not hear a lot from people and do not talk a lot about that sort of element, as perhaps one might if it was a House of Commons committee. I have struggled with that in terms of saying to myself, "Should we absolutely have a charter override and nothing in that charter can be affected at all?"

I was interested in the comment you made and your stressing of sections 15 and 28. I find that interesting and I think there is a line of argument that is compelling. But I am interested in how you see or how you measure or how you try to balance that? I do not mean that you are speaking for everybody who is at the University of Toronto law school or at the university. Would you agree that there is a need, in some respect, for some defence of the collectivity? What do we do when that runs into conflict, perhaps, with some individual rights? I know some people will say, "If it runs into conflict, it is the individual right that must take precedence." I confess that I continue to wrestle and I do not know what the answer is. I am just wondering about your musings, your first thoughts and second thoughts.

**Ms. Pearce:** I suppose the quickest answer is that we feel the balance is to include section 28 and section 15 of the charter in section 16 of the accord. We feel that still allows for this sort of flourishing "distinct society" while protecting rights that we feel, as Mr. Charnetski has said, are particularly susceptible to being impinged by section 2 of the accord. We hope that around page 7 of our written submission may be of some help. There we discuss and rebut the joint committee's reasons for not including women's equality rights in section 16 of the accord.

I think around that discussion is the whole idea of when are we going to be rendering section 2 impotent? When are we going to be putting so much into section 16 that section 2 is not going to mean anything? The reasons for putting in the multicultural and aboriginal rights have some

validity, but I suggest that validity is applicable to women's rights as well, and that women's rights have a lot of similarity to multicultural and aboriginal rights in a lot of ways. That is why we feel they should be included.

**Mr. Chairman:** Thank you.

**Mr. Harris:** Have you given any thought or any weight to just dropping section 16 right out of the accord?

**Ms. Pearce:** Go ahead, Bill.

**Mr. Chairman:** Obviously, you have to think about that one.

**1530**

**Mr. Charnetski:** Yes, we have. I am not sure we have ever come to a decision on whether that would be a good thing or a bad thing. It was my initial reaction that section 16 probably had a place in the Meech Lake accord. Of course, with that, as we now are all aware, there is a danger of excluding some and thereby somehow trivializing those rights or saying they are not as important as the ones that are included in section 16, but I think there would be a danger otherwise of trumping the entire charter with clauses such as section 2.

The charter is not the kind of omnipotent provision that maybe other aspects of the Constitution are. I think it requires protection. It is still in its youth, blah, blah, blah, blah, but I think it is necessary. However, I do think it was something that perhaps was not considered in great detail by the drafters. What happened was that you got a clause included that did not pay enough attention to its real purpose. I would say it does have a purpose and it should be there, but it should be there in such a way as to protect those rights that are most susceptible to being trumped.

**Mr. Chairman:** Just for your own interest, this morning we had a submission by the chairman of the Ontario Human Rights Commission, Raj Anand. I would commend to you his presentation because he discusses the issue of the charter being fully protected or just certain parts. I think as future lawyers you would find that of interest.

I know I speak on behalf of all the members of the committee in thanking you very much for coming before us this afternoon. It has been a most enjoyable and interesting exchange, and we very much appreciate it. Thank you.

**Ms. Pearce:** Thank you.

**Mr. Charnetski:** Thank you.

**Mr. Chairman:** I call upon our next witness, Donald Curtis, if he would be good enough to

come forward and take a chair. Welcome, Mr. Curtis. We have a copy of your submission, which is being passed out by the clerk of the committee. I ask you simply to proceed and make your presentation and we will then follow up with questions.

**DONALD CURTIS**

**Mr. Curtis:** I might mention I am slightly deaf, so you may have to talk a little louder to me.

**Mr. Chairman:** All right.

**Mr. Curtis:** Thank you for permitting me to address you regarding the Meech Lake accord. I am a retired General Motors worker. I speak to you not as a professional or an intellectual but as the ordinary man in the street.

I oppose the Meech Lake accord for many serious reasons.

It jeopardizes equal application of the Charter of Rights and Freedoms by recognizing Quebec as a distinct society.

By requiring that appointments to the Senate be made from provincial lists, it introduces provincial bias and provincial encroachment on national government.

The requirement of annual first ministers' conferences is a further encroachment, because these will tend to set the federal government's agenda and Parliament will become a ratification agency only.

By requiring that appointments to the Supreme Court of Canada be made from provincial lists, it prejudices an institution which, up until now, has worked in the national interest, with fairness to all.

It makes the Constitution practically impossible to change because it extends the requirement of unanimous consent of Parliament and all provincial legislatures to effect change. This requirement practically denies the entry of the Yukon and the Northwest Territories to provincialhood.

Senate reform will probably be denied.

The opting-out provision in the accord discourages the federal government from initiating shared-cost programs, since it will have to collect the taxes to support them and the opting-out provinces will get the credit. This provision will hamper an effective response to future challenges regarding employment and social assistance, education, environmental protection, science and technology. It will also impede the mobility of the labour force due to differing criteria in each province.

Provincial control of immigration opens the door to a patchwork of racially motivated provincial immigration policies.

The Meech Lake accord is ambiguous. Such phrases as "national objectives" or "distinct society" could be interpreted by the courts in various ways.

One of the worst flaws is the recognition of Quebec as a distinct society, requiring it to preserve and promote its distinct identity. This will divide Canada into two nations, permanently solidifying the division between the French-speaking and the English-speaking peoples, rather than encouraging the gradual melding of both races into one Canadian society as at present.

The requirement that Quebec promote its distinct identity is nothing less than providing it with the constitutional right to proceed to sovereignty-association, or even independence. Implementation of the Meech Lake accord could give Quebec the constitutional right to set its own foreign policy, to raise an army, to set up customs barriers to the rest of Canada, to demand from the federal government the exclusive right of collecting its own taxes, all in the name of promoting its identity. This provision is made to order for le Parti québécois, should it ever form a government, and right-constitutional right, that is—will be on its side.

Another terrible flaw is the massive transfer of power from the federal government to the provinces through the requirement of an annual first ministers' conference, control of appointments to the Senate and to the Supreme Court of Canada, the opting-out provision and control over immigration. This transfer of power will lessen the ability of the federal government to protect the weaker regions of the country, and as the Canadian people tend to look more towards their individual provinces for solutions to national problems, Canada will become less relevant to their loyalty.

I have read that Canada is considered the most decentralized federation in the world. It may be that this has contributed to the threats of separation in Quebec, Alberta, and now in British Columbia. If this is so, think of what the Meech Lake accord will do. I believe it will break up Canada.

I just cannot understand our political representatives ratifying this accord. It is a treacherous piece of legislation because it is encouraging Quebec to distance itself from the rest of Canada, and the rest of the provinces to set up their own little fiefdoms, precursive to the dismemberment of Canada itself. Even if this were not true, the accord should be rejected out of hand because of the many other defects previously mentioned.



Certainly, in the pressure of the moment, and with the knowledge that Quebec would sign the Constitution if the accord were agreed to, I can understand the premiers' initial agreement. But as its implications come to light, our political representatives have to put their country above cheap political gain and refuse to ratify it.

I would like to know why there is such urgency to enact this Meech Lake accord into law. Why are our political leaders pushing it through despite stiff opposition? What benefit is there in it? Do our political leaders know something that I do not know and that the public does not know? There is no vision of Canada's potential in it. It is regressive legislation pointing Canada's future in an entirely different direction from that towards which our previous prime ministers, from Sir John A. Macdonald on, have tried to direct it; changing the country from a relatively cohesive unit into a group of semi-autonomous states. I cannot believe that our political leaders are so incredibly gullible as to think that Quebec's signature on the Constitution is worth this defect-ridden legislation which provides the tools for Canada's destruction.

**1540**

While I am asking questions, I sense from the newspapers that these hearings are just a formality, that the ratification of the accord is a foregone conclusion and that no free vote will be allowed. What are these hearings all about then? Are they just a farce? Is no attention going to be paid to what we say?

All of these unanswered questions create an impression in the public mind that there is a fear of losing Quebec votes on the part of our federal leaders, and there is an impression of shabby, cynical greed for power on the part of our provincial leaders. If this is true, it does not say much for the calibre of the people we are electing to public office. Now is the time for responsibility, honesty and statesmanship. The very existence of this country is at stake with this Meech Lake accord, and our representatives must put Canada above leaders, parties, votes or personal gain.

What you should do is have a free ratification vote and scrap the accord entirely or, better still, not vote on it and let it lapse. It has too many flaws in it to be reworked. Go back to the bargaining table, find out what Quebec's real needs are, and those of the west, and make whatever concessions can possibly be made without compromising the integrity of the federal government. Next time do not give away the store.

I believe that an elected Senate with equal representation from each province would go a long way towards alleviating provincial dissatisfaction. We should continue to encourage bilingualism in all parts of Canada regardless of cost or of French population ratios, so that a French-speaking person can move to any part of Canada and feel at home. After all, theirs is an official language and they form a significant portion of our population. We must not construct a ghetto to set them apart as Meech Lake would do. If Quebec refuses to sign the Constitution, then perhaps the time is not yet ripe to do so.

Ontario has a tradition of loyalty as expressed in its motto: *Ut incepit, fidelis, sic permanet*: faithful it began and faithful it shall remain. Let us demonstrate that loyalty to our beloved country of Canada, showing the way to Manitoba and New Brunswick, by refusing to ratify the Meech Lake accord.

**Mr. Chairman:** Thank you very much, Mr. Curtis, for your presentation. Your views are set out very clearly and your conclusion is also very clear. We can turn to questions and we will start with Miss Roberts.

**Miss Roberts:** I will speak slowly and clearly. If you do not hear me say so.

**Mr. Curtis:** I am slightly deaf you know.

**Miss Roberts:** My voice will shatter glass a lot of people say—or the people across.

I would like you to turn to page 3 of your presentation. In your second paragraph on page 3 you ended by saying that right now there is a general melding of both races into one Canadian society. What has led you to believe that this is the way it is happening now?

**Mr. Curtis:** You have heard about people taking these French immersion courses. They cannot get enough teachers for these courses. People want to become bilingual, and this is in English Canada. So I feel that there is a gradual awareness that Canada must be bilingual. To get government jobs, in the federal government for instance, it is a real asset to be bilingual.

I think, probably since there was the threat of Quebec's separation, people have become more aware that there is a French fact here in Canada, that it is part of Canada to be bilingual.

**Miss Roberts:** Thank you. You are putting that in linguistic terms, not necessarily in societal terms; so your Canadian society, the way you look at it, is one that is bilingual.

**Mr. Curtis:** Eventually, I would think this country would be fairly bilingual.

**Miss Roberts:** And the French fact would remain as such?

**Mr. Curtis:** Well, my idea is this: if you make the country bilingual, then French people are not going to stay in the ghetto of Quebec. They are going to move around the country and we are going to become as one people if we encourage this bilingualism.

**Miss Roberts:** The other theme going through your presentation, which is very evident, is your great concern for Canada as a nation.

**Mr. Curtis:** Yes.

**Miss Roberts:** And your concern to deal with Quebec and the problem that Quebec has not been a signatory to the 1982 round.

**Mr. Curtis:** Right.

**Miss Roberts:** You have used the expression, I believe, that maybe the time is not ripe.

**Mr. Curtis:** Yes.

**Miss Roberts:** My fear—and this is just a comment I would like you to respond to—is that if we do not have Quebec in the Constitution or in the new Confederation, whichever you wish to call it, how are we going to deal with the Senate? How are we going to deal with the aboriginal people? How are we going to deal with—you know.

**Mr. Curtis:** Quebec is in fact in the Constitution. Regardless of whether Quebec signed the Constitution or not, it is in the Constitution because there was the required majority in the 1982 Constitution, if you know what I mean.

**Miss Roberts:** Oh, I understand legally, yes, but they perceive that they are not. They perceive that they are not and they are not participating in the rest of the development of our country. I find that a little disturbing.

**Mr. Curtis:** Do you really think they are not participating? I guess you are right. Maybe they are thinking of themselves too much right now.

**Miss Roberts:** I do not know if they are thinking of themselves too much, but in the past, since 1985 I would say, they have not participated to the fullest extent that they could in developing that Canadian nation you see.

**Mr. Curtis:** I do not know whether you have read Don Braid. I see him in the Star. He is a columnist. He was saying that Alberta may pass a law making that province unilingual. How many people whose mother language is French are going to settle in Alberta?

If every province does that, they are going to be forced back into Quebec. It becomes a ghetto and then we definitely have our two nations. We

do not want two nations in Canada. We want them to gradually come together. I think the way you can do it is by encouraging bilingualism to the extent that it is possible; and it has been very encouraging because I think that the English-speaking people of Canada have taken to it and they are trying to become more bilingual.

**Miss Roberts:** Thank you for your comments. I do appreciate them.

**Mr. Offer:** Thank you for your presentation, Mr. Curtis. Just to carry on with Miss Roberts' point, on page 3, in the same paragraph, you talk about the distinct society and then you talk about the division of French-speaking and English-speaking peoples. We have heard a great deal of information that the distinct society in Quebec is not solely its French and English languages, but rather a whole raft of other characteristics in Quebec which are not in other provinces.

1550

**Mr. Curtis:** Yes. Right.

**Mr. Offer:** It is not anything new, but it is a fact because of the judicial system and many other characteristics within Quebec. We have been told on a number of occasions it is a sociological fact of the "distinct society" distinctness of Quebec. If you agree with that, then I guess what I would like to do is hear your concerns as to what real harm there is in acknowledging that "distinct society" of Quebec.

**Mr. Curtis:** I guess you have to acknowledge that there is more distinctness in Quebec than there is in the other provinces, but each province is distinct. Why say Quebec is distinct? They are all distinct. Yes, I agree there are other things besides the language that are distinct about Quebec, but I think we want to become a Canadian nation. We want to become one people some day. It will not be in our generation, it will not be for a long time; but what we want to do is to encourage it among the English-speaking and French-speaking people.

We want to make it that if somebody in Quebec gets a job out in Alberta, say in Calgary, he can go out there and feel at home and he will settle there. We do not want to force him back into Quebec and make it like a ghetto. I do not know whether I have answered your question. Have I?

**Mr. Offer:** What I wanted to hear, and what I have heard, are your concerns with respect to the whole question of the "distinct society." I think it is very important that you come before this committee to outline these concerns. You have touched on some of the most major issues, which



we have been talking about since day one. I think it is important that not only the large associations and the large groups come before us but also individuals come before us and tell us their opinions. I thank you for that, because it is extremely important for us as a committee to hear that before we go into our deliberations.

**Mr. Curtis:** I would hope that the two language groups would mingle together some day; it will not be in our time. I am looking forward to some day—I will not be around—when we are one unified country. I think the only way we are going to do it is by encouraging this bilingualism so that a French-speaking person will not have any qualms about moving to Saskatchewan or British Columbia or wherever he wishes.

**Mr. Harris:** I want to ask you something, and I do not ask it facetiously because I have asked other people this as well. We have heard a lot about how Meech diminishes provincial powers, takes away from having national programs, everybody is treated equally, the level of service is the same across Canada—

**Mr. Curtis:** You are talking about the opting-out provision.

**Mr. Harris:** I am talking about the whole gamut. I want to talk about everything. That is part of it, and you have mentioned it. You talk about provincial involvement in the Senate and provincial involvement in the court system. On the language issue, your vision of Canada is everybody fluently bilingual across the country. I think that was Trudeau's vision of Canada as well.

**Mr. Curtis:** I do not think everybody will be bilingual, but it will be generally that.

**Mr. Harris:** But you think of each province being bilingual enough that francophones will feel as comfortable in Ontario, in Newfoundland and in Alberta as they do in Quebec.

**Mr. Curtis:** Exactly; yes.

**Mr. Harris:** And English vice versa; that is your vision.

**Mr. Curtis:** I do not like to see the English-speaking people in the rest of Canada and the French holed up in Quebec. That is going to make us two nations. If we can encourage the French-speaking people to go to the other provinces to settle there, to mingle with the English-speaking people, we are going to become one country.

**Mr. Harris:** I am not 100 per cent sure, and I am sure you do not use the term "ghetto" in a

negative connotation; you use it in the sense that there will be all French there and no English.

**Mr. Curtis:** I do not mean it negatively against the French-speaking people.

**Mr. Harris:** I want to ask this question, as I have asked others: if everything is going to be this way, is there any need to have provincial governments and provinces at all? Why do we not just have one country?

**Mr. Curtis:** Yes, there has to be, because there are other problems besides this problem. There are local items that are of concern to a particular region. There are different features of geography and different groups that settle in the different parts of the country. Yes, I would say there have to be provinces because there are items that are common to a particular region that have to be handled by the region itself, therefore, there are reasons for the different regions, the different provinces.

**Mr. Harris:** I get a sense that when we talk about provincial powers, and you talk about it and others have talked about it, you are totally opposed to Meech Lake because it gives too much power to the provinces.

**Mr. Curtis:** Yes.

**Mr. Harris:** We talk about the opting out, and yet the only powers we are talking about there are provincial powers, and they are provincial powers because each province has been a little bit unique, each province has been a little bit different, and over a period of time there has been agreement that the federal government will look after these things and the provincial governments will look after these.

We recognize that things are different. An education in Newfoundland might be a little different and might have to be a little different in that fishing village in Newfoundland than it is on the farm in Alberta, so it has evolved as a provincial responsibility.

**Mr. Curtis:** Yes.

**Mr. Harris:** This power you are talking about that is so terrible is the provinces' power. It is their right; it is their mandate to carry it out. Meech Lake says, "If the federal government wants to stick its nose in there, we want to have some say as to what it is."

**Mr. Curtis:** Sometimes it is necessary.

**Mr. Harris:** "We want to have some involvement, because it is our power. It is our right to do it. It is why we exist as a province." I am being a little bit provocative, if you like.

**Mr. Curtis:** That is all right.

**Mr. Harris:** I am trying to do it because I get a sense that your vision of the country is that everything will be the same in all parts of our country. I guess my vision of the country is that I do not think that will ever be possible, but I think we can still exist as a very strong country if we recognize regional differences, geographic differences, and even "distinct society" differences that Quebec wants recognized, and work together on those things that we do have in common and respect those things that others have that are different and let them operate a little differently.

That appears to me to be the way this country is coming together now, but I sense that is not your vision and I sense it is not Trudeau's vision. Most people who come in and express concern around these aspects of Meech Lake say: "No, that is not my vision of Canada. I see Canada as the same all across."

**Mr. Curtis:** No, I think you are generalizing too much. There are things like maybe certain social policies, education and so on that should properly belong to the provinces, but there are times when it is necessary for the federal government to intervene. It intervened in unemployment insurance, Canada pension and things like that that were really the jurisdiction of the provinces.

Where would we have gotten if the provinces had kept this to themselves? We could get a patchwork of different legislation, and I do not think this would be good. I think it is good that it is spread over the whole country so that it is all the same and if somebody is unemployed in Ontario he can go out to Alberta and get the same conditions and so on.

There are always going to be certain items that will be different from region to region, but I think it is necessary for the federal government to be strong enough to be able to intervene and level things, I guess.

I do not know whether I have answered your question. Have I?

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**Mr. Harris:** I think you have. I think unemployment insurance evolved without anything being in the Constitution. Provinces got together and agreed and it was not federal. The federal government had to get the permission of all the provinces; Meech just legitimizes that process and puts it in the Constitution and says, "Indeed." In fact, by the provinces signing this agreement, it says the federal government can come into provincial jurisdiction with a national

objective program. It sets out a few conditions on how it will work.

**Mr. Curtis:** Do you think that they would have gotten as strong a legislation if the provinces had the power they are going to get with Meech Lake? If there is more power that devolves to the provinces, do you think they would get legislation as good? It is the strength of that federal government—

**Mr. Harris:** I do not think there is a sense that there has been really any shift of power there. There have been a few shifts in that provinces are getting a little more formalized, say, in the Senate and in the appointment of judges. But as far as national programs go in areas of provincial jurisdiction, I do not think the provinces have any more power than they had before. Before it was exclusively theirs; now there is recognition that the federal government not only has the right but it may be desirable in that negotiating process.

**Mr. Curtis:** My feeling is that if you give more power to the provinces they are less likely to co-operate. You have to have sort of a big stick over them, in a way, to get the legislation that is needed.

**Mr. Chairman:** On behalf of the committee, I would like to thank you very much for having joined us this afternoon. You have provided not only a number of things for us to consider but you clearly have expressed those with some passion and feeling. We have noted at different times during our hearings that this is not just some dry legal text or dry legal issue but that a constitution after all reflects, at least in part, what we hope our country is all about. We thank you for the frankness and the honesty of your opinions as you have expressed them today.

**Mr. Curtis:** Do you mind if I make one more point?

**Mr. Chairman:** Please.

**Mr. Curtis:** I did not put it in my speech because it is political.

**Mr. Chairman:** We cannot escape that in this room.

**Mr. Allen:** We had better go in camera.

**Mr. Curtis:** The party that has been hurt the most or has had the most trouble with the Meech Lake accord has been the Liberals. The reason I think the Liberals have had the most trouble is that they believe in strong central government and they are strong for the individual.

If the Premier (Mr. Peterson) forces through this Meech Lake accord, ratifying it, he is going to alienate the Liberals in this province. Especial-



ly important to him are the Liberals who vote Liberal federally and Conservative provincially. They have swung over to the Liberal side this last time. He might find he is out of a job if he puts through this Meech Lake accord.

I just have to say it.

**Mr. Chairman:** I am sure he will get the message.

**Mr. Harris:** Shove it through.

**Mr. Chairman:** Mr. Eves and Mr. Harris, if no one else, I am sure will carry that forward. Thank you very much for being with us this afternoon.

**Mr. Curtis:** Thanks for listening to me.

**Mr. Eves:** Can we have a written guarantee from Mr. Curtis?

**Mr. Chairman:** We will put it in the revised accord.

If I could then call upon our next witness, Edward Carrigan. Please be good enough to come forward. We have a copy of your presentation which I think everyone has now received. If you would like to lead us through it, then we can follow up with questions when you have concluded.

#### EDWARD CARRIGAN

**Mr. Carrigan:** I thank this committee for receiving a submission of mine on the Meech Lake constitutional accord.

The national government of Canada represents the shared property and the common possession of all 26 million Canadians, and its authority and powers must not be casually expropriated by provincial governments to gratify cynical regional ambitions. Its authority to protect jobs, wealth and collective interests of Canadians and of future generations of Canadians must not be discarded in order to accommodate expansionist provincial ambition and the cowardice and lack of national zeal of the incumbent in the Prime Minister's office.

The national government represents a vital element of the collective strength of the Canadian people, and is a unique instrument of their collective will. Its powers must not be weakened for vicious, transitory political purposes.

**Mr. Chairman:** Excuse me, Mr. Carrigan. Would you mind going a bit more slowly for the interpreter. This is going out all over the province in both English and French. Help us a bit. We have time.

**Mr. Carrigan:** I am sorry. The Meech Lake accord provides for provincial selection of lists of candidates for appointment by the national

government of members of the Supreme Court and of senators. This would represent a fatal diluting of the natural and necessary authority of the national government to assert the national interest against regional rivalries and foreign intervention.

The persons whose names would be put on those provincial lists are precisely those who would be beholden to provincial premiers and would be eager to present provincial demands to the national government, and those demands would almost invariably run counter to the broad national interest.

The proposed dramatic change in the selection of members of the Senate, whereby the provincial governments would have a decisive hand in the process, would result in the termination of the suspensive veto, whereunder the Senate, in the interests of its survival, has for the past three decades discontinued the exercise of its right to veto legislation enacted by the House or Commons.

Under this provision of the Meech Lake constitutional accord, the provincial governments gain a means of vetoing national legislation and would be enabled to intimidate the national government into artificially restraining its legislative initiatives.

Under the Meech Lake constitutional dispensation, the national government would choose members of the Supreme Court from lists of candidates drawn up by provincial governments. This is a morally indefensible abridgement of the necessary authority of the national government. The evolution of constitutional doctrine in Canada in the past few years has moved, in disregard for both popular opinion and the imperatives of our British constitutional tradition, in the direction of strengthening the authority of the non-elected courts at the expense of the elected legislators.

It would be a dire threat to the capacity of the national government to discharge its responsibilities if provincial governments were allowed to influence the appointments of persons to serve on the national Supreme Court. It is my conviction that in the interests of preserving the due authority of the national government, the Meech Lake constitutional accord must be cancelled.

Subordinating the national government to the provincial premiers flies in the face of Canadian constitutional tradition. Following the bloody civil war that preceded the British withdrawal from what has become the United States, the US state governments agreed to transfer some of their authority to a federal government. The state

governments preceded the federal government and on their own initiative had wrested full autonomy from the British government. The British government was replaced by 13 state governments, which then decided to bestow some of their authority upon a newly created central government, which came into being as a result of their initiative.

The powers of a national government, which the Canadian government received in 1867, were not assigned to it by the preceding colonial governments because they were not nations, but colonies. These powers were received from the imperial government in London. Simultaneous with the creation of the national government, provincial governments were established in Quebec and Ontario, replacing the government of the united province of Canada.

Six of Canada's 10 provinces were created by the national government, and Newfoundland was admitted to the Canadian federation. Under the British North America Act, all rights not specifically assigned to the provincial governments automatically accrue to the national government, whereas under the US Constitution all rights not specifically assigned to the federal government automatically belong to the state governments. The primacy of the national government is enshrined in Canadian constitutional practice and should not be diluted now.

Canadians are entering a dangerous period of world history. The US share of world steel production in the 37 years between 1947 and 1984 dropped from 52 per cent to 11 per cent and in other important industrial categories, the United States has suffered comparable declines. The era of a bipolar world, comprising a strong United States opposing a weaker Soviet Union, has ended. In the future there will be several power centres whose strength is equal to or greater than that of the United States. Already Japan, the Soviet Union and the member nations of the European Community have industrial production levels in many categories which are higher than those of the United States. A strong national government will be required by Canada to counterbalance the outside forces which will be brought to bear on this nation by the expanding centres of world economic power and strategic influence.

The drive to divest the national government of its powers does violence to Sir John A. Macdonald's great vision of building a powerful transcontinental nation in Canada from sea to sea. At the constitutional conferences leading to the establishment of Canada, he rejected propos-

als that the provincial governments should nominate members of the Senate. Conspicuously, the Meech Lake proposals contain no recommendations that provincial senates, whose members would be drawn from lists made by the national government, be established.

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Macdonald called for the creation of a strong national government which would be able to counteract the disintegrating trends which had overtaken the American union, as shown in the United States Civil War, in which 600,000 men were killed, being waged concurrently with the early Canadian constitutional discussion. The immortal vision of Sir John A. Macdonald, of a nation developing an empty interior, withstanding US domination and becoming a major world power under the authority of a strong national government, has been vindicated by events. Can anyone say that the vision of Sir John A. Macdonald was a fallacy which now deserves to be repudiated? Can we contemptuously set aside 121 years of continuous progress and plunge our future into uncertainty?

The Meech Lake accords propose to reverse the course of constitutional history traced out by the United States. That nation began with a virtually powerless national government; having seen the error of its ways, it devised a Constitution which provided for a stronger national government. The first US Constitution, the Articles of Confederation of 1781, created a central government almost devoid of powers. That national government could not levy taxes, nor could it borrow money on its own authority. Its revenues consisted of voluntary contributions from the state governments, which were often in arrears.

Under the Articles of Confederation, seven US states were issuing their own paper currency and nine had their own navies. One state, New Jersey, had created its own customs service, while Virginia had felt emboldened to ratify a peace treaty on its own authority. The weak Articles of Confederation made it impossible for the United States to comply with the British-US peace treaty ending the civil war leading to US independence, and the US was denied the right to occupy the western lands assigned to it under that treaty.

Powerful US economic forces—the major banks, the huge frontier land corporations and the large land owners and merchants—found it intolerably unstable that the territory and interests of their nation could not be defended by a strong national government. The US Constitu-



tion of 1789 provides for a stronger national government to withstand the inroads of expansionary foreign powers, to undertake the development of vacant lands in the west and to ensure the universal administration of laws throughout the territory of the United States.

Canada's vital interests require a strong national government. It must guide this nation along a course leading to its becoming one of the 10 most important industrial powers in the world. Canada is the world's most important geographic entity, poised between the five great power centres of the modern world—Japan, the Soviet Union, western Europe, China and the United States. It occupies the world's second-greatest land mass, and its size and geographic position inevitably will attract the greedy attention of other world powers. A strong Canadian national government must provide a strong countervailing influence to foreign incursions into Canada's economy and territorial integrity. The drive by the Meech Lake accords favouring decentralization would make the exercise of such a countervailing influence difficult.

The proposal to choose senators from lists drawn up by provincial premiers guarantees that Canada would be rendered ungovernable and that democracy would be permanently nullified. Under the British North America Act, the Senate of Canada has been granted the authority, which the Meech Lake constitutional proposals do not propose to alter, to veto legislation passed by the House of Commons.

The Senate last exercised this authority in 1960, when it vetoed trade legislation proposed by the Diefenbaker government. But the Senate's authority to veto legislation passed by the democratically elected House of Commons remains unimpaired, notwithstanding its refusal to exercise that authority in the past 28 years. The Senate voluntarily refrains from exercising its veto rights over legislation emerging from the House of Commons. This has spared Canadians the sight of the Senate vetoing laws enacted by the House of Commons, but the Senate's veto rights are only held in reserve, to be revived at the time and manner of its choosing.

Under the Meech Lake constitutional proposals, senators chosen with the active intervention of provincial premiers, whose agendas would inevitably and often diverge from the policies of the national government, would find it intolerably irksome that they could not veto legislation originating in the House of Commons. Premiers craving the right to participation in the selection of senators are hardly likely to be satisfied if their

candidates, after becoming senators, are without the authority to veto laws passed by the House of Commons. The Senate envisaged under the Meech Lake accord would insist upon reacquiring and exercising the right of veto.

The democratically elected House of Commons, under the regime provided for under the Meech Lake constitutional proposals, would find its legislation blocked by a legislative body whose members were not subject to the democratic discipline of periodic popular election. The electorate of Canada would inevitably find that the legislators it has voted into office, the members of the House of Commons, were unable to implement the promises on the strength of which it had elected them.

The people of Canada would find their votes were valueless, because their democratic decisions were overruled by legislators who had been chosen to further the convenience of provincial premiers and were not subject to dismissal at the polls. Democracy under these conditions would be nullified, and the elected members of the House of Commons would be the slaves to senators, answerable to neither the national electorate nor the national interest.

Provincial government participation in the selection of senators would result in the presence at the centre of national decision-making machinery of persons whose objectives are not the pursuit of the broad national interest but the advancement of narrow provincial purposes. This would result in the paralysis of the national legislative processes.

The provincially sensitive senators would find themselves continually vetoing legislation originating in the democratically elected House of Commons because it was displeasing to their ideals, which emphasized the primacy of provincial governments and provincial rights. Endlessly, legislation originating in the House of Commons would be repudiated by the nonelected Senate.

The policy positions of the House of Commons and the Senate would be constantly divergent, since they would be answerable to divergent constituencies and would be subject to divergent terms of office. The House of Commons would be elected by the Canadian people at large, whereas the Senate would be composed of persons sanctioned by provincial governments.

The members of the House of Commons would be subject to replacement every four years, while senators would be appointed until retirement age. Legislation which reflected the wishes of the House of Commons would not

receive the approval of senators, while legislation appealing to senators would seldom appeal to a democratic House of Commons.

The consequences of deadlock between two national legislative bodies is illustrated by the experience of Australia in 1975. The government of Prime Minister Gough Whitlam was unable to get legislation which had been passed by the House of Representatives passed by the Senate of Australia. In consequence, the government of Australia was plunged into crisis, and the Whitlam government was dismissed by the Governor General, although it still commanded a majority of the House of Representatives.

It would be virtually impossible to bring popular legislation out of any Canadian parliament resulting from the Meech Lake constitutional proposals. Canada would be rendered ungovernable, as legislation favoured by the House of Commons was rejected by the Senate, and the values of an unelected Senate comprising provincial nominees were necessarily ignored by the House of Commons.

The purpose of constitutional change in Canada must be to enhance the governance of Canada, not to create perpetual deadlock. The Meech Lake constitutional proposals respecting the selecting of members of the Senate would render Canada ungovernable.

It is a blatant defiance of all democratic ideals and the defensible purposes lying behind the framing of a national constitution that 11 heads of government should devise what is virtually a new constitution in a couple of days of deliberation behind closed doors. It is furthermore objectionable that the process of constitutional change should be confined to the degrading process of provincial governments stripping the national government of its authority and duties, while a pusillanimous national prime minister smilingly presides over the liquidation of the national government which has served the Canadian people so well for 120 years.

The 11 Canadian governments involved in the constitutional vandalism known as the Meech Lake accords were not elected by the Canadian people to devise a new national constitution. The months preceding the notorious Meech Lake constitutional discussions of May 1987 were not marked by intensive debate among the people of Canada about the need for or composition of possible constitutional changes.

Democracy and the urgent national interest require that the drawing up of constitutions be arranged differently. In 1986, Brazil was confronted with the task of drawing up a constitution

to replace the document which the Brazilian army had dishonoured in 1964 with a coup d'état. To draw up this constitution, the Brazilian people were asked to vote for members of a national constituent assembly in November 1986.

The 559-member constituent assembly is slated to complete its deliberations in April 1988, which means that the process of writing a new Brazilian constitution will have taken 17 months and occupied, full-time, the attention of 559 leaders. Already, the constituent assembly has moved towards adopting a parliamentary form of government in which the critical national office will comprise a prime minister answerable to the national legislature.

This would be a departure from the historical Brazilian constitution based on the United States model—and Brazil used to be known as the United States of Brazil for many years—which stressed a strong president serving as both chief of state and head of government. Among the constitutional amendments being considered is one barring foreign ownership of Brazilian industry.

The members of the national constituent assembly were chosen by Brazilians in a national election in democratic fashion, and they were specifically and exclusively charged with the task of devising a new constitution. They were not full-time politicians engaged in writing a new constitution as a part-time activity.

Spain adopted a comparable procedure to devise a new constitution following the death of Francisco Franco, and in 1978 it put the results of these deliberations to a national referendum for popular ratification.

A constitution represents a nation's soul and is the principal embodiment of its collective national purpose. It must be created and modified with scrupulous care and deliberation. Its modification in any significant way must be undertaken only after the most intensive and inclusive national debate. The select circle of Canada's heads of government currently engaged in carving up the national patrimony to gratify provincial lusts must take the Canadian people into its confidence.

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Exhaustive consultation with the mass of the Canadian people must precede any major constitutional change if it can be established conclusively that the Canadian people wish to see their Constitution changed in a major way. Constitutional change must deal with more than the division of powers between the national and provincial governments, with ambitious provin-



cial governments grasping increased authority at the expense of the national government and a compliant prime minister endlessly capitulating to provincial demands.

Constitutional change should press for enhanced political democracy, enhanced social democracy and enhanced economic democracy. To achieve enhanced political democracy Canada might emulate many European nations and introduce proportional representation. This would ensure that the division of seats in general elections among political parties correspond to their respective proportions of the votes received.

This change would prevent the electoral absurdity of the Progressive Conservatives in the September 1984 national election receiving 50 per cent of the votes cast and 75 per cent of the seats at stake. It would prevent a national government presuming to undertake concurrently the dismemberment of the national government through the Meech Lake constitutional accords and the Canada-US economic integration accord.

Future constitutional changes in Canada must embrace full social justice by guaranteeing public financing of at least four major social functions: health care, education, the living costs of children and the living costs of the aged. Canada has moved towards such public financing but much remains to be done. This public financing must be guaranteed in a future constitution. Exactly as earlier constitutions guaranteed political rights, future constitutions must guarantee social rights. Future constitutional changes in Canada must embrace economic justice which would entail guarantees providing for full employment, decent adequate housing for all families at reasonable cost, and in the absence of full employment adequate public income under such programs as unemployment insurance and the Canada assistance plan.

Canada's constitutional discussions must not only deal with the division of powers but also must address much broader issues which contemporary constitutions are designed to deal with. For constitutional change to be expressive of the democratic ideal there must be a direct process of interaction between the national government and the people of Canada whom it is designed to protect and whose property it is.

The proposed Meech Lake constitutional accords would require the approval of all 10 provinces in order to introduce changes in the character, composition and operations of such national government institutions as the House of

Commons and the Senate. This proposal ensures that any future changes in these national institutions would only be possible in the direction of enhanced provincial influence at the expense of the national government, rather than in favour of the strong national government which the vital national interests of Canada will require.

Unanimity in constitutional change is a sure prescription for deadlock unless the change favours the provincial governments at the expense of the national government. Federal systems are successful only if there is a balance maintained between the necessary authority of the central government and provincial autonomy. Constitutional change favouring provincial autonomy at the expense of necessary national authority would be injurious to the national interests.

In the 18th century a democratic Poland possessed a national legislature whose decisions could only be arrived at through unanimous consent. It proved an easy matter for the Russian government of Catherine the Great to bribe individual members of the Polish assembly and thereby prevent the passage of legislation. The problems caused by Russian intervention and bribery led to stalemates in the Polish national legislature and it became an easy matter for Russia to annex large areas of Poland and finally for Russia, Prussia and Austria to divide Poland among themselves and eliminate it as an independent nation.

The process of future constitutional change should not be dependent upon the goodwill of every single one of Canada's 10 provincial governments. This would mean that a single province with only two per cent of the nation's population could veto future change. It is difficult to suppress the suspicion that the framers of the Meech Lake constitutional proposals have introduced the requirement for unanimity for future changes to make their proposals irreversible. This is subversive to the ideal of democracy. They propose to weaken the national government to the advantage of the provincial governments and to render this significant change permanent and no longer subject to modification, which is unlikely to bear the support of the majority of Canadians.

The proposed Meech Lake constitutional accords must be seen in the light of the proposed Canada-US bilateral economic integration accord. This major upheaval in Canada's economy and social structure would massively reduce the authority of the Canadian government by taking away from it control of such matters as curbs on

foreign indebtedness, energy exports and pricing and financial institutions.

With one swift blow, the Canadian government would be surrendering huge chunks of authority to a hostile United States, whose ambitions respecting Canada are inevitably in conflict with Canadian interests and popular opinion. The Meech Lake constitutional proposals would balance the proposed bilateral economic integration pact by transferring authority from the national government to the provincial governments, which have proven much more hospitable to US debt and US ownership.

It is difficult to dismiss these two initiatives as a single package designed to clamp suffocating US economic and political control on Canada. The proposed bilateral economic integration pact would deprive the Canadian government of the authority to oppose US wishes respecting such vital matters as US corporate ownership and energy production and pricing.

The Meech Lake constitutional accord would reduce the capacity of the national government to repudiate the costly bilateral economic accord in the future. The Meech Lake constitutional accord would reinforce the bilateral economic pact and could be seen as designed to produce precisely this effect.

Canada can afford neither of these initiatives. They are both subversive of Canada's critical national rights and of the strong government required to enforce these rights.

Many of us are hoping that at least one of Canada's premiers will rise above parochialism and strike down the Meech Lake constitutional accord and its essential drive of making Canada irredeemably weak and therefore more susceptible to US strategic domination and economic plunder. I hope the members of this committee will consult their consciences and recommend that the Ontario government refuse its endorsement of the Meech Lake constitutional accord.

I thank you for your patience and attention.

**Mr. Chairman:** Thank you very much for your submission. I would just note as well the two articles that are attached to it. I think your focus has been different again, and interesting, in looking at problems faced in the 1980s and looking into the next century. The reference to Brazil is an interesting one in terms of both how it is proceeding and what it is wrestling with, as well as some of the other international references that you make in your paper.

**Mr. Offer:** Thank you very much, Mr. Carrigan, for your presentation. The last part of the presentation talks about process. We have

heard a great many submissions surrounding this whole question of process, the perceived shortfalls, the lack of public input prior to the signatures; I know you are well aware of that. The accord itself calls into play these types of constitutional conferences on a yearly basis, the demand for a process or a framework to address public concern with respect to whatever type of issue might be discussed.

On page 11—and I just want your comment on this—you talk about future constitutional change in Canada and you talk about the embracing of full social justice by the guaranteeing of public financing for major social functions—health care, education—and it goes on to talk about the guarantee providing full employment and decent adequate housing for all families at reasonable cost.

No one would take issue with that, save as to—my question to you is: are those issues, notwithstanding how very important they are, the subject matter for constitutions, as opposed to the Constitution outlining some framework of reference that these are the issues which governments who are seized with those particular powers must address? I would like to get from you your thoughts as to whether they should be the subject of constitutional change, as opposed to something that is very much an issue oriented matter; and if so, why.

**Mr. Carrigan:** I raise that because the constitutional changes proposed under the Meech Lake accord simply address, for the most part, the division of powers between two levels of government. I submit that the Constitution of Canada addresses much broader issues and should address these much broader issues.

For instance, the US Constitution embodies the principle of separation of church and state. I do not necessarily agree with that. The point is, it says that the question of the separation of church and state should be embodied in the constitution.

You can put in a constitution whatever you think is a right and represents a right. The earlier constitutions of the 18th century tended to stress both the reduction of the authority of such things as the aristocracy, the church and the monarchy and political rights, the right to vote and the right to participate in the political process. I think that future constitutional changes must in time increase social rights and economic rights much more than just the division of powers between two levels of government. These are appropriate matters for constitutional change.



I submit that this kind of constitutional change is probably several decades away and it results from the formation or the evolution of public opinion, so that you have a consensus preceding recognition of the embodiment of these rights in the constitution. I think these are entirely appropriate and logical components of any future constitution. A constitution need not just address the division of powers between two levels of government. In many respects it is almost a spiritual document expressing the will and character and purposes of a given nation.

**Mr. Offer:** In your answer you have also answered my supplementary which was to be on the whole question of the evolutionary aspects of this proposal you are making, this thought or vision of yours that this is somewhere off in the future. If that is the case, and without commenting for a moment on whether one agrees or disagrees, surely people are going to demand a framework of reference within the process to deal with these issues where people do input into the agenda for constitutional reform, whatever it might be in the future. As people become more and more aware how their rights and interests are affected by the constitution, so there will be the greater demand for this type of process.

I wonder if you can share with us any thoughts you might have on the type of process that we might want to think about for these types of constitutional conferences, these constitutional agendas for the future, to give greater impact to public input.

**Mr. Carrigan:** The process that has been employed in many countries over the years is that of a constituent assembly, whereby people directly elect people to draw up a constitution. This usually follows some kind of crisis; for instance after the Second World War you had new constitutions in France and Italy and various other countries. Again, in Brazil, you had the replacement of a military dictatorship. You have constituent assemblies whereby people directly vote for representatives whose sole purpose is to devise a constitution.

Actually, I think American state governments have recourse to that and the American Constitution does provide for the calling of a constituent assembly should there be a need for a broad constitutional change, although that has never been exercised in the last 20 years or so. American state governments also have constitutions, with one or two exceptions, and they do have constituent assemblies.

If you are talking about broad constitutional change rather than just sort of incremental

change in a little while, I think that anything short of that would be pointless. I do not see how you can have government leaders, who are not elected after all to frame constitutions, take time out from their work just to draw up a new constitution. It seems to me to be intolerably casual and involves little direct participation of people, particularly when there is no urgent demand for a change in the constitution and there is no evidence of any spontaneous wish by people to change the constitution.

What you have is a process whereby certain provincial governments demand more powers and the central government yields and grants more powers.

**Mr. Offer:** You are saying, with respect to any broad constitutional reform or constitutional change, that people ought to be specifically elected by constituents for that purpose.

**Mr. Carrigan:** We should be looking at something every three years or so or something like that.

**Mr. Offer:** I guess the corollary—or this might not even be a corollary—but an alternative is that you do not see the legislators elected in the way in which we are all elected as having a mandate to embark upon this type of constitutional reform at any level of government.

**Mr. Carrigan:** If you are looking upon broad sweeping constitutional reform, unless again these were issues in the election which led to their selection, I do not see how it could be. I do not think that in any election we have had these as issues. People are not going to say, "Let's go run for or against this person on the grounds of his position on the constitution." There are other issues in the elections.

We are not going to have that change, because there are two things: first, there are broad, sweeping changes, major changes; second, you have a process of future change which, in fact, makes the current changes irreversible except in the direction of greater provincial rights. I think that if you are looking at broad changes, yes, there should be some sort of democratic participation, such as a constituent assembly, which has been broadly used throughout history.

**Mr. Allen:** I want to say to Mr. Carrigan that I appreciate an unusually thoughtful presentation whose range of reference certainly rivals, and may exceed, most of the presentations we have had before us. One would like to have a rather relaxed seminar, I think, around this paper, rather than a few questions back and forth.

I was struck by your emphasis on the relationship between the changing pattern of world power on the one hand, and what that might imply in terms of future Canadian need in our own nation, because that is certainly a perspective which has not been put to us before. It is one I am going to want to think about a good deal.

I gather that you feel very strongly opposed to any move away from what we have historically characterized as a parliamentary system of government and that the devolution of authority, in the Canadian case from Great Britain, is the way in which things properly happen, because it does tend to cluster authority closer to the centre rather than disperse it through a lot of the parts. Is that your overall perspective?

**Mr. Carrigan:** Yes. I believe we should have a strong central government because in the future we will be confronted with many efforts at intervention by foreign nations. You are going to have, in 25 or 30 years, China as strong as the United States industrially. Already Japan produces more than the US industrially in every major category, although it has half the population. That means, in effect, that the capital production of Japan is twice as great. That is not reflected in their military force, one thing or another, but in the future it may very well be.

I can see China becoming as strong as the United States. I can see India becoming as strong as the United States. That being the case, these governments will be tempted to intervene in Canada because we occupy a huge area and a strategic location. In order to provide a counterbalancing influence to this outside intervention, which I think will inevitably come, we need a strong central government dedicated to preserving the national interests of Canada. Any effort to reduce the powers of the national government is offensive, dangerous and irresponsible.

**Mr. Allen:** I presume, from your overall perspective, that you would tell us this matter, the problem with your favoured constitutional construction, has not just simply arrived with Meech Lake, that it probably has its chief initiation in 1980-82, with the new Constitution and the charter.

**Mr. Carrigan:** Yes, that is right. One thing that should be emphasized is that the Canadian Constitution stresses a much stronger national government than the US Constitution, because the Canadian government received its authority directly from the British government. It was not handed to it by the provinces. In effect, it gave the provinces that authority. Two thirds of the

area of both Quebec and Ontario consists of land given to the provinces by the national government from land which it bought, in effect, from the Hudson's Bay Co. In fact, Ontario and Quebec only came into being in 1867, at the same time as the Canadian government came into being.

Therefore, I see the national government as prior to and stronger than the provincial governments and I do not think its authority would be weakened. I think that the ideals of a strong national government and a strong provincial government are compatible. This way, if I want some, say, social reform, I can go to both levels of government. If I get rejected at one level of government, I can go to the other one. By transferring large chunks of authority to provincial government, in effect, we rule out the federal government as a source for progressive social and economic change.

**Mr. Allen:** Given that under Meech Lake the Senate, for example, would still function under the present terms of reference; given that the provinces only have power of nomination; given that the Supreme Court justices will not be appointed by the federal government unless they are acceptable; given that Meech Lake entrenches spending power, which was not entrenched previously; and given that the immigration clauses give the federal government a kind of primacy with regard to overall standards and objectives in immigration, is there not rather more preserved of the federal parliamentary initiative in Meech Lake than I think I hear being acknowledged in your paper?

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**Mr. Carrigan:** No. The provincial governments would have the power in effect to determine who would be members of the Senate. The Senate does have the right to veto legislation and has not exercised that right.

**Mr. Allen:** Under penalty of the withdrawal of the suspensive veto by the Commons or some other more drastic action.

**Mr. Carrigan:** Yes, but this would disappear under Meech Lake, so they would be able to exercise a right of veto over legislation and they would be under pressure to exercise that right from the people who were decisive in determining that they had become senators. The provincial governments would only put on any list submitted to the federal government such people as are friendly to them and friendly to their ideals and objectives. These people would in fact be more concerned with provincial rights and needs



and ambitions than they would be with the national interest.

The right of veto power of the Senate would simply revive automatically, spontaneously, under these conditions and you would have the Senate vetoing legislation. They have done it before. In the 1920s, the Senate vetoed the first pension legislation passed by the House of Commons under Mackenzie King. They did that earlier. This kind of veto would revive under the Meech Lake proposals.

**Mr. Allen:** Finally, is it not true that over time new conditions and new circumstances that the nation finds itself in have a way of asserting themselves over the written constitution itself? I am thinking of the ways in which in Canada peace, order and good government have been differently interpreted and differently used.

I am thinking of the way in which, when federal power appeared to be necessary for the continued expansion of the American economy, for example, and the primacy of federal power, the interstate commerce clause was used as a way of doing that in a way which it had not been exploited for that purpose previously.

Within certain margins of the way in which one frames a constitution, there clearly is quite a bit of latitude that is left to change in time and circumstance, and for other generations to utilize the document. I am wondering whether, in the light of that circumstance, you do not think that Meech Lake stays within a proper frame of latitude which might allow us to move one way or another given the dispositions of given provincial governments or given federal governments but which, none the less, keeps us more or less on track with regard to the potential that we have.

**Mr. Carrigan:** I look upon Meech Lake as a major departure from what is necessary for the Canadian nation. I think indeed there is some truth in what you say. The federal government for a long time had the right to disallow legislation. As late as the 1930s, there was disallowing legislation by the Alberta government. This right is not exercised.

This Canadian tradition can be accommodated without the major changes and indeed the wholesale changes envisaged by Meech Lake. The whole thrust of the Meech Lake proposal is to weaken the federal government in favour of the provincial governments, which I do not think is required at this particular juncture in history. I think we must look at, in effect, framing a constitution for the next 50 years. I do not think that the people who are participating in this process in terms of decision-makers would

reflect the wishes of the Canadian people when they weaken the federal government for the sake of provincial governments.

The provincial governments are strong, and it is right that they should be. If somebody were to suggest that we weaken the provincial government for the sake of a federal government, I would be opposed to it. I want two strong governments, at the provincial level and at the federal level. I see this moving in one direction only, that of weakening the federal government. I think we are in real danger.

What happens with the Senate? What happens when the provincial governments in effect have a major hand in selecting senators? I can see that leading to the continuous vetoing by the Senate of legislation passed in the House of Commons. It has happened in the past. Of course, the Meech Lake proposals virtually cannot be modified because of the unanimity clause and that means that the Senate would be more disposed to veto legislation. I see that as dangerous.

It is quite right that they should modify legislation, which they have been doing for years, but I would be very much opposed to a proposal that would make it possible for them and make it likely for them to veto legislation wholesale, without any danger of this being changed under the Meech Lake proposal and its stress upon unanimity.

So I think yes, we must evolve and we have been evolving and will continue to evolve whatever happens; but we are not just talking about evolution, this is revolution not evolution.

**Mr. Harris:** I also have one supplementary on the Senate. How many senators does it take to veto a piece of legislation from the House of Commons?

**Mr. Carrigan:** It has not happened since 1960. I would assume just a bare majority. I am not certain.

**Mr. Harris:** So it would take a combination of at least 50 per cent of the population of all the provinces whose senators are represented there to agree that they are going to veto a particular piece of legislation before one was ever vetoed.

**Mr. Carrigan:** I do not know how that relates to—the senators would be appointed for life, as I understand it.

**Mr. Harris:** But you are saying they would owe their loyalty to the province that appointed them.

**Mr. Carrigan:** Yes.

**Mr. Harris:** So to get to a veto, given they are there until age 75 probably 60 or 70 years from

now finally all the senators in the chamber will have been appointed or at least have come through this process. For them to exercise this veto, which they traditionally have not done in recent years—but you say it could come back—it would take a majority of the senators. Now a majority of them will not come from any one province, so it would take presumably at least 50 per cent of the population of Canada's senators, who all have a provincial concern, to veto the legislation.

**Mr. Carrigan:** I think the people in Canada at the electoral level to some extent are divided. In the 1970s the people of Quebec voted both for René Lévesque and Pierre Elliott Trudeau. I think they function on several levels. On one level they want a strong central government, and on another level they want a strong provincial government.

**Mr. Harris:** But you accept what I have said, and it would still offend you that 50 per cent of the population of Canada could get together somehow on an issue via their Senate appointments and block a piece of federal legislation.

**Mr. Carrigan:** I would challenge your appraisal that it would be 50 per cent of the people. These people would be appointed to a great extent by the provincial premiers. They are not directly elected by the people as the senators in the US are.

**Mr. Harris:** No, but if I accept everything you say, then for the two senators appointed by the Premier of Prince Edward Island, that Premier has to totally control them and say: "Look, I have made a deal with the Premier of Ontario and the Premier of Quebec"; or "I have made a deal"—not with Ontario but with everybody else, I guess, to get up to 50 per cent—"here is the deal: you all go in there and vote this way because we don't like it." Is that not what has to happen?

**Mr. Carrigan:** The point is that the provincial premiers would tend to nominate as senators people who agree with their philosophy.

**Mr. Harris:** I have said I accept that. I think it would be passing strange if that happens but I have accepted that. They all now are doing nothing but what the premiers tell them. Even though they were appointed by some premier 30 years ago and a new one is in power, they are going to do that. Does it still not take 50 per cent of the population?

**Mr. Carrigan:** I cannot see how the population would necessarily be involved. They would be in office until retirement.

**Mr. Harris:** Can you answer one other question? Why would any government of Canada appoint one of these people if it was convinced that they were there to respond to the provincial premiers? They do not have the right to appoint senators.

**Mr. Carrigan:** They have the right to submit a list and on that list would be people—

**Mr. Harris:** Of course, but if I thought they were going to have a provincial concern, why would I, as the Prime Minister of Canada or the federal government, appoint them?

**Mr. Carrigan:** Because in the end you would have no choice. They would just keep submitting lists again and again.

**Mr. Harris:** That is fine.

**Mr. Carrigan:** But in the end, the Prime Minister would be under pressure to appoint one of the names on the list.

**Mr. Harris:** Why?

**Mr. Carrigan:** There is no reason to doubt that, because potentially that will be their only realistic course of action.

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**Mr. Harris:** Can I ask you one other question? In your Trudeau Returns to the Fray, Newsday, Wednesday, July 8, it states: "Mulroney's Progressive Conservative Party has long stood for provincial rights and foreign imperialism towards Canada, originally British imperialism and now, increasingly, the American imperial vision, which would keep Canada subordinate to the United States in foreign, economic and military policy."

Do you believe it is Brian Mulroney's goal and that his party has long stood for a policy that would keep Canada subordinate to the United States in foreign, economic and military policy?

**Mr. Carrigan:** The Conservative Party, historically from the 1890s on, has a policy of British imperialism, which is one of the reasons the Liberals won the election time after time, and they stood for backing the British imperial vision, I guess I should say. That, of course, has evaporated since Britain is no longer a major power. I think, in fact, the thrust of the Mulroney policies—he says you must give the US the benefit of the doubt; the relationship is more than an economic one—would emphasize Canada's subordination to the United States. That is my interpretation.

**Mr. Harris:** You interpret his desire—because you talk about the free trade agreement; it is not to provide trade opportunities for Canada, it is to



try to get us into a position where the United States can dominate us in foreign, economic and military policies. That is Mulroney's vision of Canada?

**Mr. Carrigan:** I think it is.

**Mr. Harris:** Thanks.

**Mr. Chairman:** Thank you very much, Mr. Carrigan, for joining us this afternoon and for making your presentation. As has been noted, you have touched on a number of issues, and as we are still struggling with answers. We appreciate the time and effort that you have put into your paper. Thank you very much.

Our last witness for the day is Gerry Meinzer, president of the German-Canadian Congress. If you would be good enough to come forward, I want to thank you for being able to rearrange your schedule and come at the end of the day. I should also note that it is always fitting to end the day with someone who comes from such a glorious part of Ontario, which is to say King township, which just happens to be located in my riding. That, of course, bears no relationship whatsoever to the presentation you are going to make, but I feel you have been very good and patient.

We want to welcome you here to make the presentation on behalf of the German-Canadian Congress. We have a copy of the submission. I believe that has been circulated to the members. I will just let you proceed and we will follow up with questions.

**Mr. Meinzer:** I hope it is last but not least. There are such evils as still having to run a company, so when these things get rescheduled it means a lot of rescheduling. It turned out to be quite nice the way it did fit in the end. I am pleased that we could still do it today.

**Mr. Chairman:** Thank you very much.

#### GERMAN-CANADIAN CONGRESS

**Mr. Meinzer:** I represent, as its national president, the German-Canadian Congress. As you know, German-Canadians are the largest so-called ethnic group in this country. I want to focus my remarks on one particular aspect of the Meech Lake accord, which is multiculturalism, because it does not only touch the federal side of the world but also the provincial side of the world.

I need to tell you at the outset an interesting phenomenon that has happened recently and why I want to put so much focus and emphasis, and perhaps even a bit of emotion, into my presentation on multiculturalism. It took a long time,

because of events of the past, events of history, for German-Canadians to be true participants in multiculturalism in this country. If it goes away tomorrow, perhaps nobody in our community would really care all that much. But, interestingly enough, the last official census said there were 1.7 million people of German origin in this country. It is a known fact that immigration out of German-speaking countries is virtually nonexistent. Yet the new census, of which I have just received preliminary results, says there are now 2.5 million German-Canadians in this country.

I mention this at the outset because it is interesting. Finally, people of German origin are confessing that they are of German origin. It is no longer something you need to hide. You can hold your head up with a great degree of pride. If one talks about distinct societies and founding nations, German-Canadians have been in this country as long as anybody else. They are indeed a founding nation. In fact, there are documents, loads of documents, to support this fact.

**Mr. Harris:** Or you are reproducing much faster.

**Mr. Meinzer:** Actually, this is a problem, certainly in West Germany. At their current rate of reproduction, there are going to be more Turks living in West Germany than Germans; but that is their problem.

The problem I wish to address today is the entire issue of multiculturalism. I speak not only from experience as a leader of the largest ethnic group in this country, but also as the immediate past chairman of the Canadian Multiculturalism Council, which fought very hard to get section 27 into our Constitution. I feel rather strongly that, as part of the Meech Lake accord, section 27 will become less meaningful all the time. In fact, it might become totally meaningless.

I feel that if one does believe in multiculturalism as a sharing of cultures in an equal sense, then it is totally hostile to say there is one society in our country that is distinct. Distinctness in the legal interpretation can mean that many things the province of Quebec will undertake, such as educational aspects—and I cite one example in my submission: they could in fact say, "It is important to us, as a distinct society, that your German-language Saturday morning classes are going to be cut out." They would use that "distinct society" provision in the Meech Lake accord to have the power to do so.

My case, to be made today, is that if one truly believes in Canada being a multicultural country, by whatever description you define multiculturalism, one needs to accept that there cannot be a

multicultural country under the definition of multiculturalism when it was first introduced, as a result of the Royal Commission on Bilingualism and Biculturalism, as it was originally called—and later on multiculturalism entered the picture—where all cultures are equal you cannot then say, “Yes, but there is one society that is distinct.”

If one must talk about Quebec as a “distinct society”, I feel it is of no harm to include in the same statement that talks about Quebec multiculturalism—as an equal position, not as an afterthought in section 16, not as sort of a loose proviso in section 27, but right in that first paragraph—to include a simple amendment stating that multiculturalism is part of Canada’s fabric, as much as a “distinct society” of Quebec; where Quebec and Meech Lake are not harmed on the one side and multiculturalism on the other side does not run any risk at all of being treated as sort of a second-class participant in our society.

I feel that the different ethnic communities may have come at this from different perspectives, but ours is quite clear. Ours is not an ethnic issue; ours is a true multicultural issue. There is quite a distinction. It might be subtle, but there is a distinction. When I speak as a leader of an ethnic group, I really do speak as simply a Canadian who comes out of one of these pieces that make up Canada and its ethnic fabric.

I feel this on behalf of my congress, with its own multiculturalism within it. There are Mennonites in it, Hutterites, Danube-Swabians and people who have never in their lives seen Germany or who do not perhaps even know what it looks like. We have finally put this group together under one umbrella, now only to be somewhat undermined by the provision of Meech Lake that says there is a “distinct society” and multiculturalism is somewhere down there.

1700

It is true that in this country, in all western provinces, German-origin Canadians are in second position, not French. I think one needs to recognize that ethnic communities, not just ones of our size, have the right under multiculturalism to be treated as equal partners. As an alternative, I think the policy should be abandoned. I feel rather strongly that one cannot keep paying lipservice on one side to the position that cultures are equal and on the other side very strongly entrench in the Constitution an amendment that says, “Yes, there is one distinct society.”

Mr. Chairman, I know we have been running way late and I would much sooner answer questions you may have. At this point, it

summarizes where we are coming from. All the detail that leads me to this summarization and to my statements is provided in the handout you have before you.

**Mr. Chairman:** Thank you very much, in particular for zeroing in on that one issue. While it has come up at different times, I think you have raised it with particular force and with a particular focus. We will turn right to the questions of Mr. Cordiano.

**Mr. Cordiano:** I certainly have done my fair share of talking on this question as far as our hearings go, and many of the other members of this committee have debated and discussed this issue and asked many deputants who came before us for their views on the whole matter.

One of the things I would like to get your response on, and share with you a view I hold, is the fact that when I look back at the charter, and you and others have pointed this out, there is a shortcoming with respect to multiculturalism in that section 27 really is an interpretative clause in the charter. Since it was fashioned as an interpretative clause, it does not give any additional strength to the whole view or notion of multiculturalism, and in fact perhaps that is the best that could have been accomplished at that time, given the constraints people were working under in trying to draft the 1982 Constitution.

Having said that, I think the Meech Lake accord’s section 16 will not really take anything away from section 27 of the charter. It is my opinion that it does not give anything additional, but it does not take anything away from section 27; it is just a reaffirmation of what was there. I think we are going to have to look at the whole question of multiculturalism, and as a committee certainly we will be.

In fact, when you look at section 2, the whole “distinct society” section, what we are talking about is that this is a fundamental characteristic of Canada—that is, that Quebec constitutes a “distinct society”—but it is only one of the fundamental characteristics of Canada. That is what that section implies. Would you agree with me on that or do you feel that there is some other meaning or interpretation?

**Mr. Meinzer:** I agree with your position; first, on section 16 vis-à-vis section 27, but in the old Constitution accord there was not a discussion at all about a distinct society either. We are now introducing something new that distinguishes one part of society in this country against another, where we have always declared ourselves as equal culturally and being multicultural. Therefore, if one now needs to put a position



into a new constitutional document which says there is a distinct society, there would be an opportunity, and I think a necessity, to at the same time enshrine multiculturalism as part of the fundamental characteristics of Canada.

**Mr. Cordiano:** OK. Having said that, and I agree with you in the tone of what you are saying and the direction in which you are heading, I think it is also fair to say that Quebec was not a signatory to the 1982 Constitution and that there was not a full recognition of Quebec within the Constitution. For all intents and purposes, Quebec was certainly part of the intent of the Constitution, but it did not give its blessing, if you will. Obviously, they refused to participate and did not sign the Constitution Act in 1982. I think this is an attempt to ask Quebecers what in fact they wanted with respect to the Constitution, what they wanted to see as part of the Constitution, to get their support for inclusion in the Constitution and the Meech Lake accord. The result of that is what we see here.

Notwithstanding that view, I think we are looking forward to seeing what we can do in the future, not only on this committee but as Canadians to further constitutional evolution, to further the goals that might be accomplished down the road. This is the first round, it has been suggested. With the provision in the Meech Lake accord for annual constitutional meetings there are going to be further discussions. One of the things I would certainly like to see furthered is the whole question of multiculturalism. I would like to see it, too, recognized as a fundamental characteristic of Canada. I think other people have put that view forward.

Do you think we can move forward with that? Do you think there is enough of an understanding within our country to bring that view forward; and just what would that mean?

**Mr. Meinzer:** It is my conviction that if it does not happen at this point, it is not likely to happen, because while Quebec used multiculturalism quite nicely in the Royal Commission on Bilingualism and Biculturalism to enshrine bilingualism officially and move bilingualism forward at the time, and while it did accept multiculturalism instead of biculturalism in order to get bilingualism, it has never felt a true participant in multiculturalism in this country.

Quite interestingly too, Quebec still to this day treats the other groups as the ethnics. Most other provinces have looked at multiculturalism as it is in Ontario. Certainly, under this government, it has come a long way. But Quebec has never gone in that direction. My position is that as far as we

are concerned, this is the time to put it in. It does not harm Quebec and it is probably the only time we will get it in.

**Mr. Cordiano:** I do not see it that way—

**Mr. Meinzer:** Live in Quebec for a while.

**Mr. Cordiano:** —only because I think there is provision in the Meech Lake accord for our next constitutional meetings. If the will exists to make a change in the Constitution, then certainly a change is possible. Quite frankly, we saw that with Meech Lake. It may come to pass and it may not. The jury is out on that. All 10 provinces have to approve the constitutional package, and who knows if that is going to happen in the end? I would like to see us get Quebec back into the fold, that is a very desirable objective. However, in the future it will not be impossible to have something like multiculturalism brought in as part of that package, as part of another package or indeed alone.

**Mr. Meinzer:** I do believe the objective of this exercise, the Meech Lake accord, is to enhance our national position where all provinces are signatory to a document that we call our Constitution. In the same vein, I think multiculturalism in this country, if one is true to its interpretation, is so important in this Constitution and as part of our national fabric that if we are talking about bringing everybody into the fold, this is our document to bring everybody into the fold. Because Quebec had not signed, this is the time to do it. Whether the will will exist two years from now or a year from now, who knows? I would much sooner see it included as part of this bargain than see it isolated down the line and never get it.

1710

**Mr. Allen:** I appreciate Mr. Meinzer coming before us and laying that one item on our agenda for the balance of the afternoon, because I think it is one of the central issues that has to be debated and discussed in the context of the Meech Lake accord.

At the same time, what concerns me in the discussion is that, first of all, with respect to Quebec and the bilingual and bicultural phenomenon, we have been looking at it in this country for a long time, trying to find ways and means of relating the two poles of the dualism to each other: the English-speaking communities on the one hand, made up of many different peoples and backgrounds; and the French-speaking community on the other hand, which increasingly is made up of people of many different French backgrounds. Parenthetically, there is a kind of

multiculturalism in both poles that is fairly significant.

In addressing that, we have been doing it under a Constitution which has recognized given governmental structures and relationships. We are talking about provinces principally, although we also talk about aboriginal groups in terms of treaty rights and so on. These are all formal entities that have powers within the Constitution and some kind of special arrangements between each other that are laid out in the Constitution. They have specific powers.

One of those provinces happens to be Quebec, where certain provincial powers are given, but at the same time it happens to be the home of the majority of the French Canadian people in the country. That tends to colour everything else. That is the nature of the Constitution.

What concerns me about the multicultural part of the equation is that there is no province which is the residence principally of German people speaking German or principally Belgians speaking Belgian or principally Chinese speaking Chinese. Do you see what I mean? You do not have this connection between the provincial powers as given under the British North America Act and a cultural configuration with language attachment, which creates the unique character of the situation in Quebec.

I am not sure what it means to entrench the multicultural fact in Canada. Does it mean that every province in the country is obligated to have immersion schools in every functioning linguistic community that may be able to make a claim in the province? What does it mean? We have not wrestled with those things. That is the one point at which I am nervous about entrenching any more multicultural heritage rights than are already acknowledged as those we should enhance. Going beyond that makes me nervous in that respect because I do not think there is a national mind that is even near to being consolidated around those questions.

I say that as someone who took a very prominent part in the heritage languages debate. I am a partisan of having heritage language immersion schools in Ontario and full-day programs in the regular school system. I would like to see those things happen, but I really do not think there is a national consensus even close to being formulated around those questions, let alone others pertaining to the multicultural community.

How do you respond to that? I do have a problem. I cannot see our people getting their heads around what it means in so many terms. I

agree with Mr. Cordiano that what we need to have is a round of debate and discussion of a constitutional nature focused on the multicultural question itself, just as we have done with respect to Quebec. I would not be totally pessimistic about that happening. I think it is one of those unfinished agendas and we will have to get to it.

**Mr. Meinzer:** I guess one needs to be very cautious to segregate the linguistic aspect and the cultural aspect. I do not think anybody under the guise or heading of multiculturalism suggests there should be linguistic equality of all these different heritage languages. It is a fundamental fact of this country that we are bilingual. I, for one, personally and more on behalf of my congress, am not setting out to change this; but I am setting out to suggest that we have also stated a policy that says we cannot call ourselves bilingual because almost 40 per cent of Canada's population comes from cultures other than English and French.

One talks about multiculturalism. It means everybody. It means natives, it means you and you and everybody around here. That is multiculturalism. That is compared to ethnics, which says, "There is English, French and there are ethnics." It is quite different. If we do not recognize in our Constitution that all aspects, all cultural heritages are equal, then I do not know where we will recognize it, just as a statement that it is a fundamental characteristic.

That statement might suggest a solution to it. I do not think that my suggested solution to it will for one moment suggest that you must then also offer heritage languages as part of your daytime program or any of that. It just recognizes that culturally, yes, there are many cultures in this country that are to be treated equally, although we recognize that you can teach them only in English or in French, or even in their own language; but officially we speak two languages.

I know there is a fine line, but one must keep that fine line in mind. When one speaks of multiculturalism, it means everybody. By definition, if you are talking about dominant cultures of English and French, whenever you talk about multiculturalism including these two, English and French, where a multiculturalism pie gets bigger somebody else's gets smaller, the slice gets smaller. It needs to be recognized that there is an exercise of sharing and not go the other way around where it says, yes, there is one group that is distinct, and because of its distinctiveness it can take certain rights.

**Mr. Cordiano:** Can I have a supplementary on that? It is a very brief one and very pertinent. I



**Mr. Allen:** Go ahead.

**Mr. Cordiano:** I just want to say that I agree fully with what you are saying. I think this is what Mr. Allen was trying to say. I am not trying to put words in his mouth; I will say it from my perspective.

There is a notion out there among some people that in order to maintain or preserve culture, language is the first and most necessary component of that culture. What that translates into as a structure for maintaining that culture is another matter.

For example, we have had this debate on heritage languages. Should it be a language of instruction? Some would argue that, yes, it should be a language of instruction, which brings it almost into the realm of everyday useage for that language in order to maintain the culture. As an end to try to justify the maintenance of that culture, you try to use language as a tool. There are some who will argue that very vigorously, and I think that is what we are talking about here. We are trying to ask ourselves, what is it that we want to do as a goal, as an objective in terms of multiculturalism?

I would agree with you that we have two official languages and those must be put above all other languages, no question about it; but when it comes to a question with respect to education and using language as a tool for the preservation of a cultural identity, then we get into a whole fuzzy area that is not clear.

I think that is what Mr. Allen was trying to say. I am not sure, but I think that is the view some people hold.

**Mr. Allen:** I guess I was going to go on and ask much the same kind of question. I find it very difficult not to keep language and culture very, very much mixed up with each other. Otherwise, the point you make about Quebec, under the guise of the "distinct society," cancelling German language classes on Saturday morning in Montreal does not mean anything. You might as well learn French and remember your German heritage in French. But then that is a contradiction for me. You need to have something going there and at the language level it has some secure basis. I think that we should be a mature enough country to realize that, given the kind of global world we live in, that is a reasonable project to undertake.

1720

I do not see that we have our heads around just how all that comes together nationally to get it into the Constitution in those terms, but I am terribly sympathetic to having another round that

goes at that question very forcibly and gets us thinking on those lines much more directly than we have done.

**Mr. Chairman:** Before Mr. Meinzer answers that, I know Mr. Harris has a supplementary on the same point. This is a multifaceted question requiring a multicultural answer.

**Mr. Meinzer:** I will answer it unilingually.

**Mr. Harris:** I do not know whether it is anywhere near possible, but I think what you are saying is that you would accept under "distinct society" the supremacy of the French and English languages as it dealt with language. It is a bilingual country; it is French and English. That is number one. But when you talk about culture, it is multicultural. In any dealings that have to do with culture, you want all cultures to have equality. I think that is what I hear you saying.

**Mr. Meinzer:** That is exactly what I am saying.

**Mr. Harris:** I do not know whether it is possible to do it.

**Mr. Allen:** What does it mean? That is my question.

**Mr. Harris:** It means the French culture in Quebec is not ahead of the German culture in Quebec, but the French language is. That is what I think you are saying. I do not know how you do it.

**Mr. Cordiano:** How do you maintain that? Let us have a debate.

**Mr. Chairman:** Mr. Meinzer is going to resolve this whole question in his answer.

**Mr. Meinzer:** In his election pitch in 1984, the current leader of the federal Conservative Party and our Prime Minister stated that multiculturalism is part of what it means to be Canadian. As a Quebecker, he states it very fundamentally in one sentence.

I think recognition has to be given that if one believes, as section 27 suggests—and it is an interpretative clause—that Canada is multicultural, then one needs also to agree that in order for Canada to be multicultural, it has to be a fundamental part of Canadian citizenship. As distinct as our two languages are and as distinct as Quebec is in its linguistic priority, it needs to be recognized in equal terms.

As to what "distinct society" means at this point, there will be interpretations galore and there will likely be lots of rounds where one defines multiculturalism more specifically. As undefined or as defined as "distinct society" today may be, all I am asking is that multicultural-

lism go in at the same level. Alternatively, perhaps one should get off that policy altogether.

It is not good enough to say that multiculturalism is equal to being Canadian and then relegate it to section 27. It just does not work. It is fundamentally hostile to the position that everybody preaches, "Yes, we are a multicultural country;" and at the same time say, "Yes, but our Constitution says there is a society that is distinct." The two do not work.

**Mr. Allen:** I would argue otherwise. It is possible to have a "distinct society" and a multicultural community at the same time.

**Mr. Meinzer:** In my own experience—and I was on that council for four years, two years as vice-chairman and two years as its national chairman—I have wrestled with this problem extensively. It was always a major issue to get Quebec francophones to participate. It was never an issue in Ontario, it was never an issue in New Brunswick, it was never an issue anywhere else; but it is an issue in Quebec, because the Quebec government pushes in a different direction.

**Mr. Allen:** Yes, but at the same time, even though I acknowledge that, I think the fact of the "distinct society" and the French language has also meant a lot for the development of multilingualism and multiculturalism in Canada. I would submit that, in the context of Quebec society, one means not only majority French at the present and in the foreseeable future; one also means a certain history that had been attached to that province, that is part of the memory of that province, and also the existence of the civil code.

Anybody who goes there, whether Vietnamese French or whether from Senegal, has to live within the civil code as the recognized legal dimension of Quebec's life; but that all being there, none the less they have the right to maintain their own multicultural organizations, their voluntary societies without any hindrance or discrimination, to mount their own linguistic heritage programs if they wish and so on.

I do not see that as really counter to, although it may over time change certain elements of the ambience of Quebec society. Indeed, it has: Quebec, as a French-majority province, is not the same today as it was 50 years ago in a whole lot of ways, but most of all in the multicultural dimension.

My sense is that it is possible to maintain equality of multicultural rights at the same time as maintaining the sense that there is a "distinct society" there and that there are two dominant languages in Canada.

**Mr. Meinzer:** I am not totally disagreeing. I am saying recognize it right here.

**Mr. Allen:** But what I am saying, if one were to come back at you and play devil's advocate, is that one could say there is nothing in the Constitution that derogates from a de facto equality of the multicultural communities in Canada, because they all have an existence at a voluntary level. What I do not know is what it means for them to have an existence at a constitutional level. You see what I mean? I do not understand that yet.

**Mr. Meinzer:** I guess my side of the debate is that you are now singling out a distinct society without putting, on the same denominator, the multiculturalism aspect. Because "distinct society" is there by itself, one can then use that to say, "Yes, but under this provision we don't really need to worry about multiculturalism."

I am not disagreeing with you. I am saying let us just anchor it right here and right now while things are on the bargaining table. It is nothing for Quebec to give and it is everything for 40 per cent of this country's population to gain. Nobody is disagreeing, but nobody wants to sit down and say, "Yes, let's say so." That is really all I am asking.

When you look at the ethnic communities in Quebec, and I speak for my own, they did not leave in the René Lévesque days; they learned French. Predominantly English-speaking people left. The Italians are all still up there; they learned French. It has helped to get an appreciation of another language.

**Mr. Chairman:** Just before Mr. Eves asks his questions, if I could just ask members: There is one very brief matter we need to deal with for 30 seconds after we are finished here. Thank you.

**Mr. Eves:** My question has already been answered by the witness. I think he said it far better than I could say it. Basically, what you are asking for is a statement about the multicultural nature of Canada in the Constitution. That is what you would like to see.

**Mr. Meinzer:** Absolutely; plain and simple.

**Mr. Eves:** I do not think there is anything wrong with a little bit of emotion as well as sincerity added to a presentation. We thank you for yours.

**Mr. Chairman:** Mr. Eves, as always, is short, sharp and succinct.

**Mr. Meinzer:** Not distinct.

**Mr. Allen:** Mr. Chairman, would that be the triple S?



**Mr. Chairman:** That is right: the triple S.

I think this has been a particularly useful exchange for us. As Mr. Cordiano said earlier, we have talked about this issue, particularly earlier in the sessions. I think it is interesting to come back to it after having heard a lot of other things about other topics in terms of how they are affected by Meech Lake. I really want to thank you for focusing so clearly and, as Mr. Eves says, for also speaking with feeling and with some passion. I think your experience previously with the multiculturalism council has, as you noted, certainly allowed you to see how this issue is approached in different parts of the province and the country in the different provinces and how we should proceed. We want to thank you very much for coming here today and helping us in this task that we have before us.

**Mr. Meinzer:** I appreciate the opportunity. Thank you, everybody.

**Mr. Chairman:** Thank you.

A very brief question: I need a motion to enable the clerk to pay the chairman's expenses at the conference in Ottawa.

**Mr. Allen:** Sorry.

**Mr. Harris:** See you later.

**Mr. Chairman:** That is what I was afraid of. I wonder if there is anyone brave enough to so move.

**Mr. Allen:** So moved.

**Mr. Chairman:** Thank you, Mr. Allen.

**Mr. Cordiano:** What committee?

**Mr. Chairman:** It was the conference on the Charter of Rights, Canadian Parliamentary Association over the spring break. While others were relaxing, I was working on behalf of the committee. Thank you very much. We stand adjourned, then, until 9:30 tomorrow morning.

The committee adjourned at 5:31 p.m.

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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Pollock, Gloria, Executive Vice-Chairman

McPhedran, Marilou, Adviser

**Individual Presentations:**

Levman, Dr. Garry, Research Associate, Department of Physics, University of Toronto

Charnetski, William

Pearce, Tracey-Anne

Curtis, Donald

Carrigan, Edward

**From the German-Canadian Congress:**

Meinzer, Gerry E., President







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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### Select Committee on Constitutional Reform

1987 Constitutional Accord



**First Session, 34th Parliament**

Thursday, March 31, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, March 31, 1988

The committee met at 9:53 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. We will begin the morning session.

One of the things we all find, living outside of the confines of Metropolitan Toronto, is that it is an adventure every morning to get here. This morning was as interesting as some other mornings, so I apologize that we are beginning somewhat later than we had intended, but that will not affect the amount of time that we will be able to give to each presentation.

Our first witnesses this morning are the representatives from the Business and Professional Women's Clubs of Ontario: the Ontario president, Liz Neville; Fran Morrey, the vice-president; Margaret Jackson, the past president; and Kris McDonald, who is a member. We all have a copy of your submission, so I will pass the mike to you. Please proceed with your presentation and then we will get into questions after that.

### BUSINESS AND PROFESSIONAL WOMEN'S CLUBS OF ONTARIO

**Ms. Neville:** Thank you very much. I am Liz Neville, the president of the Business and Professional Women's Clubs of Ontario. On my far right is Fran Morrey, the vice-president, and on my immediate left is Margaret Jackson, who is actually a past president of our Canadian federation. Kris McDonald is on my immediate right.

Our brief, for us, is reasonably short, and I am not going to attempt to read it all, although I hope you will find the time to do so, because some of the perhaps anecdotal material that we have put in, I think, is very pertinent to this issue; but I will not go over it in its full detail this morning.

I do want to emphasize that the Business and Professional Women's Clubs of Ontario is a co-ordinating organization for about 40 clubs throughout the province, and our membership is a very active group of women in business, in the professions, in technical and in support-level jobs in all sectors of employment. We are, of course, members of the Canadian Federation of Business and Professional Women's Clubs, which has clubs throughout Canada, and of the

international federation, where we have category 1 status as a nongovernmental organization with the United Nations agencies. This gives us the right to speak to some of those bodies and emphasizes the status of our group in the international world.

In Ontario, our clubs in fact go back as far as 1910, and our objectives have always been to improve the status and promote the interests of women in business, the professions and industry, and particularly to promote full and active participation of all women in public life. We have presented many briefs to this government and to other levels of government, including on the issues concerning women's participation in and responsibilities for the administration of law and government. You will see from the length of our history that some of our members will vividly remember the "Persons" case, and in fact were lobbyists for a time in 1928, and the extraordinary measures that were needed for the British Privy Council to overturn the ruling by the Supreme Court of Canada that women were not persons in the British North America Act, or Constitution Act, 1867.

Many of us remember that only eight years ago we participated in the debate about the patriation of the Canadian Constitution and in the extremely important Ad Hoc Conference of Canadian Women on the Constitution, which resulted in significant changes which appeared in the Canadian Constitution Act, 1982. We thought that at last progress was certain and that never again would women's interests be overlooked in framing public policy.

Reality has indeed caught up with us, and although we debated whether it was worth our while to appear at this committee in terms of the process of arriving at the Meech Lake accord, we did decide that it was our duty to record the three serious concerns which we consider will, in the short run as well as the long run, undermine the significant achievement and basic purpose of the Meech Lake accord of making it possible for Quebec to be fully part of Canada. This purpose is too important for the unfortunate ambiguities and omissions of the accord not to be remedied before it is entrenched in the Constitution.

In summary, our concerns are: the lack of a democratic process prior to commitment by the

premiers to the Meech Lake accord, the famous Group of 10 meetings in the middle of the night; the risk of the erosion of gender equality rights provided by section 28 of the Canadian Charter of Rights and Freedoms; and the risk of the erosion of equality rights under section 15 of the charter. You are very familiar with why we have this concern. It is basically because of the combined impact of section 1 of the accord and section 16 of the accord.

I want to assure the committee that these first two concerns have been identified in consultation with our membership across Canada, through president Gertrude Demecha of Kamloops, British Columbia, who is our national federation president. I have also personally discussed these issues with Germaine Bolduc, president of the Quebec BPW Clubs, l'Association des clubs de femmes de carrière du Québec.

#### 1000

We emphasize that the Canadian federation is fully in support of section 2 of the Meech Lake accord and recognizes the importance of these provisions to Canada's national unity. I must admit that the Quebec president does not perhaps fully share the urgency of our concerns, but she fully supports our efforts to clarify and confirm that gender equality rights will not be eroded in any way anywhere in Canada by the entrenchment of the new section 2. Obviously, we all wish this to be accomplished in a way that is acceptable to Quebec and will preserve the essence of the accord, which I believe were your words, Mr. Chairman.

The third issue we are concerned about arises out of our experience of presenting briefs, to both the federal and provincial governments, which have relied on the development, encouragement and maintenance of specifically defined national standards. I am referring to the ambiguity of the accord's provision with respect to federal shared-cost programs, and particularly the term "national objectives," which will determine the payment of federal funds to provinces under future shared-cost programs.

I will comment first on our concerns about the lack of democratic process, which I summed up in my head in the course of preparing this brief: good intentions are not a foundation for the unity of the nation.

The first two paragraphs on page 3 point out that we in fact have felt well served for many years by the efforts the Ontario government has made to involve us and to create an open, participatory process in looking at issues and making legislative decisions. In May 1987, we

were certainly assured in our minds and really rather proud of Premier Peterson's role, as we understood it, in facilitating the negotiations to ensure that Quebec could accept the 1982 Constitution Act.

I must admit that at that time of the year, and especially last year when we were planning to go to a conference of our international organization in The Hague, we perhaps did not fully look into the accord in the first place, although we did note, and were rather puzzled, that clause 16 was added to the accord in a hurry. This certainly alerted us, but not sufficiently at the time, to the implication that somehow the accord would otherwise take precedence over these charter rights and therefore possibly override others.

When we returned to Canada, it was very distressing that we were indeed alerted, through our Ottawa club alarmingly so, to all the excellent briefs that had been put together by some of the national women's organizations, including the Canadian Advisory Council on the Status of Women. We were dismayed at the way these briefs were being treated by the federal committee. Our Ottawa club in fact reported that the joint committee of the Senate and the House gave a cool reception, on August 20, to the brief from the Canadian advisory council. Our faith was still that, with proper consideration and time, Ontario could be persuaded to slow things down and give due consideration to reasonable opinion.

We came back, of course, to an election campaign. We were reassured by Mr. Scott that there was no intention on the part of Premier Peterson and the Ontario government to endanger the equality rights of women or anyone else. He promised public hearings, which certainly did come through and are happening.

Having read the Hansard record of the presentation of the motion, we were very aware of the Premier's apparent unwillingness to really undo the accord at this time and to indeed have any further slowing down of the process. I have quoted from Hansard some of the remarks that were made on that occasion.

In summary, our feeling about all of that process is we recommend that this select committee report back that it is not in the national interest to force the upholding of the accord by Ontario without further consultation by the Premier of Ontario with all the first ministers, to review all the concerns which have been debated since the accord was signed and became subject to this public debate.



Specifically on equality rights, turning to page 5, we do indeed consider that there is a serious and egregious risk of erosion to gender equality rights provided in section 28 of the Canadian Charter of Rights and Freedoms, and the risk of erosion of equality rights under section 15 of the charter if the Meech Lake accord is not amended.

We have explained before the basis of our concern, the conflict between clause 16 and clause 1. We have read the legal arguments which have been presented to the joint committee and to this committee, and particularly refer you to the presentations of Professor Beverley Baines and Professor Mary Eberts.

In addition, we would like to bring to your attention our own reading of some of the explanations about these two sections. I particularly noted that Mr. Scott said to the motion in the House that clause 1, which is section 2, "does not override the Charter of Rights....it is subordinate to the charter." In her paper on this point, in discussing whether anyone considered that section 2 overrides the charter, Professor Baines noted that Professor Hogg, whom I believe has advised this government on this matter, could have been said to have made that statement too, but he qualified it somewhere later on, and she said that he thought, "... he might be better interpreted as meaning that the charter—"

I think I have misquoted the statement. Would you give me leave to check that statement because I do not think that is the point I am making?

The fact was that Professor Hogg's opinion did qualify his remarks that clause 1 would override the charter. In fact, our original purpose in quoting Mr. Scott was to contrast his statements with those from correspondence with a representative of the federal government, and I apologize that we have that sentence in two places in the brief.

Our Canadian president, Gertrude Demecha, received a letter from the honourable Barbara McDougall dated October 14. Mrs. McDougall is the minister responsible for the status of women in the federal government. In Mrs. McDougall's reply, it was indicated that, in the course of the past four months of discussing the impact of the accord, it had become evident that the accumulation of the body of test cases before the courts will be extremely important to the understanding of the effect of the charter. However, she was able to come to the conclusion that she was convinced that the important rights established under the charter are not diminished by the accord, and quoted the joint Senate and

House committee in saying that the accord builds on, and does not undermine, the achievement of the charter.

Mrs. McDougall emphasized that the "duality" and "distinct society" rule will not override the gender equality rights, or vice versa, and that they will be read together with other constitutional values in any charter analysis by the court in any cases under section 2.

#### 1010

Our problem is, how can we be satisfied with leaving the uncertainty about which of these responses is the valid response and how the courts will in fact interpret our legitimate concerns in future? Therefore, we urge that the Meech Lake accord be amended so as to ensure that section 2 of the Constitution Act will not affect the equality rights of the Charter of Rights and Freedoms.

On our third point, on the shared-cost programs, we have mentioned our various presentations to the governments, particularly on education, training, and of course child care. We have also made presentations on the need for national standards for workers' health and safety.

In all of these areas of provincial responsibility, our concern has been that there shall be comprehensive national programs in support of these essential requirements and that they be backed up by funding across Canada. We do not rule out provincial autonomy, but we are facing the reality that provincial priorities across Canada, even in Ontario, do not always coincide with agreed-upon social needs, especially of women.

You are familiar with the provisions of section 7 of the accord. The last part of it is, "if the province carries on a program or initiative that is compatible with the national objectives," then it will receive compensation from the federal government. There is tremendous uncertainty in several of the terms in this clause, and we are particularly anxious that the word "objectives" be clarified by using the word "standards" and that standards be applied and have to be complied with before federal compensation is made to programs. We urge that the term "national objectives" with reference to federal cost-shared programs be replaced or defined to ensure that compensation depends on compliance with "national standards."

Thank you very much.

**Mr. Chairman:** Thank you for a very clear presentation and specific recommendations. While there may have been a problem with a couple of lines, the point was clear. If you simply want to send us a revision of that paragraph, that

is fine; I think we understand the point you were trying to make.

I wonder if I could begin the questioning by asking if you would expand on one point in your brief. As a provincial committee—and I suppose this is going to be a problem for all provincial legislative committees dealing with constitutional change, now and in the future—we are going to have to develop some meaningful process. A provincial committee which is dealing with a national issue perhaps cannot travel and perhaps should not travel to all parts of the country. That may be more appropriately the role of the House of Commons and the Senate.

One of our difficulties has been trying to figure out, in terms of all of this discussion, what many of the comparable groups and organizations in Quebec feel about some of these issues. You have mentioned in your brief discussions with the national level of your association and also with the Quebec wing. Without presuming that you can speak for the Quebec body, of course, I wonder if could you share with us how you evaluate its concerns or where perhaps there are nuances or shades of difference. I think it is very helpful to have the statement where you note that they support the efforts to clarify and confirm that general equality rights will not be eroded in any way anywhere in Canada. Is it that they think this can be done in a different way? Are there any particular points there that you could share with us in terms of differences of approach?

**Ms. Neville:** It is rather difficult to answer the question because of the way this came about, with tremendous pressure from the Quebec government, which in fact originated the proposals that were accepted, with some changes I am sure, by the other premiers. Then immediately the accord was reached, Quebec went back and discussed with some of the public, including some women's groups, I believe, and rushed this through the National Assembly, at which point I think our clubs in Quebec, even more so perhaps than in Ontario, felt: "Great, that is done. Quebec will be in. "Federalism is extremely important to some of them—it is important to all of them, I would say.

They are fortunate in Quebec in having a very progressive state of affairs with regard to the status of women. In fact, they have often led the way. On the other hand, things are not perfect in Quebec. Certainly with respect to our own women's groups, Germaine Bolduc was quite clear, on the basis of the brief she had seen from the Canadian Advisory Council on the Status of Women, that if there was this degree of concern

about equality rights, one could not be sure, and it was in the best interests of indeed all women in Canada, including their group. Although they hoped against hope that it would not be detrimental to them—and that if it was it perhaps could be dealt with at a later stage—they are nevertheless very concerned that it might be so.

**Mr. Chairman:** So the bottom line remains that if there is doubt and there is a way of clarifying that doubt, then let us do it.

**Ms. Neville:** That is right.

**Mr. Chairman:** And there would be no difference of opinion over that.

**Ms. Neville:** Right.

**Mr. Allen:** I appreciate the fact that the Business and Professional Women's Clubs of Ontario have devoted such careful thought to the subject, that they have a very intense line of argument going in the brief that steps through in a very presentable kind of way. I appreciate your concerns. As the chairman has indicated, we on the committee have all been seized of the process problems around all this and we are determined to try to do something about them. I will let that go at that.

I certainly have no problem with asking the Premier (Mr. Peterson) to do one more round with the other premiers to check out whether there is not some consensus developing after a number of months among his colleagues around some of the issues that have been raised and debated at some length.

I want to make two points and ask you about two matters in your brief. First of all, let me go to the simplest one; I will come back to the equality question. The question of spending power and shared-cost programming and so on has been a very difficult one, I think, for a great many people to get their heads around. Obviously, we have in this country an immense attachment, which certainly I share because my party had a good deal to do with the origins of some of those social programs, to the Canada assistance plan, the Canada Health Act and a whole range of programs out there that undergird the health and security of people in our country. We cannot under any circumstances compromise those, so I take your concern very much to heart.

I think what has perhaps given undue concern about that issue is that there seems to be an impression that somehow the federal government has been relatively free in the past simply to propose programs, to move with national standards and to bring all the provinces along as though that were a matter very much taken for



granted and to ignore the fact that, first, many of those programs have begun initially in provincial jurisdictions; and second, have only over time been negotiated into national programs through the agency of the federal government.

**1020**

I think what the accord tries to do, in fact, is strengthen the federal hand rather than weaken it. I will put that proposition to you. It confirms for the first time that the federal government has a right to spend money in areas of exclusive provincial jurisdiction. Without that, every movement of the federal government into that area would be contestable in the courts. Now there is a beachhead; there was not before. There was money there to attract people, but there was not constitutional authority, really, to use it in that domain.

I note that when you quote that section of the accord, you do, perhaps by an oversight, leave out that phrase: "in an area of exclusive provincial jurisdiction." Unless you have that in, the whole point is missed as to what the accord is all about. Would you respond to that, please?

**Ms. Neville:** Yes, on that last point, it is a point which personally I am absolutely familiar with and therefore did not see any need to include, because obviously we would not be talking about this—at least I did not think we would be talking about this—unless it was a question of the federal government operating in areas where the provinces have jurisdiction.

**Mr. Allen:** Exclusive jurisdiction—

**Ms. Neville:** Exclusive jurisdiction.

**Mr. Allen:** —because there are other shared areas where they have jurisdiction but the federal government does too; they are in the same area together. This is different.

**Ms. Neville:** I do understand the point you are making, that this clause gives them leave to provide funds in those areas. I still think, though, looking at the child care situation in particular, that it is very important that the national standards be set. Otherwise, the money could be going to provinces which are supporting very inadequate and very poor programs in fact.

You may well say that something is better than nothing, but without going into any details, I could say that sometimes something is worse than nothing. I would not like to see our moneys moving in that direction. Above all, where there is a cost-sharing program, our main concern on a Canada-wide basis is that the federal government should have the clout of that money to raise the standards across Canada.

**Mr. Allen:** I certainly agree with that. I would submit that the case you have mentioned, that of child care, is a case of a government which is not prepared to set national standards or even objectives that are meaningful in any real sense of the term, and I think that even under the strongest kind of language you would want, you are still not going to be able to use it to persuade a federal government which is reluctant to set standards or to set objectives. It is simply a boundary beyond which they cannot pass, that is the language you are looking for.

**Ms. Neville:** Perhaps it is more the case that we would not agree with the standards it would set. Maybe that would then be debatable in setting those standards. The word "objectives" is very loose and is not used, for example, with respect to the immigration clause in section 3 of the amendment. It is standards and objectives we are talking about there for sure, built, in the Meech Lake accord.

**Mr. Allen:** Does it give you some assurance that the Canadian Council on Social Development, which has declared its interest in moving into new fields of national shared-cost programs, has written as follows in a brief to us: "We maintain that the concept of national objectives can be employed to ensure clarity of direction and purpose, as well as public accountability of governments, while not undermining program development, administrative flexibility or creativity"? They have given us four rather substantial paragraphs on the content of national objectives.

**Ms. Neville:** Mr. Allen, I think the point is that I would agree with that, that it could be. I am in the human resources field myself, and the word "objectives" can be very valuable in determining what a program shall be about and so on, but I think our requirement that this be more explicit, that it be indeed more detailed, as I think the Canadian council is expecting it to be, is actually defined within the documents. This springs from a lack of trust, which has been undermined in the process of establishing the Meech Lake accord itself.

**Mr. Allen:** Our concern in this whole exercise is what reasonable interpretations have been placed on language and on words. To me, the Canadian council's assurances give me more security than I had before with regard to that language. That is certainly a point I wanted to make.

**Ms. Neville:** I hope that you and they are right.

**Mr. Allen:** On the equality question, may I just simply observe that it is always interesting to

compare the statements of politicians involved in events. You can always find those nuances that you have found in a very interesting series all the way from "not diminished," "does not undermine," "will be read together," "does not override," "subordinate to;" but when you take it all together, I would submit to you that the reason for the confusion in the language is that there is no certainty in the charter itself. So when you ask for a charter override, you are really asking for a document to override which, in itself, allows for a whole series of diversions, if you like, from the equality principles of section 15.

Even in section 15 there is the affirmative action section, too. Then there is section 1 with regard to what is reasonable in a free and democratic society, the legislative action which may be used to balance off rational assertion of right. There is section 33, the overall "notwithstanding" clause. There are the clauses that have to do with aboriginal rights, multicultural rights, that have to do with denominational schools' rights—the whole series in there which can lead in a number of directions and which are weighed in alongside the equality section. I would submit to you that the reason for diversity in the language is that the charter itself has a variety of options within it for balancing legislative and judicial concerns around the question of rights.

Is that at all a persuasive argument for you?

**Ms. Neville:** No, I am afraid it is not, Mr. Allen.

**Mr. Allen:** OK, tell me why, please.

**Ms. Neville:** We are aware, and I agree with Ms. McDougall's remarks that there is still a lot of jurisprudence to happen with respect to the charter.

**Mr. Allen:** Certainly.

**Ms. Neville:** But the equality provisions of the charter and section 28 of the charter, the gender equality rights, I think are the absolute basic principles of statements of rights. Of course, we are anxious to see how the courts interpret these in the event, and so far we have been reasonably well pleased, especially with the Morgentaler decision. But to create further uncertainty by suggesting that those rights are not the principle still to be applied to the clauses of Meech Lake, particularly to section 1, is just a travestition of all the thought that went into shaping those equality rights and gender equality rights of the charter, and I would not like to see them called into question at all as being applicable to the Meech Lake accord, in the same way as the premiers rather late in the day—in fact, not until

after the first signing—thought it necessary to include sections 25 and 27. If that is necessary, then certainly section 28 is necessary, and preferably section 15 as well.

**Mr. Allen:** I would submit that section 16 was a mistake.

**Ms. Neville:** That is another possibility, but we have got it.

**Mr. Allen:** You see, my only point is that the argument is that Meech Lake somehow goes backwards, and I think if you look at the charter itself, the same arguments can be used about the charter as are used about Meech Lake. The problem is not in the Meech Lake accord. Thank you very much. Those were very interesting remarks.

### 1030

**Miss Roberts:** Thank you very much for coming today with your excellent presentation and making very briefly three points that we have heard on many occasions and bringing your own particular slant to them, as well as your own expertise.

I want to continue on from what my colleague has been saying with respect to the rights that are in the charter itself and your comments, your determination of the importance of having sections 28 and 15 in section 16. When you were looking at the Meech Lake accord and when you were reviewing it, you were aware of the many different types of rights that there are in the charter. There are the legal rights and minority language rights. I think there are some education rights as well. There is the general section in which you have those areas that are dealt with under sections 25 and 27, multicultural rights and aboriginal rights.

To clarify in my mind your exact position on this, what is the best way to deal with this problem? I will give you three. Your answer can be four, OK? Take out section 16 of the accord; add to section 16 sections 15 and 28 of the charter; put somewhere in the accord that the charter prevails, the entire charter, or something like that. Which is the best way to deal with that? Which will achieve what you consider to be your recommendation 2? I will leave it at that right now.

**Ms. Neville:** I appreciate that you have asked us to be specific. I would say that the bottom line is to ensure that section 28 prevails within Meech Lake.

**Miss Roberts:** Over what?

**Ms. Neville:** That section 28, the gender equality rights, overrides section 2.



**Miss Roberts:** So that is your bottom line? You think that is the most important thing?

**Ms. Neville:** That is the bottom line. If it could be achieved by taking section 16 out, that would be fine. If it could be achieved by section 28 being included in section 16, that is another approach. Preferably, we would like to see both sections 15 and 28 of the charter, the basic rights and freedoms and the gender equality rights, clearly override section 2.

**Miss Roberts:** You are not concerned about any other rights in the charter that would not be mentioned.

**Ms. Neville:** The basic individual and group rights in the general rights of section 15 are very important. Speaking as a women's organization, section 28 is as important to us.

**Miss Roberts:** My other question very briefly is with respect to the process itself. You mentioned the lack of trust and that you were not involved in that negotiation, or someone was not involved on behalf of women. Have you thought about the process? Because the charter itself has some problems which we all know about, as we hear what the Supreme Court says those problems may come to the fore much more than we anticipate right now.

One, how are we going to make this process work in a democratic society as we see it in the 1980s and the next century; and two, if Meech Lake does not go, by what process do we get Quebec in?

**Ms. Neville:** You are talking about the future.

**Miss Roberts:** I would hope the future, yes, because that is what we are looking at. Meech Lake deals with the future and not the past. What process can we follow?

**Ms. Neville:** Do you want to speak to that part, Mrs. Morrey?

**Mrs. Morrey:** Yes. My name is Fran Morrey. I am a provincial vice-president of the Business and Professional Women's Clubs of Ontario and come from Hamilton.

We are speaking about trust. I am a recent convert to this particular brief, and one of the reasons I am a recent convert is that I see a lot of déjà vu out there. I remember the previous government and the current government stating—we have copies of correspondence with them—how the funding of the separate schools would affect our communities and ourselves, and this was fine. In my political naïveté, I believed them, and then the Supreme Court came along and said, "Oh, no, this is excluded." This is my problem: I believe you people; I really do.

**Miss Roberts:** We even believe ourselves sometimes.

**Mrs. Morrey:** I do believe you, but five years from now there is a remote possibility that none of you might be around. There is also a possibility that the whole tenor of rights can change. All kinds of things can change in the next five years and into the next century, as you said. This is what our concern is, that if it is not specified and not open to interpretation by the courts, we feel we are protected.

As a women's group, and our mandate is for women, this does not mean we do not care about other people and other things, but we are one of the few groups that is basically interested in women. This is why we are here today. This is why we feel so strongly that this should be entrenched as a basic right and to say that it is for the future that we are doing this.

**Miss Roberts:** I ask you to put your mind to the process, because the Constitution is not something that is going to stay static. It is going to change.

**Mrs. Morrey:** It is not supposed to.

**Miss Roberts:** We have just started. How are we going to make it a democratic process? That is all I would like to hear your comments on, because you have been involved in this for a number of years.

**Ms. Neville:** The thing is that Meech Lake, and any constitutional accord, should not be signed by government executive people before the contents, the proposals and the conclusions have had public airing. We saw this happen in the process of what became the '82, the '92—no, 1982; I am always concerned that I am in the right century when I am talking about the Constitution acts. We saw that process open up. It very nearly did not, but as women, and through the ad hoc committee which follows us, were able to gather the women of Canada together to open up that process to women in particular, with some very good results from it.

I see no reason why the premiers needed to sign that accord in May or in June without first bringing it back for discussion to their legislatures and having full and open discussions about what their conclusions were about the way to go. They were obviously persuaded, between May and June 6, by somebody who got to know, around the aboriginal rights and the multicultural rights provisions not being well enough protected. I know some people say, "Oh, yes, but it is obvious that duality and 'distinct society' have impact on aboriginal and multicultural

concerns." It is also clear to us that women, 50 per cent of society, also have some very special cultural aspects of their ways of thinking and so on.

It is possible to present these for discussion. I know we do not like green papers and so on; we prefer white papers. But there is room for discussing. I cannot imagine a process that will continue where the executive group makes these decisions and then comes back and says: "Here you are, folks; sign it." I do not know how you, as members of the Legislature, can tolerate being presented with this without prior discussion with you.

1040

**Miss Roberts:** The question is very simple. That process is not wrong; it is allowed under our system. I am asking you to put your mind to that process; you do not have to answer today. You people have the resources, the background and the training, and you have all the creativity to look at a process that we can either put in the Constitution or through provincial legislatures. You can do something to make sure that this process, executive federalism or whatever you wish to call it, does not continue.

But it is not disallowed by our Constitution. We only look at it because we are saying it is not democratic. Although you cannot answer today, it is important that you look at that process. I am just asking you, as an institution, as a group, that you come up with something. Every year—it is frightening—we might be back here doing the same thing. What they did is not incorrect. It is not legally wrong.

**Mr. Harris:** She did; she said come back and have hearings, because they had six weeks before they finally had to sign it. I agree and it is deplorable.

**Mr. Chairman:** I think there is no question that one of the items that has come up, apart from the substantive issues in the accord, has been the whole question of process. In response to your mention of how we as legislators feel, I think we are involved in a situation which, if you like, was developed beforehand, and we are trying to deal with it as best we can. I do not think anyone would want to do this again in this way.

I think you made a point about building in the discussion prior. There are a number of different ways that could be done. Obviously, that is critical. However we have done these things in the past and however constitutional or legal—because that is the way we have done it—they may have been, clearly that will not work any more. I do not think our system could maintain

any credibility if people felt continually that they did not have a say somehow.

I think people are quite prepared to accept it if, at the end of a fair and democratic process, their view is not accepted. At least one feels one has had a kick at the can. I think one of the things we as a committee have to do is make recommendations around questions of process so that whatever other constitutional discussions we get into or whatever amendments are proposed, there is a clear, public, participatory part of that process. Obviously, first ministers are going to keep meeting. Ministers will meet. Organizations and groups meet. Sometimes those are in private and I think that is a fair and necessary part of the system as long as these other elements are there.

One of the things we are wrestling with is how to define that, how to describe what would be an appropriate process. Hopefully, in our report on that aspect, there may be some things we can say which will stimulate discussion and help us evolve that. That does not deal specifically with Meech Lake here and now, but we know there will be other constitutional amendments down the road and we are going to have to be better prepared to deal with them.

**Ms. Neville:** I certainly appreciate your remarks in summing that up, Mr. Chairman, and the gentleman to the right.

**Mr. Chairman:** Mr. Harris.

**Ms. Neville:** Miss Roberts, I assure you that we realize the process was not illegal. I have gone as far as I can at the moment, and we will, in future discussions of this, if we have any more ideas, certainly bring them back to you. The point is that it cannot go on in the future, as the chairman was saying.

**Miss Roberts:** Very much so, I was just trying to encourage you. I understand your position. I am hoping you are not saying to me, "All we want to do is have something like the Meech Lake accord come and then we will have public hearings each time." I think you want to be involved in that process.

**Ms. Neville:** Exactly.

**Miss Roberts:** That is what I wanted to hear. Thank you. I understand your position.

**Mr. Chairman:** On behalf of the committee, thank you very much for joining us this morning. Your brief, as we have noted, is very clear, very specific. As we move through the hearings, we are very much aware, particularly in these areas, of the clarity of the point of view of many of the women's organizations and individual women



who have come before us. While we may have heard some of this before, it is always presented with a somewhat different focus, and because the group is different the background is different. I think that is very helpful in ensuring that we understand that position. We appreciate your being with us this morning.

**Ms. Neville:** Thank you, Mr. Chairman.

**Mr. Chairman:** I next call upon the representatives of the Ad Hoc Committee of Women on the Constitution (Ontario); Daria Kiperchuk, Linda Nye and Nancy Jackman, if they would be good enough to come forward.

**Ms. Kiperchuk:** Good morning.

**Mr. Chairman:** Good morning. I believe we have circulated a copy of your presentation. If I might ask you to proceed with your presentation, then as usual we will follow up with questions, comments and thoughts and try to share—

**Ms. Kiperchuk:** Would it be possible to have a little bit more water?

**Mr. Chairman:** Yes, absolutely.

**Ms. Kiperchuk:** This is thirsty work.

**Mr. Chairman:** The thirstier end of the table; we will take that back and get it refilled, if you want to give us just a second.

#### AD HOC COMMITTEE OF WOMEN ON THE CONSTITUTION (ONTARIO)

**Ms. Kiperchuk:** Thank you for taking the time to listen to us this morning. With me today are my colleagues, Linda Nye and Nancy Jackman. On behalf of the Ad Hoc Committee of Women on the Constitution (Ontario), we appreciate the opportunity to present to you today the problems Ontario women have found in the Meech Lake accord and the reasons we count on you to accept the challenge of helping us to fix them.

The Ontario ad hoc committee is an umbrella organization of women's groups representing over a million women in this province, including teachers, nurses, black women, women of ethnic origin, disabled women, francophone women; the list goes on. We all care about this accord.

We first formed the ad hoc committee in 1981 to ensure women had a strong voice in the 1981 constitutional process, and specifically to ensure that our equality rights were clearly written and well protected.

We were successful then in making some essential changes, but we had to reactivate the committee last summer, once again to protect the Charter of Rights and Freedoms from risk, this

time from the constitutional amendments proposed in the Meech Lake accord.

We want to start today by saying that every Canadian who cares about his or her rights and the protection of his or her rights understands the meaning of the word "notwithstanding." We use the word this morning to state clearly and unequivocally that notwithstanding anything we will say to you today, anything we have said or anything we are reported to have said, the women of Canada support the intent of the Meech Lake constitutional accord. We are in favour of bringing in the government of Quebec as a signatory to the Canadian Constitution.

However, there are serious problems with the way the Meech Lake accord attempts to do this. It should not be ratified as it now stands; it should not and it must not. We can afford a better accord and today we are here to tell you why.

The Meech Lake accord puts the Charter of Rights and Freedoms at risk and it does not have to. For women, any risk is too much risk. The charter is too important to our future for us to stand by and let this happen.

Only in the charter is there protection for our equality. Only in the charter will you find clear statements to the courts that this country will no longer tolerate discrimination on the basis of sex and that women have a right to affirmative action programs that redress years of holding us back and leaving us out.

Is it any wonder then that the charter is so precious to us? Is it any wonder that so many of us have given over so much of our lives in the last nine months to make sure that the Charter of Rights and Freedoms is left untouched and intact? However, we cannot do it alone. We need your help, and we believe that you can and should make the difference.

#### 1050

The accord must be revised to read that nothing in it will abrogate or derogate from any of the rights and freedoms guaranteed in the Charter of Rights and Freedoms. It seems a small change to ask for 52 per cent of the population. The charter holds the promise for women of a future where we will have full and equal participation and opportunity, where we will not have to put this kind of energy into arguing for the right to take part in shaping our Constitution.

But that is the future. Today we are told by our first ministers that they did not intend to put our equality rights at risk, but that they do not intend to make sure they are not at risk. In fact, they do not intend to let any Canadian, other than themselves, touch the accord.

We object strongly to this. We object to the efforts our first ministers have made to exclude us from the constitution-building process. We object to the preconceptions and limitations that have been forced upon the public debate of this important document and we lay the responsibility for this right at the feet of the Premier (Mr. Peterson) of our province and the Prime Minister of our country.

We remind Premier Peterson of his promise three years ago that this government would be open and accessible to the people of Ontario. He made that promise to us on a beautiful sunny day in June 1985, at a picnic on the lawns of Queen's Park. We trusted the Premier then and we trusted him last summer when he told us that if the accord put any Canadian's rights at risk, if it put equality rights at risk, his government would not pass it into law without the essential and appropriate changes. Where did that sunny day and that solemn promise go?

Now the Premier appears to be breaking that trust. He has changed his mind and proposes to pass this accord with no amendments allowed. Having secured a majority, the Premier is justifying his dictate of no changes to the accord by pronouncing the risk to women as infinitesimal. He has decided that it is acceptable to leave equality rights at some risk as long as he feels it is not too much. What is not too much risk for the Premier is far too much risk for the women of Ontario.

**Ms. Jackman:** Prime Minister Mulroney has no trouble putting our equality rights at risk either, and even worse has used nothing short of tactics of intimidation to silence public participation. To disagree with this accord is not to be anti-Quebec, no matter how often Mr. Mulroney may try to link the two. For our Prime Minister even to suggest this, and more to suggest that the smallest change would cause the whole deal to unravel is to cut off Canadians from our right to take part in the constitution-building process.

In fact, we argue that unravelling is exactly what we need. Let us look at this word. It is a knitting term. Let us look at why and when we unravel and exactly what happens when we do. First of all, we unravel to correct a mistake, a slipped stitch, a wrong stitch, a forgotten colour change or some mistake in the tension. We go back only as far as the mistake, fix it and then carry on, building on the good part.

When do we unravel? Before we finish. We would never finish something with obvious flaws and then try to figure out how to repair it later. What happens when you unravel? Is it chaos? Do

we end up with wool all over the floor and do we lose track of what we were working on and forget our original purpose? Absolutely not. We do not change the purpose of the piece, the colour or the texture. We just unravel to get rid of mistakes and make it better. The term should not frighten any of us any more than "knit one, pearl two." We invite you to do some healthy constitutional unravelling with us.

Peter Hogg, a witness to this committee, told you that the process used to create this constitutional accord was flawed and must never be allowed again. He and a few others as well seem willing to tolerate this for the sake of getting an agreement, any agreement. We are not. We think that for a document this important the process itself must be right.

In 1981 and 1982, there was a massive lobby by women to protect our equality rights by adding section 28 and strengthening section 15. We put our hearts, souls, time and our money into that lobby because we knew then what we still know today, that a constitution can and should make a difference to my life and to our lives.

In 1982, we celebrated. We had all taken part in shaping our Constitution and we were hopeful and proud. Indeed, we thought we had ensured the beginning of real and full equality rights for us, for our daughters and for our granddaughters, for our nieces.

Yet here today, six years later, none of us are celebrating. None of us have had the chance to be part of this Meech Lake constitutional process. Indeed, we have been told to leave it alone and accept what has been given. And the result? We have been put at risk. We have been given a Constitution that puts our equality rights in a less clear and a less hopeful position.

We were always taught that a constitution is our country's statement of values, that a constitution in a democratic country clarifies and strengthens human rights, that a constitution protects people in the conduct of their daily lives.

I am proud and Canada is proud of its international leadership role in calling for the protection of human rights in other countries. Yet in our own country, our first ministers ask, and indeed insist, that we stay out of the process and accept without complaint a Constitution that clearly weakens our equality rights; accept a constitution that offers us confusion instead of clarification, risks instead of rights; and accept their promises that, "Everything will be all right; trust us."



However, even the most worthy politicians are not in office for ever. In fact, only two of the 11 first ministers involved in 1982 are part of this constitutional amending process today and two of these men have already moved on in less than a year, taking their promises with them. It is not promises that our politicians must leave us with but a strong and clear Constitution that will endure much longer than a term of office.

We believe in a democratic process of constitution-building and in our democratic right to shape the decisions that shape the future. Since this is not happening, we believe that together, women and men will put a stop to this undeniably undemocratic process.

But bad as it is, it is not just the process we object to. The substance of the accord shows the evidence of too hasty consideration, too hasty a process, and too small a group of Canadians to see the problems being created for those of us excluded. We are the ones to identify the problems and the risks that the accord holds for us. No one did this for us, but you could do it with us.

**Ms. Nye:** First, you must believe us.

After Lowell Murray listened to the presentations of women's groups at the federal hearings, his response was: "We have heard from the women. Now let's hear from the experts." But we are the experts. We are the experts in our lives and have always been. Now we are the experts in how laws and political decisions affect our lives. But every time we tell our political representatives where the risk is and where the problems are, they move the yardstick.

The Attorney General (Mr. Scott) insists that no witness to this committee has yet given an example which his ministry has not already examined and already dismissed long before these hearings commenced. Until someone succeeds in hitting this target of something new, we are told that the Premier's dictate prevails.

## 1100

Mary Eberts illustrated in her presentation to this committee this constitutional doublespeak and gave a brief history of how legislators have kept moving this target on us. For nine long months, women's groups have been trying to hit these targets. Examples have been developed only to be dismissed as unlikely or unreal. Expert legal opinions have been researched, written and made public only to be dismissed as not expert enough. Yet have we seen even one of our governments subject its written legal opinion to similar scrutiny?

We wonder what is going on here. A political decision seems to have been made to put at risk the equality rights in the charter and to make equality seekers absorb that risk. It seems, we are told, that it has to fall on someone's shoulders.

In November 1981, nine premiers and the then Prime Minister, Trudeau, unilaterally imposed an override on rights in the charter. Women successfully defended section 28 from that encroachment. Only six years later, through a side-door, and supposedly without intent, 11 male leaders have again decided to expose equality rights to risk and to offer up annual kicks at a constitutional can as their assurance of justice for us.

Examples are not the arrows needed to hit this target. There is no hypothetical which can change this political reality. There is no expert who can change this. That is why in writing our brief, we decided, "No more examples." If you want examples, we refer you to our legal opinion, written by Mary Eberts and John Laskin, two constitutional experts, and to this committee's transcripts. In particular, we refer you to the example in your transcripts of subsidized language training for recent immigrants. We invite the Premier and the Attorney General to go beyond omniscient dismissal and actually explain why our examples are unreal.

It is not just Lowell Murray who is denying our expertise. Our politicians, federal and provincial, still believe they can and should do it for us. Thus we get assurances when we raise our concerns. We are assured by some that we are wrong and that there is no risk to equality rights, by others that there is some risk but only a little risk, and are comforted by still others that it is not that much risk, even though a Constitution is supposed to clear up risk and protect against it. We are assured that we need not worry because the worst will never happen, even though a Constitution is supposed to protect us when it does.

We have a right to a Constitution that clearly states that equality rights have the same status and the same protection as other constitutional rights. We have a right to a Constitution that clearly states that no amendments will infringe upon the rights and freedoms guaranteed in the Charter of Rights and Freedoms.

When women cannot get what is right through the political process, we are forced to turn to the courts. Once again, we are put at a grave disadvantage because the court process is very costly for women, not just in money we do not have but also in the time and energy it demands.

Our courts are still not as accessible or as accountable to us as they should be. They are not a comforting alternative for us and they are not the alternative we want.

Canadians deserve a good Constitution. We deserve a better one than we got in 1982 when Quebec was excluded. We deserve a better one than this accord offers in 1987; and we can afford a better accord.

An open process will give us that. We still have confidence in the system of government that we have worked so long and so hard to improve and safeguard. Representative democracy has many built-in difficulties and you know that better than anyone in this room. You are all elected MPPs. You do your best to represent the views of your constituents and when you do not know what they think you ask them. When you are not sure you know what they think, you ask them.

You ask them if it is all right to put a stop sign here. You ask them if it is all right that a Hydro line go over there and if the Ontario Egg Producers Marketing Board should have more or less power. We have many ways for lawmakers to open themselves up to the voice of concerned citizens and to take that voice into account.

As Canadians, we cherish our democracy. We cherish an open and accessible relationship with our political representatives; and constitution-making, we believe, is the most important work we can do together.

You have the chance to carry to the Premier and to the Ontario Legislature the clear and strong demand for amendments to this accord that people from all over Ontario have been presenting to you, and thus going a long way towards addressing today's cynicism towards the political process.

This is an opportunity few politicians get and we urge you to use it wisely. It is a unique opportunity to turn this around and strengthen the process of nation-building by standing with us to demand that the accord reflect more than just the first ministers' vision of Canada.

We are calling on you to champion the democratic process, to turn this undemocratic process around and to ensure that the needed revisions to this accord, revisions that would fully protect the Charter of Rights and Freedoms from risk, are made with us and not for us.

We would be happy to take questions now on our position and our feelings about the accord.

**Mr. Chairman:** I think one of the points you raised related to experts. If I can underline a fact that you undoubtedly know, this committee is not

a committee of experts. It seems to me that one of the important aspects of our political and democratic system is that many times, as elected members, we are called upon in some way or other to assess information, evidence or whatever, and ultimately make a decision.

I think it is fair to say that the experts may well differ on many aspects of an issue, and somehow, out of all of that, we have to sift through and in our own way try to find out what is the—not necessarily the truth, although that is part of it—the right and proper thing to do and the right and proper route to follow. While we accept that experts are important and are very helpful, I think I can underline that we do appreciate and realize that there is a lot more to a constitution than the view or the views of this or that constitutional expert, however good he or she may well be.

We can begin the questioning with Mr. Breagh.

**Mr. Breagh:** I think we may actually be getting somewhere for a change, after the end of a very long process; and that is kind of hopeful for me. I watched Pierre Elliott Trudeau dazzle the old folks in the Senate last night. I am not for a moment afraid to say that his vision of Canada and mine are, I hope, very different, so I am not concerned about that and I am not concerned about expert opinion. I represent about 77,000 experts on a wide variety of items from hockey to football to fishing. You really cannot get caught in the process of listening to what the experts say.

What I look for always is a consensus beginning to build around a particular issue and a clear way to go. It is not going to be a way that pleases everybody, but there is a consistent analysis of what is wrong with something and what you might do that in a very direct way would correct that. I think we are getting there. One of the problems I have encountered with this agreement is that it is all over the place on you. It is difficult to put a focus on what is wrong with this thing.

#### 1110

I think one of the problems that members of the committee have had has been, frankly, that people come in and say there are 95,000 things wrong with the Meech Lake accord and, as practising politicians, we are going to say we have never fixed 95,000 things at one time in our lives so that is an impossible task.

I want to make reference to a presentation that was made yesterday by the human rights commissioner here in Ontario. For whatever reason, he seemed to crystallize this argument about the Charter of Rights and Freedoms and to



point to a solution which was at once, not simple, but direct. It seems to me that is what we need. We have talked, for example, about referring this matter to the courts and the problem is we cannot quite get agreement on whether that is a workable thing, on what it would look like, on how you would do that and whether it would really resolve the problem.

Yesterday he took several arguments from different groups, wove them together nicely around the question of whether the charter gets slaughtered by this accord or not, and pointed to a way to rectify that situation. I do not know whether you have read what he had to say to us yesterday, but I would ask you to do that because I think it had a bit of an impact on me that I was looking for. I want to get your comments on what I spoke about, the array of problems that people have presented to us. I think that has been one of our major difficulties; you cannot come in and say this thing is all wrong and these guys are all nuts. They may well be all nuts, but they are duly elected nuts and we have to contend with that.

What we are looking for is the consensus about what precisely are the major problems in this agreement and what precisely we can do, as a legislative committee, that would rectify that. We have seen a couple of groups now begin that process of building the consensus about where the major errors are and what precisely we might do as a nation, not just as one little piddly legislative committee, but what can the country do that would rectify the serious problems that we agree are there in that accord?

**Ms. Nye:** I think I would like to first start answering you by going back to this question of experts, because I think one of the points we want to make is that when we are talking about expertise, we are not talking about constitutional experts; we are talking about women and their knowledge and understanding of their lives, and their ability to recognize when a document is going to cause problems for their lives, this is the kind of expertise that is missing in the political process right now.

To answer your question about what do you do when a document is this bad, I think you have to address two things. You have to address the reason this document is so bad, and that sends you back to the process. I think that tells us all very clearly that this is not the way to build a constitution or to amend a constitution. It tells us very clearly that we do not know how to do that yet and that we have a big job ahead of us to sit down together this time and find the ways to do constitutions and to make them constitutions that

really reflect both men and women's vision of the future. So I think that has to be addressed.

I know, for example, that there has been the suggestion of a royal commission put to you. Whatever kind of study makes sense, I think, it has to happen and then the expertise of women has to be involved in it. Addressing this document right now, I think it is important, out of those 95,000 problems, to focus on what the courts are doing with the laws that are handed to them. I believe what we see now is a shift in the courts to where they are really trying to balance values. Therefore, for us, that is why it is so important that it be clear that there is an equal balance between constitutional and cultural rights and the rights in the Charter of Rights and Freedoms.

From our perspective, we would say that addressing that balance, and making sure that at least is clear, would then give the courts an opportunity to define the charter, which they have not even begun to do yet—they certainly have not begun to do it with the specific sections that are the guts of our equality rights—and to allow them then to address the other parts of the Constitution and the constitutional amendments that have been put to it.

The only thing I would add to that is I think, as well as addressing that, I would come back again and say that none of this should be done without the other half of the population. We have not been able, in the last 10 or 20 years, to redress the imbalance. The figures before us show there is still 700 and 800 years before we are equal in Parliament. Many of us do not expect to live that long and we do not want to wait.

**Mr. Breagh:** I may not even do that myself.

**Ms. Nye:** We would like our governments to start inviting us into the process rather than going to such Herculean efforts to keep us out. So we would not like to see this document passed at all, even with one of the 95,000 mistakes fixed, without sitting down at the table with representatives from the women's community.

**Mr. Breagh:** Let me pursue this just a bit. One of the things, in my experience anyway, that makes the political system go wrong is that when you let the politicians sit in splendid isolation and be very wise, that is a really dangerous thing to do. Of course, that is precisely what happened in this instance. In private session, 11 men decided to do something. You would not allow a rezoning to happen in any municipality in that manner, because what we have is that the process is then reversed. We now try to have a series of public hearings where we gather information and

opinion and try to sort that through and decide what to do.

In my view, if we would only let the normal parliamentary process work, we could salvage this. That is to say normally, if we were dealing with a piece of legislation, we would hold public hearings, we would move amendments, a parliamentary committee would consider whether this is right or wrong, how to fix it if it is broken, how to leave it alone if it is not. We would take it back upstairs into the chamber and 130 people would take a look at it.

We are struggling as to whether or not we can do that. I think that is a fair assessment of this committee's point of view at this moment. We have heard what the Premier of Ontario said. I did not go to the picnic on the front lawn, but that was just good taste.

**Ms. Nye:** Take our word for it.

**Mr. Breagh:** So we are struggling with the political reality. I think it is true, if this committee can identify the things that are clearly wrong with the accord, and more than that if we can identify the things that clearly require corrective action, and we have a consensus that is what we ought to do, the saving grace in this is that there is a political system at work, that 11 people could not go and change the Constitution of a country in private. They do have to bring it back through legislative chambers. People will have to vote. Whether David Peterson says there will be a free vote on this or not, there will be people upstairs—I am convinced of it—who will analyse whether this is good or bad, and some will say, "It is so bad I cannot bring myself to vote for that." So we are trying to put some balance in that.

Just in closing, I would encourage you to look at what the Ontario human rights commissioner had to say to us yesterday and to analyse carefully one of his solutions. One of the problems we have had is that people can come before us with a range of concerns all over the place, but they are not really sure about exactly why all of this nervousness is in them. They cannot really point to one thing and say, "If you went in that direction, that would resolve my major concern."

I would have to say, in personal terms, there is a lot in the Meech Lake accord that I could care less about. It does not bother me one whit, nor anybody whom I represent. But there are some things in there that leave me with some rather nagging concerns about whether, wittingly or unwittingly, some great evil will befall somebody who means a lot to me. That is what gets my ears up. I am not really worried about the

Supreme Court or the Senate or a whole lot of other things that are dealt with in there. As I must have said on a number of occasions, I do not share a whole lot of concerns and do not even want to have an argument about objectives or national standards or any of that kind of stuff.

There are some things in here that get my political ears in tune to something wrong. What I am searching for now is the consensus on precisely what is wrong in this agreement and just exactly what we should do that in a clear, straightforward way would rectify that. That is where you can help us.

**1120**

**Ms. Nye:** I think that if you went back through your transcripts, as I am sure you will all have to do, and if you take a close look at the presentations you have had from women's groups, you are going to find an incredible amount of consensus. We have not given you the exact wording, because that is what does have to be worked out by experts and that is what has to be worked out with the experts from a feminist perspective as well.

I think there is much more consensus around some of the major clarifications that this document needs than may even be apparent to you, since you have had the onslaught of everything coming at you about everything day after day. But I believe if you look through the women's presentations, you will find that we have looked through much of it through the same eyes and we have mostly the same concerns about what this document is going to mean for us, and further for Canada and for the nature of the government in this country.

**Mr. Offer:** Thank you very much for your presentation. I agree with you very much with respect to the fact that if we went back over the transcripts, we would certainly see a consensus evolving. There is no question about that.

I want to carry on with the line of questioning that Mr. Breagh has opened up, and it revolves around process. I use the words of your brief. In your brief, you have used the words "in the public debate," "the limitations," you talk about Canadians being cut off from the constitution-building process; you say that the process itself must be right; you talk about a democratic process and an open process.

Can you share with us some framework of process? You have taken me right through your brief saying: "The process is not good. The process has to be changed. We need an open process. We need public participation in the process." You take me right to the edge and you



do not help me with what type of process, especially from your standpoint, because you and your groups have been involved in this for many years.

Have you directed your mind to taking that next step and saying here is a framework we suggest might be workable to meet the particular criticisms that go right through your brief?

**Ms. Nye:** I think the reason that you do not see the answer and the framework is that we do not believe we should be creating it without you, any more than we believe that you should be creating it without us. It is such an incredible question to ask how a country is going to build its constitution and build in an amending process that we certainly have strong feelings, most of them centring around not doing it without us.

You see before you our ways and means of being involved at this point. We spend our evenings, we spend our weekends, we struggle with these documents. Our legal advisers, our friends who suffered through law school and got to the end of it, sit down with us and say, "This is the problem, we think." We put that all together and we work as hard to understand this document and the problems as you do, but we do it all in whatever time we can get. Actually, there is not an awful lot of time left over to build a framework for constitution-building as well.

Even more so, we believe that is a job we still have to do, but in there somewhere there has to be a way built in that invites women into the process now, despite the fact that we do not hold even close to an equal number of seats in the legislatures, even close to an equal number of seats in the senior bureaucracy or at any of the decision-making tables.

**Mr. Harris:** We are in that position as well.

**Ms. Nye:** Well, we are not going to work for you.

Interjections.

**Mr. Harris:** You could dominate; the whole Legislature could be female and you would not have been involved in the process.

**Ms. Nye:** Yes. What a thing to have to say about the government.

**Mr. Harris:** I am sorry but that is the case. There is not a single MPP right here who did not want to be involved, and none of us were.

**Ms. Jackman:** If every single MPP in this Legislature were female that would include the Attorney General and the minister responsible for women's issues, although that might be the same person, at the time of signing such an

accord at least she might be a little more responsible than the incumbent at the time.

I would like to respond a bit to your question on process. What is going on here in a way is a process of reflection on what has gone on before. We have done a lot of that in the evenings and on the weekends—hiring babysitters and taking child care for friends so they go off to meetings and so on. But reflection always leads to action. If you are hamstrung as Mr. Eves—

**Mr. Harris:** Mr. Harris.

**Ms. Jackman:** —Mr. Harris suggested this committee may be, then it is a real problem.

**Mr. Offer:** I hope Hansard picks that up.

**Ms. Kiperchuk:** I think it would be fair to say that this is a learning experience for all of us in the country. I personally would have felt easier if the first ministers had come out of that meeting with some suggestions for a blueprint for process and offered it back to the House and said: "We are in the process of developing a new Constitution. It has only been repatriated for a very short time and we would like to consider changes, but first what we need to put down is how to go about achieving those changes."

They could have come back with a blueprint for us to look at. Instead it was like building a building and having a different architect design every floor. You wonder if the stairwells will meet up. No one has a sense of how high it is going to go.

**Mr. Offer:** Here is my problem on this aspect. Since the charter, since 1981–82, more and more people have become aware that the Constitution, the charter and court decisions will have the potential to impact on their lives. Your last response was this blueprint for change.

**Ms. Kiperchuk:** Process.

**Mr. Offer:** That is exactly what my question is. My concern is not so much the blueprint for change but rather if there is a blueprint for change, how is it going to plugged into a process so that change can be commented upon, studied, reflected upon and questioned as we are doing right now?

I think as time goes on, it is going to be the responsibility of each province to have this type of framework. They may all be different but that is another problem. In Ontario I think that is certainly going to be a responsibility which we are going to have to come up with, because this Constitution is going to be changed and reworked as time goes on and it evolves. We have to have some framework so we can obtain input when people come in and say: "This is how it affects

me. This is how it impacts upon me. This is why I like it. This is why I don't like it. This is what I want you to keep in mind when you issue your report before the blueprint for change becomes change."

It all goes back to my initial comment that we are going to be grappling with the whole question of process, what is required and what we sense is needed. We are going to have to have your help and that of other groups to learn what you think is the framework that should be built.

1130

**Ms. Nye:** Yes.

**Mr. Offer:** If you can suggest some things, and I know you are suggesting not just for women's groups but for all groups, for all people to come forward, to be a part, to meet the concerns and the criticisms that have run right through your submission.

**Ms. Nye:** At this point in time, I do not see how our recommendations could be any more specific than to say, "Obviously, there have to be representatives from the provincial legislatures and the federal Parliament and from at least a number of the municipal councils as well because the Constitution eventually touches us right down on the street and in our homes."

Then I think you would have to look to the community and you would have to build a representative group, so that the major interest groups and women—and we do not consider ourselves an interest group—were sitting at the table with you and struggling as equals to come up with a process that allows us to design a constitution that takes us somewhere, that takes us towards the kind of country we want.

Further than that, I honestly do not think it would be appropriate, because I believe it would be like falling into the same trap as somebody else going off and figuring out how to do it all. I do not think any of us, all by ourselves or in our own particular communities, have the answers. I do believe that today, when things are so big and so complex and move so fast, the best we can do is to sit down at the same table and come as close to what makes sense and is right and good for all of us; and then go with it, test it out, watch it and take care of it.

Another thing is that it has to be something that is consistent, constant and regular and that we have to do it; that we not just do it once in 1987 and then come back in 2087.

**Mr. Allen:** I do not know who wrote this brief but I must tell you this is probably the most

articulate and eloquent statement, I think, we have.

**Ms. Nye:** Women wrote that brief.

**Ms. Jackman:** Experts wrote it.

**Mr. Allen:** It is a marvellously drafted piece of work. Whoever has got those kinds of skills is probably going to make a tremendous impact somewhere because this is great language. I compliment them on it.

**Ms. Nye:** We had a lot of passion moving us.

**Mr. Allen:** I can tell that. I think the extended analogy on unravelling is marvellous. There are a number of things going on in the brief as a whole that I would like to be able to get into, and obviously I will not. The purposes of constitutions: are they to frame ideals or do they simply define structures that we can all work with and go about promoting our ideals, one with another, in order that the community can advance in a wholesome and healthy way? There are two very different approaches to constitution-making historically, and a lot of implications in which one you accept in terms of your philosophy.

**Ms. Nye:** It is probably one of the main questions that we would have to address before we could go any further on how to build one.

**Mr. Allen:** Yes, precisely. You raise the question of risk. I do not think that my sense of a constitution is one that is going to guarantee us against risk. I think that any way we go there is risk; any language we use there is going to be risk. I do not think we ever define reality sufficiently so that there is no risk in the document.

If I could extend your analogy, the problem is not someone knitting and being able to go back to an error. The problem is you have 11 different people knitting the same document and none of them entirely agreeing where the error is or how much they have to unravel in order to get back to that error and what the consequences are or whether any one of them will continue to knit his part of the document or his part of the fabric.

I wonder just what your assessment is of the consequences of not going ahead. I do not take seriously all that is said on that front but I suspect that if English Canada, broadly, does stop the document for whatever reason, whether it is the good stuff you are giving to us this morning or whatever it is, Mr. Bourassa has got a reason to become very defensive and to go to his public. He is going to have to escalate the issue in order to counter the opposition in Quebec and the hue and cry. I have been there recently, I have asked some people about it and I think that will happen.



What is your assessment of the risk and what is your bottom line over and against that alternative scenario of, for example, us at the end of the day coming out of this with no accord and all of Quebec still not affirming the Charter of Rights, which you and I think could have a great impact on people in Quebec as well as in the rest of the country?

**Ms. Jackman:** It is quite clear that there is always some risk. There would even be some risk if the whole of the charter was in the accord. It is one reason to wait and see what the Supreme Court is going to do with cases before it, like the *Andrews* case, the *Canadian Newspapers* case and other cases.

The ad hoc committee has consistently and always said that we are in favour of bringing Quebec into the Constitution. We have never asked for the scrapping of the Meech Lake accord. We have asked, as we have stated on page 3 of our brief very clearly, that nothing in it will abrogate or derogate from any of the rights and freedoms guaranteed in the Charter of Rights and Freedoms. That is how I would respond.

What Mr. Bourassa has to do in Quebec, he needs to do in Quebec. We are the ad hoc committee in Ontario and it is to you that we appeal. It is your and our political environment whose needs we need to meet primarily, knowing that we also want to bring Quebec into the Canadian Constitution.

**Ms. Nye:** I do not think we would see the best scenario as one in which, say, a province like Ontario suddenly stands up and says, "We will not pass this document." I think what has to happen now is that the same people who created this have to hear what is being said and have to go back to the table. They have to take the positions of women across this country, and there are a lot of women in Quebec, maybe some of them a little fearful of blowing their own community apart because to be pro-accord has been put on such a delicate level publicly, but there are many of our friends in Quebec who are standing with us and who in fact have not had a hearing process, some of whom would have even come to this committee just to be heard.

It is not that we see a province, and an English-speaking province, rising up and saying no and cutting this off at the knees. We see the need to be heard, the need for a legislative committee like this to go back to the Legislature, and particularly to go to the Premier and the senior bureaucrats and senior ministers involved, and say: "This is not acceptable. You will have to work out together with the other premiers who

agreed to this in the first place what you can now agree with. Then you can come back."

That will deal with the major problems at least and, hopefully, would also be the beginning of some kind of royal commission or suggestion or recommendation about how we are going to go about constitution-building, other than with this kind of trial-and-error process. This is the worst kind of trial-and-error process, because they get to try and we get to suffer the errors. We are not even allowed to say, "Well, you tried and here are the problems."

We cannot believe that they would come out with this document and not call it a draft. We would never sit down, even if we stayed up all night—and we have stayed up all night with this document—and say that what we came out with in the morning was anything more than a darned good draft and that what we want now is to have some input to help us make it better. We are saying that the English-speaking provinces need to take that message back through the premiers, bring them together again and do it right this time.

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**Mr. Allen:** What would you think of a process which entailed the Legislature of Ontario passing, alongside the Meech Lake accord, not formal amendments but a series of companion amendments, which we then would refer to the other legislatures of the country and pass an order of reference which would draw together representatives of all the legislatures in Canada to emphasize the political importance, the extreme urgency, of the central points in the companion amendments?

Then maximum pressure could be placed upon the premiers to look at this once again, and if they did not they would see the writing on the wall politically with respect to the absolute and critical urgency of doing it all in the immediate future in the wake of the Meech Lake accord. If that turned out to be the way it played out, how does that scenario—

**Ms. Kiperchuk:** Are you suggesting the accord would be ratified with the companion resolutions that you speak of?

We have acknowledged that the process is bad and that is reflected in the document. In *Fathoming Meech Lake*, which is the title of Bryan Schwartz's book on the Meech Lake accord, he talks—I do not know if anyone has had the opportunity of reading this. We looked at even presenting it, but I think it would have taken too long. It is an excellent, in-depth study of the accord. Bryan Schwartz is a constitutional

expert; in fact, he was a consultant to the government in Manitoba.

I just want to read to you a little part of his book, when he makes reference to the whole notion of looking at the accord in the second round. He says: "It requires disingenuousness or incredible naïveté to pretend that serious defects will be remedied during the 'second round'" and "No one, however, should be satisfied with an agreement to 'look at' defects in the 1987 accord in the 'second round.' That would be like pleading guilty in a criminal case because you think you might win the appeal."

To me, that is what you are suggesting when you talk about presenting a companion resolution. You are suggesting that we go ahead and hope that we can win the appeal. I think we have been very clear in saying that the reason we are looking at a flawed document is because the process has been bad. We must put a stop to this kind of process, and the Meech Lake accord should be revised to read that nothing in it will abrogate or derogate from any of the rights and freedoms guaranteed in the Charter of Rights and Freedoms.

**Mr. Allen:** What I am suggesting is that the process is initiated for the future by this kind of technique. It is live and it addresses the issue. I do not buy Bryan Schwartz's totally pessimistic scenario, but that is a matter of opinion, I guess.

**Ms. Nye:** From our point of view, it puts us further back and at further disadvantage because one of the problems we have with the Meech Lake accord is that it gives tremendous powers to provincial governments. One of the problems we have with the Meech Lake accord is that it sets up almost a third level of government and one that, if anything, is even more distant from us as women in the community.

We would be in the position not of getting one honourable premier to stand up and be honourable, but of getting all 11 first ministers in most cases to agree to what we are arguing for, when at least one of them probably is going to be responsible for the problem that we are coming up against. We are assuming that at least one of them wants some of this and, therefore, is not going to be the premier who is listening when we come forward and say, "Remember we said that this was a flaw and you said that after you passed it into law you would look at it and readdress it?" Our problem of convincing them becomes elevenfold more of a problem for us. We would probably have to spend holiday weekends as well as all the other weekends and probably have to

give up jobs which are at risk now anyway. It is just abhorrent to us.

We think the worst thing that could happen now is that you pass into law a bad law or a bad series of laws, a bad document, a flawed document. It is far too dangerous as far as we are concerned, and we have no confidence that at that constitutional conference our voice will actually be as strong as it needs to be. We do not even know who is going to be around the table at that constitutional conference and what happens when the promises made today do not mean a thing to the premier who does not belong to that party and does not buy those promises and says, "I was not there."

For us it is absolutely unacceptable. We would not sit around the table and help you create companion resolutions.

**Mr. Harris:** If there were people in this Legislature who lost every battle that you are talking about—and I disagree as to what the companion resolution does. It does not say plead guilty and then appeal. It says we are standing here with 15 others, all charged with different crimes, and we all have to go down the tubes together or plead guilty or fight and stand together. You make a decision; and I am saying I do not think we are going to have a choice in the decision anyway.

**Ms. Nye:** I have a hard time understanding that.

**Mr. Harris:** I do too. Quite frankly, I can sit here and argue that for the next five years. All I am asking you is, if it comes down to that, is it not better to stand on your own as one issue? Let us see the premier who will stand up and say no to women's equality rights, as opposed to now when a premier can stand up and say no to a whole confusion of mumbo-jumbo, a multitude of reasons why it is not worth opening this thing up.

I think a companion resolution is better than absolutely nothing. It does have a focus if the resolution is on one specific issue of equality rights or on the supremacy of the charter, or whatever. It then forces that legislature and the House of Commons and the Senate and those premiers or the Prime Minister to say on that one issue, "There is no more unravelling, nothing else." They have to say yes or no to that one issue. I think that is a lot tougher for them to do.

**Ms. Nye:** It may be a lot tougher for them to do, but we would like to know why it cannot be too tough for them right now to do.

**Mr. Harris:** I understand that.



**Ms. Nye:** In fact, I was handed Raj Anand's resolution here. Talk about consensus. All the women's groups are saying the same thing as the Ontario Human Rights Commission. There are so many major equality-seeking groups that know what we need. If it passes into law, we have to live with it as a law until they fix it. We are right now in the courts. We do not yet have one decision that sets a precedent for the guts of equality in the Charter of Rights and Freedoms. They put it on the shelf for three years. We did not even get it until 1985.

Now before we get to do anything with it, before we get to see what surprises the Supreme Court has in store for us, we are going to put more between them and the equality rights we so desperately need. We are going to put more between the Supreme Court and the decisions that we need to make use of the sections in the Charter of Rights and Freedoms. So what happens when it becomes law and they sit down at the court and they look at this case and they say, "Yesterday I was dealing with this with respect to the Charter of Rights and Freedoms. Now I have to say, 'What did they mean when they did not protect these sections of the charter? What did these people mean when they did not do this or do that?'" We cannot afford that. We are behind enough now.

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**Mr. Harris:** I understand. My question is, if I lose all that, do you want me to throw up my hands and say, "To hell with it," or do you think a companion resolution might make some sense? Would you say, "Forget it; let it go down the tubes"? That is my question.

**Ms. Jackman:** I do not want to answer that question—

**Mr. Harris:** That is fair too; I understand that.

**Ms. Jackman:** —but if that is the only political option open to you, I would certainly be glad to be involved in the designing of that resolution.

**Mr. Morin:** On page 2, you say, "It should not be ratified as it now stands; it should not and it must not." Yet we hear experts like Gordon Robertson, who appeared before us, who was a senior adviser to Mr. Trudeau. He said that if the accord were not ratified it would lead Quebec to separatism. Can I have your comments on that.

**Ms. Nye:** I believe that is the kind of argument that shuts down debate and cuts us out of it. I do not accept it as an argument. I do not believe it. I do not believe that this is the only deal Quebec would make with Canada. I do not believe that if we say, "Listen, we like most of this but here are

some of the changes that are needed," and some of this is coming from Quebec voices as well, that they would not sit down to the table and do it. I do not believe that.

**Mr. Morin:** We are told it took over 60 years to bring these feelings together in real specifics. It was an historic moment; first time ever.

**Ms. Jackman:** But it has taken over 60 years to get women's rights in the Constitution.

**Mr. Morin:** Now they say that if we back off, if we do not ratify it, this is what is going to happen.

**Ms. Nye:** They have put us all in a very untenable position, but I do not believe in an agreement at any cost.

**Mr. Chairman:** In a sense, some of these are questions that of course we cannot answer. I guess that is all part of the balancing that is going on. I apologize for interrupting but we are terribly behind schedule and I know there are other groups who are hoping to make their presentations before we break for lunch. I wonder if I might go to Mr. Eves for the last question.

**Mr. Eves:** I will try to be very brief, Mr. Chairman. I really compliment your group on your presentation here today.

The wording on page 3, "The accord must be revised to read that nothing in it will abrogate or derogate from the rights and freedoms guaranteed in the Charter of Rights and Freedoms," I think hits the nail exactly right on the head; I could not agree more. I think if there is one change that absolutely needs to be made in this agreement before it is ratified, it is that one. There are probably some others that could be made, but I suppose my bottom line—everybody has a bottom line if you come down to it—is this one.

I would like to see a premier who would stand up and publicly say he does not think women should have equality rights. If there is one out there, I wish he would identify himself.

**Ms. Nye:** That is the dare the Prime Minister should have given the country.

**Mr. Eves:** I really wish he would, and if none of them disagree then what is the problem with the amendment?

**Ms. Nye:** This goes back to addressing the issue of how we can do this if Quebec will not link with us. If in fact the premiers are saying, "We have no intention and had no intention of overriding the rights and freedoms in the charter," then how can we believe it is a problem for them to go back to the table and make that

clear? How can we believe that is going to be an issue that closes down Quebec and makes it want to leave, unless it is not true that they had no intention of overriding equality rights and charter rights. If that is the truth, then it is not out on the table.

**Mr. Eves:** That is exactly right.

**Ms. Nye:** It is not out on the table and that is not right.

**Mr. Eves:** I could not agree with you more. I want to make another comment briefly about the process. People are talking about how we can improve this process and that it is too bad we did not have a more open process at the beginning, but that this is all behind us. I want to point out to this committee for the record another time that this government and this Premier did have an opportunity. This Premier was asked a question in the Legislature, shortly after the first draft on April 30, whether he would open up the public process, exactly as it is being done now, before the final draft was agreed, and he categorically denied public hearings on this issue at that point in time.

I do not want to put words in the Premier's mouth but I will paraphrase him, if I may. His comment was to the effect: "Can you imagine the amount of mumbo-jumbo? There would actually be some members of the public come forward with some ideas to improve the accord." Wouldn't that be a terrible thing if a member of the public actually had a better idea than one of the 11 first ministers and actually could improve upon the wording of the accord?

This Premier missed the boat once. The process still has three more years to run. Maybe he will not miss it the second time. That is my final comment. Thank you.

**Ms. Nye:** There is enough time to do it right. Interjections.

**Mr. Chairman:** I was going to say, "As we end on that positive note," but I am going to have to be careful. I think one of the intriguing images that came up as Mr. Allen was talking and we got into our knitting analogy was the thought of the 11 first ministers that night knitting and weaving around the table, and whether Charles Dickens might have had some kind of scenario. One perhaps should be careful about just how far—

**Mr. Breagh:** I had another knitting analogy.

**Mr. Chairman:** Yes. Knitting and unravelling, I suspect, are going to be strong images as we go through this whole issue.

On behalf of the committee, I want to thank you very much for coming. We have been in

touch and in contact throughout this process, and I know through your hard work a number of others have come before us. I think it is quite clear that there is a statement, as you yourself have suggested. If we go back, as we will, through the testimony, there are certain very specific and clear things that have been stated.

As a committee, we have to wrestle with that. We have to, it is our responsibility. It is our responsibility in terms of our oath. It is our responsibility, having been set up as a select committee of the Legislature, to take that testimony and at some point in the next few months to go back and try to determine what we can do to meet the concerns we have identified as being ones that must be met.

Obviously, there are problems in that; but also and equally obviously, a Constitution is more than a simple statute; it is a fundamental part of our country, and we are going to have to do that. I know it is our intent as a committee to try to deal with those issues in a fair and open and honest way. While you can never do everything, as Mr. Breagh has said, I think we recognize that we have to move forward. We cannot stay where we are, and I guess that is our challenge.

We appreciate your coming this morning, and certainly not making the task any easier but saying what had to be said. Thank you very much.

**Ms. Nye:** Perhaps if we could help, we would make it easier. Thank you very much. We appreciate the opportunity, obviously, of bringing our concerns to you. When we did it at the federal level, we did not get very far. We were told even by the members of Parliament who agreed with us—in fact the Liberals put forth a number of amendments, many of which agree with the suggestions that have come to you—that they would hold their noses and vote for it.

When we look at the whole picture and ask what can be done when all the leaders of the political parties are clamping down on all the members who are trying to represent their constituents, the only break we can see is if the members break. We do not see anything else. We know what kind of heavy responsibility this puts on you and we are really counting on you.

**Mr. Chairman:** I next call upon the representatives of the Ontario Advisory Council on Women's Issues: Sandra Kerr, the vice-president; Ceta Ramkhalawansingh, a council member; and Bridget Vianna, executive officer. Perhaps they would be good enough to come forward. I might, as everyone is getting organized, apologize on the timing, but we have found



with this issue that it is important to explore some of the various concerns in some detail. If it means we have our lunch a bit later, so be it.

**Ms. Kerr:** Get your lunch sent in.

**Mr. Chairman:** It is a pleasure to have you here with us today. We all have a copy of your submission, so if I can turn the mike over to you and if you could lead us through it, we will follow up with questions.

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#### ONTARIO ADVISORY COUNCIL ON WOMEN'S ISSUES

**Ms. Kerr:** I am Sandra Kerr and I am the vice-president and acting president of the Ontario Advisory Council on Women's Issues. On my right is Ceta Ramkhalawansingh who is also a council member, and on my left is Bridget Vianna who is our executive director. I thank you for the opportunity to be here today. I must confess that in our concern and hurry to ensure that we got here at 10:30 a.m., there are a few little errors in the numbering of the pages of your brief. If we had known we would have had time, we would have held them back and corrected them, but please just follow along. The order should be correct but the numbering will not be; I apologize.

**Mr. Chairman:** It sounds like we will deal with all the issues. I think we will feel right at home.

**Ms. Kerr:** That is right. What order do you want? Pick a number?

The Ontario Advisory Council on Women's Issues, as you know, is an advisory body to the Ontario government on all matters pertaining to women. The council is in the unique position of being the government's only official advisory body on women's issues. This means that the government has made a commitment to listen to its views and recommendations, and this unique relationship allows the council to effectively critique the government's direction and policies and provide advice for direction.

There are 15 members on council, including a president and vice-president, all of whom are appointed by cabinet on a part-time basis for three-year terms. Members come from all over Ontario and meet on an average of eight times a year as a council body.

In addition to monitoring legislation, policies and programs related to the needs of women, council also does research and holds consultations with groups throughout Ontario. Council often acts as an advocate on behalf of Ontario

women with the government, institutions, cabinet ministers and other organizations.

We come at this point in time to discuss with you the issues around the Meech Lake accord. The first one we would like to address is our concern in terms of the process. To this point, all of Canada has come to realize that the Meech Lake accord is not a truly democratic opportunity to amend our Constitution, despite Mr. Mulroney's assurances that the democratic process would be respected.

The process of the Meech Lake accord has been a perfect example of executive federalism, which might have been appropriate when the subject was rights between governments. However, the 1982 Charter of Rights gave rights to the people, and the process taken with the Meech Lake accord either forgot or ignored this.

Professor Beverley Baines, in her presentation, referred to the accord as the "men's round." We echo her sentiment, as indeed you have heard many before us. The accord as drawn up belongs to the Prime Minister and 10 premiers and excludes the people of Canada. This must be rectified.

Ontario women have great concern not only with this process of executive federalism but also, and more particularly, with Ontario's current process. Premier Peterson said in August that the accord could be changed if Quebec's "distinct society" provision derogated in any way from the rights of individuals, women in particular. Since then, he has backtracked to say that the accord should be ratified without amendment.

As the official advisory body on women's issues to the government of Ontario, we find ourselves confused as to the purpose of these hearings. Are we to speak for the record but not for the ears? Is there any point to presenting our views of flaws, indeed of risks or of process, if in fact there will be no recommendations to go forward? Surely there is no intention on this government's part to make a mockery of the consultation process? This committee does have the power to go back to the Legislature with recommendations, but does it have the will?

You have heard from many groups concerned that the Meech Lake accord jeopardizes their rights under the charter. Some questions have been asked. What commitment is the government making to ensure that aboriginal rights are dealt with as part of the Constitution? Is there a timetable? Would provinces be able to restrict mobility rights of minorities? Does the unanimous amending formula prohibit the achieve-

ment of provincial status for the Yukon and the Northwest Territories? Does the accord threaten Confederation and the structure of government in Canada?

As Canadians, we are concerned about the above questions. However, as the Ontario Advisory Council on Women's Issues, our mandate is the concerns of women in Ontario, and we have restricted our comments to these.

It might be useful at this point to reflect on why women have such a deep-rooted concern around the Meech Lake accord. Until 1980, women had no part in the constitutional decision-making process in this country. This was largely due to the fact that politicians and the senior bureaucrats who participate in this process are men, and there is no open consultation prior to decision-making.

In fact, women's rights would have continued to be ignored but for the strong and swift national reaction by women's groups, such as you have just heard, which produced the current Charter of Rights and Freedoms.

To now face an amendment to the Constitution that once again ignores any concern for the risks of women's rights is appalling.

It has been stated by Premier Peterson that there is no proof of risk to women's rights in the accord. However, equally, there is no proof of no risk to women's rights. Arguments on both sides are hypothetical. The Attorney General, (Mr. Scott), stated the accord could not be analysed by some hypothetical alternative, yet no concrete assurance can be given that any such alternative would be purely academic. Women feel a risk because there is a sense that something can go wrong. Women are concerned by the very nature of patriarchal assurances of trust and by the assurance that changes to the accord could mean even worse. It seems to most women, however, that if you cannot prove factors on either side of an argument, the issue must be at risk.

You have heard presentations made by a number of women's groups and lawyers who state that the accord could potentially jeopardize the hard-won rights guaranteed by the charter. The council, too, has heard that argument throughout Ontario.

Our desire to have women's rights secured is not at the expense of Quebec as a "distinct society". Some way needs to be found to ensure that national reconciliation includes the rights of women as well as the rights of Quebec. Over one half the population of this province, indeed of this country, is women. The implication has been that some risks are more significant than others and that a timetable should exist to address these.

Keeping in mind that the process to amend the Constitution is long, laborious and detailed, how long must women wait? In fact, has the accord created a hierarchy of rights?

Questions that should be addressed include: Can the Supreme Court of Canada interpret the "distinct society" clause as superseding gender equality rights of the charter? What guarantees will be given to ensure that new national social programs are consistent in both quality and accessibility to women? What measures will be taken to ensure that the mobility rights of minority women are not restricted and that they have access to language training programs? What guarantees are being offered to aboriginal women to ensure that they are consulted in any discussions concerning constitutional change? What guarantees are being offered by the Ontario government to ensure that these fears are unfounded?

**Ms. Ramkhalawansingh:** I would now like to address the issue of Ontario's role in this process.

If, in spite of all the arguments and suggestions that have been presented to you, the Ontario government is still determined to ratify this accord without change, we strongly recommend that Ontario take concrete steps to ensure that women achieve equality.

Over the years, our council has made numerous recommendations for changes to legislation, policies and programs. Women in Ontario still have a long way to go before they are equal. For example, current Ontario labour legislation prohibits domestic workers from unionizing; sole-support mothers suffer from inadequate incomes and lack of support services; immigrant women do not have access to language training programs; and, as another example, lesbian women are denied services and benefits due to their sexual orientation. In fact, the last change to the Ontario Human Rights Code made certain definitions around what a spouse is, in fact, in order to make that even more difficult to change. Those are pieces of Ontario legislation which you can address to improve equality for women.

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The Ontario government must demonstrate its commitment to equality for women. Once again, we call for a review of all labour legislation in Ontario, including the Employment Standards Act and the Labour Relations Act. We would like to see the introduction of employment equity legislation as well as a contract compliance program and we would like to see some real pay equity laws in this province.



These kinds of changes will, in fact, introduce equality for women. We would like to see the elimination of barriers for women in the education and health care systems. We would like to see improved access to services for francophone women, native women, disabled women and women from ethnic and racial communities. We would also like to see greater provision of affordable and accessible child care and housing, as well as the assurance of security of the person for women in today's society.

With the accord, we have seen a fair amount of devolution of authority to the provinces. With the existing authority that we have in Ontario, all of these are issues within the province's jurisdiction, and you can actually take some real, concrete steps to improve the equality of women in this province. In addition, we would also recommend that Ontario adopt an advocacy stance with federal, provincial and territorial governments for the passage of laws, programs and policies which have as their objective equality for women.

With respect to future process, we recommend that the government heed the suggestion of the Attorney General to investigate ways in which the process for constitutional change might be improved in the future.

We believe that the Ontario government must consult openly with all women and all kinds of women's organizations—minority women, ethnic and racial groups, aboriginal women—and all other affected groups on an ongoing basis to ensure that their specific issues are part of the agenda at first ministers' meetings dealing with the Constitution.

To be more specific, representatives of these groups should be invited to attend as part of the Ontario delegation so they are right there on the spot. Our council would be pleased to assist the government in the consultation process with these women's groups. I think if you were to engage in this kind of consultation process, further changes would not be open to charges of this being a boys' club.

**Ms. Kerr:** In conclusion, we once more call on Premier Peterson to reconsider his stance and make these hearings a meaningful process.

We ask the Ontario government to firmly demonstrate its commitment to equality by reviewing legislation that is within its own jurisdiction to ensure equality for Ontario women, considering a companion clause enshrining commitment to equality in the Constitution, publicly consulting with women's groups and others before negotiating on constitutional issues

with the federal government and adopting an advocacy stance with the federal, provincial and territorial governments for the passage of laws, programs and policies which have as their objective the achievement of equality for women.

We remind this committee to heed the Attorney General's statement that Canada has been built and sustained through political compromise. Surely the risk of women's equality is important enough, strong enough, and indeed serious enough, to warrant this government's taking a stand. Women account for half the population. Any national reconciliation must take into account women's equality rights. Political compromise must include a guarantee of equality for all classes and groups of women in the accord.

**Mr. Chairman:** Thank you very much for your presentation and for the various recommendations which you have made in the paper. I will move right into questions so that we can maximize the time available.

**Mr. Harris:** You point out the flaws and say things, but when it comes to your recommendations I hear you saying something quite different from most women's groups who have been before us. You are saying, "Approve Meech." You are not saying, "Don't let Meech go ahead." You are saying that we should do some other things: review legislation, consult for the second round or the third round, whatever it is, play an advocate role and consider a companion clause.

Most of the groups who have come before us—and you heard the last group—really do not even want to talk about a companion clause, and I can understand this, because talking about it says this is an easy way for these guys to get off the hook. They can say: "We have done the right thing. We approved Meech, but we put in our two bits for the second round, and here is our companion resolution."

I do not know if I am being critical. I am trying to be objective.

**Ms. Kerr:** Did you want us to reflect on that?

**Mr. Harris:** Yes.

**Ms. Kerr:** I guess there are several possibilities to add to that. First of all, I think we would all see that if we are talking about a companion clause passed by Ontario, coupled with our urge for you to lobby and advocate with other premiers, you would also advocate that other premiers and other provinces adopt the same sort of companion clause.

We offer the option of the companion clause because we sense that the reality is that the accord will not be changed. We support all of women's stands in terms of saying that the risk is there for women, that they realize and sense a risk; but the reality is likely not to mean a changed accord. If that means that politicians are afraid to make amendments to the accord, therefore we can opt into saying, "We will make a companion clause and we will not call it an amendment, because politically then we would be affecting the accord," this way we can add our own rider that says this is where we stand in this province. At least that puts it forward on the agenda together with the accord, instead of ratifying the accord and leaving the equality question to some other future constitutional hearing.

Our concern was, first of all, that the reality looks as if the accord is not going to be changed in any way, no matter who says what. The second option is that, if that is going to be the reality, we want to see something up forward with that ratification by Ontario which states right now that Ontario understands where women are coming from with this accord, that there is a concern about their risks and that this be advocated with other premiers.

I do not think we are saying something different; I think we may be saying it differently, that is all.

**Mr. Harris:** I think that other groups are saying, in spite of what we have heard publicly—and perhaps the election currently going on and the election of Mr. McKenna in the east have encouraged groups to say—there is a window of opportunity here to change these guys' minds. Most of the groups have come before us saying, "We are not very happy with the process, but we are here on the outside glimmer of possible hope that all the things we heard are not true, that you are willing to listen, that you are willing to make a change."

You really are coming here saying: "We cannot make a change. We accept the reality, and here is the next step."

**Ms. Kerr:** No, we are not saying we cannot make a change. We come here saying and stating very definitely that there needs to be a recognition of the need for change.

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**Mr. Harris:** Why would you not ask this committee to put forward that resolution now, today, ask the Legislature to pass it now and send it on its way? Why does it have to be a companion piece of legislation? Its companion means we have lost the battle; it is over and done with; they

have approved Meech; the next best thing is to send a companion resolution at the same time as opposed to a month later or leaving it to the first ministers to initiate. What is the matter with doing it right now? We have until 1990 to ratify this. McKenna is not going to approve this in the next six months, it does not look like.

**Ms. Kerr:** There is also an election probably going to go through, too, before that, federally.

**Mr. Harris:** Why would you not advocate that?

**Ms. Ramkhalawansingh:** I think that, unlike other organizations, the Ontario advisory council is made up of a number of very diverse individuals and individuals who have very differing opinions. We are not a homogeneous group. People are there from a variety of perspectives. In the process of our own consideration of the issue, we canvassed the opinions of a broad number of individuals.

I think probably what you have in front of you is the current consensus of the council opinion. I think there may well be some of us who would be willing to say what it is you have just indicated to us, but I think we would only be saying that as individuals as opposed to a council opinion. The structure of our body is fundamentally different from that of other groups which have a single interest or are much more homogeneous in their composition.

**Mr. Harris:** Can I ask one more question? You are the advisory council. You are appointed by the Premier or by order in council to advise the cabinet and the Premier. Were you asked for any advice before the May meeting?

**Ms. Ramkhalawansingh:** No.

**Mr. Harris:** Were you asked for any advice between May and June?

**Ms. Kerr:** No, we have not been asked for advice. We are presenting our advice.

**Miss Roberts:** In particular, I would like to turn your attention to page 11, your summary. I think you make it very clear in your first paragraph that you are asking the Premier to relook at it and to make these hearings a meaningful process. I assume that is what you based your summary on. Then you move into the area about asking us to look at our commitment to equality.

My concern, and I would like to have you reflect on it, is: is there anything in Meech Lake which you have been able to put your finger on that says it is going to stop us from going ahead? "It is going to put us at risk"; that is what everyone has said. Is there anything in Meech



Lake that is really going to stop us from moving ahead? It may put us at risk from moving ahead, but is there any definite thing that can stop us?

**Ms. Ramkhalawansingh:** What do you mean? Women achieving equality? I am not sure what you mean.

**Miss Roberts:** That is right, yes: developing our equality and developing a society that is going to treat us as equal. I always tell people I belong to one of the largest majority minorities in the world. I think it is important that we know we are in a changing situation. Is there anything there that is going to stop us in that development?

**Ms. Ramkhalawansingh:** I think the accord endeavours to set up a hierarchy of rights and therefore a hierarchy of equality. That is probably one of the fundamental problems with the accord: which groups and which characteristics and which issues should be more equal than others? That, in itself, is at odds with the fundamental notion that all Canadians are guaranteed equality under the charter based on, you know, thus and so, and I think it is that kind of situation with the accord that may create a problem in the future.

**Ms. Kerr:** You cannot get away from the fact that people perceive certain things within certain words and the way things have been done in the past. With the Charter of Rights, whether it can be absolutely proven or not, women perceive that they were now given an equality position that was their right within society. If that then is not enshrined in the constitutional amendment in the accord, the perception is that no longer is this right there, that it has now been put down the line, further down the road for interpretation as opposed to being actually part of our Constitution.

**Miss Roberts:** That refers back to the problem of not even having various sections of the charter already dealt with through the courts in an appropriate manner.

**Ms. Kerr:** That is right.

**Mr. Chairman:** I regret that because of the time this morning—and we do have one other witness to hear—I cannot take another question. I am afraid we are going to have to cut it off at this point.

I want to thank you very much for coming. I think we have this morning, in the presentations that have been made, both your own and the two previous, explored in pretty extensive detail concerns that have been brought forward by women's groups and from women's perspective.

I would like to thank you very much for joining with us this morning and presenting your brief.

**Ms. Kerr:** You are very welcome.

**Mr. Chairman:** Perhaps I could ask Arthur Milnes if he would be good enough to come forward.

A copy of your presentation is being circulated. In order to make full use of the time, let me quickly turn the mike over to you, and we will follow up with questions when you have concluded.

ARTHUR H. MILNES

**Mr. Milnes:** I understand we are running late. I see some hungry looks on the faces of the members of the committee, so I imagine with that and the fact that I am very nervous, I might speed up a bit and try to move right along.

**Mr. Chairman:** Please do not feel nervous. Just while you are getting to feel less nervous, let me state that we have had a number of people who have appeared as private citizens, and we welcome that. Undoubtedly, in any committee hearing you receive presentations from various groups and organizations, some of which are quite used to this sort of thing. I can assure you that we are not intimidating persons and we want you to feel very much at home. Just go ahead and make your presentation.

**Mr. Milnes:** We must first ask ourselves why this country we call Canada ever came into existence. The odds against the British possessions on the northern half of this continent ever uniting themselves into Confederation in 1867 must have appeared insurmountable to observers at the time. History, geography, culture, to name but a few, all combined in a seemingly concerted effort to keep the people of British North America apart.

Canada lacked a uniform cultural nationality for its people. Instead, two great races split by history, condition, and most of all language, populated the land. The people native to this country lacked a feeling of belonging to either of the European races that had invaded and stolen their soil. We were therefore a nation in which a nationality could not be relied upon to occur naturally. It had to be created.

On the southern borders of the colony there stood the colossal giant called the United States of America. In 1867 the United States had just finished a great and bloody civil war, leaving almost a million of her people dead. The armies of the United States were massive at this time and her government was filled with hostile intentions towards the empire of which we, as British North

America, were a member. The huge population, a growing industrial might and the American desire of expansion all seemed to threaten us.

The climate and the terrain faced by the people of British North America were among the harshest faced by anyone on the face of this earth. In the days before the conveniences that are provided us by modern telecommunications, the distances seemed great and the land threatened to envelope us. And spread over these distances was a people who, even when one ignored the obvious differences of language, still lived a different regional experience depending on which part of Canada they lived in. In other words, there really did not seem any hope that our country could have come into being.

In order that the Canadian miracle could happen, one essential ingredient was required. This ingredient was a special one, and each of the Fathers of Confederation carried it inside himself. Unfortunately, it seems that the men who drew up the Meech Lake accord lacked this quality. The quality I speak of is that of vision. When dealing with a confederation such as Canada, the quality of vision involves the ability to go beyond regional prejudices, the ability to understand the wishes of others, the ability to engage in constructive debate with the willingness to compromise and the ability to put aside self-interest and to see the needs of the whole. In short, the Fathers of Confederation had the courage and the vision to beat all the odds and to conceptualize a better place for us together. They saw a strong nation, a nation called Canada.

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For over 100 years this vision has worked well for us. It has by no means been easy and our history is filled with many examples of times when the Canadian vision was obscured. But even during times of war, times of depression and times of hardship, the vision was not put completely aside. Canadians have not given up on each other, even though doing so would have been the easiest route to take. By staying together, we have built ourselves a great country, one that is envied the world over.

The Meech Lake accord with its provisions threatens this country and all that we are. Had we been governed by a set of constitutional rules like the ones proposed in the Meech Lake accord, all that we have accomplished would not be. Canada would have broken up long ago to be swallowed up by our huge neighbour that is the United States. The Meech Lake accord provides us with a quick road to the destruction of the Canadian nation. If not stopped, or at least reopened for

debate and amendment, then all that we are, all that we have been and all that we could be will have been lost. A nation will cease to exist and in its place 10 new ones will arise and take the place of what was once a single Canada.

The change in our Constitution that I find most disconcerting is found in subsection 2(1) of the accord which states:

"The Constitution of Canada shall be interpreted in a manner consistent with:

"(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and

"(b) the recognition that Quebec constitutes within Canada a distinct society."

Having thus quoted from the Meech Lake accord, it might help if I translated this constitutional language, or constitutional mumbo-jumbo, into something that those of us present who are not constitutional lawyers might understand. In effect, what these amendments tell us is that from now there will no longer exist one Canada, but two. Instead of a single Canada, one that is bilingual and multicultural, there will now exist two Canadas, each defined by its language.

In agreeing to the Meech Lake accord, those Canadians who reside outside Quebec are saying we no longer have the courage to live with the French language. We are saying, "Go back to Quebec because we only want to speak English." Canadians who speak French have decided to withdraw behind the walls of a distinct Quebec. Those who speak French outside Quebec have been quite effectively written off in this document. Where is their vision and where is their courage in this?

It has only been 19 years since the Official Languages Act came into being in 1969. The great progresses in terms of tolerance and respect demonstrated by both French and English speakers in this country that have been made since the 1960s are to be turned back. We had only just begun to spread the use of both languages across the whole of this land. I cannot argue that this has been accomplished easily and, yes, we have had our problems; but surely Canadians, especially Canadians of my generation, are beginning to see the advantages of living in a country of two languages.

Rather than being scared of such a prospect for our future, we are excited by it. But in all this country there is still much work for us to do, as New Brunswick stands alone as our only



bilingual province. Yet now, as a result of the Meech Lake accord, the dream of a single bilingual Canada is to be frozen long before it has had the chance to be realized. I ask those who disagree with my interpretation to read subsection 2(2) of the accord which states: "The role of the Parliament of Canada and the provincial legislatures to"—and I underline this—"preserve the fundamental characteristics of Canada referred to in paragraph (1)(a) is affirmed."

Thus the status quo of language in this country is to be preserved. We are speaking of a status quo which has a supposedly bilingual country of nine unilingual provinces out of a total of 10. With these facts, our leaders have asked us to preserve a situation of language in this country. But if one studies our history, one can see what this will lead to: it will lead to separation. Instead of the promotion of our official languages, an unacceptable status quo will be preserved.

To make matters even worse, after giving us the amendment to preserve the status quo, we are then told, and I quote again from the accord, "The role of the legislature and the government of Quebec to preserve and promote the distinct identity of Quebec...is affirmed."

Criticizing this aspect of the Meech Lake accord does put someone like myself in a difficult position. I am not from Quebec and I am not a French Canadian, and thus some might say I am ignorant of it. All I can say to that is I can only do my best in understanding Quebec, and since I believe Quebec to be a part of Canada I believe I too have a stake in her future. It seems to me that this clause puts a wall around Quebec only seven years after the people of Quebec said yes to Canada in the referendum of 1980. I thought the walls were supposed to come down, not be put up again.

An eminent Quebecer recently wrote: "The real question to be asked is whether the French Canadians living in the province of Quebec need a provincial government with more powers than the other provinces. I believe it insulting to us to claim that we do. The new generation of business executives, scientists, writers, film makers and artists of every description have no use for the siege mentality in which the élites of bygone days used to cower."

If those in Quebec need this constitutional wall around them, which I believe they do not, why is it worded in such an ambiguous way? I have scanned the records and there is little agreement as to what in terms of actual power for the government of Quebec this clause will really mean. As was asked of you this morning by the

two groups I was fortunate enough to listen to, what about the rights of women as outlined in the Canadian Charter of Rights and Freedoms? Can these be stripped away in order that the "distinct society" clause be promoted? What of the rights of native Canadians that still have to be addressed? Can they be stripped away? Can this clause steamroller over these kinds of things in the promotion of the distinct society? It appears to me that nobody knows what we are talking about here.

I make no claims to be an expert in constitutional law, but from the little that I have studied I do know the importance of a Constitution in a nation's existence. It thus seems very obvious to me that to blindly throw such a phrase into the supreme law of our land is to commit a highly dangerous act.

Before much time has passed, this document with its cloudy wording will land before the Supreme Court of Canada. It is not possible for us to guess as to what sorts of interpretations the learned justices of the court will arrive at when this document appears in front of them. The duty of our Supreme Court is to interpret laws, not to dictate them. But the Meech Lake accord effectively hands this power of dictation over to the Supreme Court as our elected leaders have run from the duty of decision-making which their jobs as elected leaders demand that they do. Rather than giving us clear, concise meanings for where they wish to take our country, our leaders have taken the easy route and left it up to others in the Supreme Court to provide these meanings.

The society we find ourselves in is one that has built up a great safety net of social programs. Canada is a compassionate society, and we have made great efforts and spent large amounts of money in order to alleviate some of the negative effects of 20th-century industrial capitalism. This is not to say we cannot be doing much more as there still exist great inequalities of wealth and condition across this country. But certain foundations have been laid, and we can build upon these as needs arise.

It is important to note that it has been the federal government in Ottawa that has led the way in providing most of the services of the Canadian welfare state. Without Ottawa's efforts we would lack family allowance, medicare and unemployment insurance, to name but a few. These programs find themselves in areas of provincial jurisdiction and only through shared-cost programming have these been undertaken. The federal government in Ottawa, the only government elected by all Canadians, has been

able to set the standards for social programs from sea to sea, as we saw in the early 1980s with the Canada Health Act. But under the Meech Lake accord it is unlikely, if not impossible, that there can be any future expansion in social welfare programming on a national scale.

Meech Lake tells us that provinces are entitled to "reasonable compensation" if they choose to opt out of any future shared-cost programs. This compensation will be provided if the provinces put into place programs that are "compatible" with the "national objectives."

Once again, this accord provides us with language that is really beyond anyone's comprehension. Does anyone out there know what the term "national objectives" really means? Perhaps it will mean that great inequalities of access and quality of social programming will exist across the nation. Most important, the Meech Lake accord does not tell us who will decide what these national objectives are.

Before Meech Lake, one might have assumed that the federal government in Ottawa would have had the power to set these national objectives. But now one gets the funny feeling that this power will be taken away from the federal government. Premiers might now argue at their enshrined first ministers' meetings every year that they hold this power. Then, in effect, Canada acquires a board of directors to direct the new Canadian corporation. In other words, instead of a single, national program offering the same to Canadians from Port aux Basques to Port Coquitlam in British Columbia, there will now exist 10 separate programs. If this is true, why then should we exist together at all?

If the Meech Lake accord is to be approved as now written, has anyone stopped to consider what will happen to the federal government? Over time, Ottawa will begin to operate while wearing a constitutional straitjacket. The government will be unable to assert any form of national leadership or national vision as it will be subject to the control of the provinces. One of our former prime ministers once posed a question that made many stop and consider such a scenario for the first time. I think the time is right now for us to consider this question again, so I ask, using Pierre Trudeau's phrase, "Who shall speak for Canada?"

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Look at the plans that Meech Lake has for the Senate of Canada. As the Senate exists now it is the subject of much national loathing and the subject of constant debate. I can state from experience that politics professors love nothing

better than to ask for views on reform of the Senate in their papers or in their exams. Canada is a democracy, yet the upper chamber of our Parliament is unelected by Canadians. It is filled by patronage. The 1984 election campaign showed that Canadians are sick of patronage run wild. So here we have an institution that satisfies nobody and is in need of reform or abolition. I am not an expert, I do not know which one; but all that Meech Lake does is to transfer this source of patronage over to the provinces and to basically ensure that this institution will never be reformed.

We must be aware that the powers of the Senate of Canada are immense. I find it difficult to believe that once given this power, the premiers would unanimously and willingly give it up. Because of Meech Lake's impossible amending formula, we could be stuck with an archaic Senate controlled by the provinces that will stand for all time. Provinces will now be able to veto the federal government with the convenience of not even having to leave Ottawa itself, as they can do it in the Senate.

But that is not all the power that Meech Lake gives over to the provinces. Remember that the Supreme Court of Canada will now also be appointed from lists supplied by the provincial premiers. Where is there any balance in this system? Ottawa is left at the mercy of the provinces. For those who once again say I am taking too negative view, just look back at our history and try to consider what would happen if Premier Duplessis had been able to operate in such a system as Meech Lake now proposes.

I could go on and provide many more examples of what I believe to be erroneous in the accord. But you are members of a committee that has spent five weeks hearing submissions about the accord. I am sure you know it both in and out. I am obviously not an expert on federalism or on the Constitution and the many other areas that the Meech Lake accord takes in. Though lacking in the impressive credentials that many before you have, there is still something that qualifies me to present my views here.

I carry within me a passionate love for my country and I am a guy with great faith in our future. Many have provided you with arguments that are based on reason and political reality but I make no such claims. At its central core, mine is an argument that is based on a love for my country that has grown as I have. It is this that has brought me here to Queen's Park because I believe the Meech Lake accord is one of the greatest threats ever presented to this country.



I fully recognize that many conceive of Canada in a different way than Pierre Trudeau, Sir John A. Macdonald, Sir Wilfred Laurier and others did and do. Others have articulated a different national vision and purpose than that advocated by these people and others. I am willing to debate different conceptions of Canada as I know it is most healthy that a nation constantly examine itself. But in the Meech Lake accord I find no national vision or conception to debate. This document is completely bankrupt of any sort of national dream. If Meech Lake is passed, then I fear that the dream is over. The great experiment called Canada has been ended and, most sadly, has been ended from within.

My presentation is now nearing its end. I would like to thank the members of the committee for allowing me the honour of presenting my views here at Queen's Park. It is not every day that I get to do something like this, so thank you for listening to me. I hope the members of the committee will see fit to recommend that the Ontario Legislature reject this accord as now written.

For a final word on this matter I will turn to one of the greatest men of vision who ever occupied the national stage in this country. Having lived in his home town of Kingston—if any of you have been to Kingston, you will know it is Sir John A. Macdonald's home town—and studied at Queen's University, I would find it most difficult not to mention Sir John A. Macdonald in such a speech.

The warning that he gave the Canadians of his day I believe should be heeded by ourselves as we consider the Meech Lake accord today. I quote from Sir John A. Macdonald: "We are a great country and shall become one of the greatest in the universe if we preserve it. We shall sink into insignificance and adversity if we suffer it to be broken."

**Mr. Chairman:** Thank you very much for a very thoughtful and passionate presentation. I think your views have come through very clearly. I am not sure if we are keeping track of these things, but it seems to me that, in one form or another, Queen's University has certainly provided a fair bit of comment on the Meech Lake accord before this committee both in terms of—

**Mr. Milnes:** I do not think most of them agree with me, do they? I think I am in a minority at Queen's with this.

**Mr. Chairman:** Different points of view have been expressed from there. But we thank you very much for coming. We will start the questioning with Mr. Harris.

**Mr. Harris:** It was an excellent paper, by the way. I enjoyed your thoughts. I want to comment very briefly on a couple of things and then get to what I think is the heart of the agreement. You go into that in some detail.

I am not convinced that, for example, the phrase "national objectives" is very difficult to understand. I think by spelling out "compatible with the national objectives" in the Constitution, when the federal government proposes a cost-sharing program, it will state in the legislation the national objectives of the program. That will be there.

**Mr. Milnes:** Why were these not enshrined in the first ministers' meetings? If that is true—and if this happens, I hope it is—why then was this not spelled out more?

**Mr. Harris:** It is. It says it will have to be "compatible with the national objectives."

**Mr. Milnes:** What are they?

**Mr. Harris:** They will depend on what the program is. I think it will now be incumbent upon the federal government, when it wants to get into provincial jurisdiction, to say, "Here are the national objectives of this program we are proposing."

**Mr. Milnes:** Then every province says no and you end up with 10 separate programs everywhere, so a Canadian in Newfoundland gets a different—

**Mr. Harris:** No. The only way a province can say no and get compensation is ultimately to satisfy a court that it has a program that is indeed compatible with the national objectives, which the federal government would have the sole authority to outline.

**Mr. Milnes:** Does the federal government have that sole authority? If it does, then I have missed something.

**Mr. Harris:** Sure it does. It is a national program. That is the way I interpret it.

**Mr. Milnes:** I guess I take a different interpretation of it.

**Mr. Harris:** I am not particularly happy with the Senate but I do not think it is any better or worse than what is there. Everybody seems to think the provinces now are going to control the Senate and the Supreme Court. If I were the Prime Minister of Canada and a premier put forward an appointment I suspected was not eminently qualified to represent the national interest, I would not accept the appointment. I would just say, "I'm sorry."

**Mr. Milnes:** So what do we do? Go back and forth for ever?

**Mr. Harris:** You could go back and forth for ever. That is how stalemates are broken.

**Mr. Milnes:** Do you want a Senate appointed by a Duplessis for 20 years?

**Mr. Harris:** If I was the Prime Minister and I suspected that a Duplessis put somebody forward for the wrong reasons, I would say, "Sorry."

**Mr. Milnes:** What about the argument that he is elected by the people of that province and the Senate is appointed this way and, therefore, how can the Prime Minister turn that down?

**Mr. Harris:** All he has to do is say no.

**Mr. Milnes:** Can he do that?

**Mr. Harris:** Of course he can.

**Mr. Milnes:** But the Senate is now appointed from a list supplied by the premier. The premier is elected in one jurisdiction, elected by the people of his province. Therefore, one might argue, how can the Prime Minister turn that down?

**Mr. Harris:** He just says no. Ultimately what would happen is what happens right now. There is a basis of consultation right now between the Prime Minister and the premiers of the various provinces. You are assuming the worst-case scenario, that somebody has this ulterior motive of putting forth somebody not because he will be a good senator but because, "I can control that guy and he's going to do exactly what I want as Premier of this province." You are assuming that, so that is a worst-case scenario.

**Mr. Milnes:** I do not think in the 1970s Premier Lougheed would have appointed senators who would have gone along with Mr. Trudeau.

**Mr. Harris:** He cannot appoint anybody under Meech Lake. The Prime Minister appoints.

**Mr. Milnes:** Appointed from lists supplied by the premiers.

**Mr. Harris:** That is right.

**Mr. Milnes:** You are assuming that the Prime Minister has this power to say no and that we will not go on and on. If that is true, let us outline that completely.

**Mr. Harris:** I do not see anything in Meech Lake that says he does not have that power, so I am not persuaded that these are big problems.

With the main part of your brief, which deals with how we see Canada and the language issue, the Quebec issue and the whole reason for Meech

Lake, I think you have hit the nail on the head on how Canadians see Canada developing. The difficulty I have with what you propose is that you have given us a vision, I would argue compatible with Trudeau's, of a Canada bilingual enough in Alberta that the people of Quebec will not feel threatened by not having to have special status, that it is a bilingual country and that francophones will be comfortable.

**Mr. Milnes:** In Meech Lake you are ignoring the more than one million francophones who live outside Quebec. What about them?

**Mr. Harris:** I agree with what you are saying. However, you are saying that what you want is achievable, but the government of Quebec at this time in history is not saying that. The government of Quebec does not agree with you.

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I suppose ultimately somebody has to say, "This government of Quebec does not represent the people," in order for your view to prevail or for Trudeau's view, as I heard it spelled out last night, to prevail. Somebody has to stand up and say: "You, the government of Quebec, are wrong. That is not what the people of Quebec want. We know what the people of Quebec want better than you know what the people of Quebec want, and we therefore reject that vision of Canada. We reject Meech Lake and we reject the demands for a distinct society." How do you see that playing out?

**Mr. Milnes:** I guessed right that this was probably a question that would be fired at me, "Art, if you reject the accord now, what is going to happen with Quebec?"

**Mr. Harris:** I am one of those who thinks it is why you reject the accord. If you reject it because you feel women's rights have been derogated in some way, that is one thing; but I think you are telling me to reject this because the demands the government of Quebec has put forward, the desire to be a distinct society, the desire to be recognized as different within Confederation, is not what I in Ontario think the people of Quebec want.

**Mr. Milnes:** I go to Quebec and I can say in many ways it is distinct, obviously. When leaving Kingston and going to Quebec City, it is different. But to throw that into the Constitution blindly, as I see we are doing, is obviously dangerous, as I outlined.

If you are correct and in order to get Quebec into the constitutional family we have to have Quebec designated a "distinct society," why do we have to lobotomize or castrate the federal



government in order to do that? I do not understand that. That is another one of my points. If we must agree that Quebec is a distinct society, what is all this other stuff? Why are we doing this to Ottawa?

**Mr. Harris:** There is some of the other stuff that I agree with you is a problem and some I have said I do not agree with you on, but I am really zeroing in on the problem you are presenting to me as an Ontario legislator. One of the reasons you say I should reject Meech is because the government of Quebec is really not articulating what is good for the people of Quebec. I do not know if anybody knows what they really want. I do not know if I know what I want. When I grow up, maybe I will know.

Do you understand how difficult that argument is for Ontarians to make, that we reject that the provincial government of Quebec or the Premier of Quebec is indeed speaking for the people of Quebec, and that that is not what is good for Quebec in the long run? "What is good is what we tell you is going to be good."

I suggest to you it is one of the reasons Trudeau could never get Quebec to sign and would never be able to if he lives for another 100 years and is Prime Minister for 100 years. He always said to Quebec: "I know what is good for you. I know what you want." He always rejected the government of Quebec.

**Mr. Milnes:** Trudeau did something very important. He recognized that there are a million French Canadians living outside Quebec. That is very important. In this, you are writing them off. You are saying basically that you are to preserve these little clusters of minorities and that is it; I take the worst-case scenario.

Back in 1982, Quebec did not sign up, but you were dealing with a French Canadian Prime Minister from the province of Quebec, which had 74 or 75 seats at the time. We can get into an argument as to who actually did represent Quebec at that time, was it Premier Lévesque with his majority or was it Prime Minister Trudeau? Right now, is it Brian Mulroney with 55 seats? I do not know.

I am saying that if we really must do this, let us talk about it, let us do something about it. Here are 11 men getting together overnight, walking out and saying: "Here is the document. Do not debate it. Do not talk about it. This is it. It is written in stone." What I really resent is Mr. Mulroney's and Mr. Bourassa's underlying assertion, "If you do not support me, then you are a bigot. You are anti-French Canadian. You are anti-Quebec." I reject that completely.

**Mr. Harris:** You can appreciate the difficulty we would have in rejecting it on the basis that we do not think Quebec's interests have been properly represented by the government of Quebec. We can reject it if we do not think Canada's interests have been—

**Mr. Milnes:** OK. What if that is the case?

**Mr. Harris:** You are saying in your brief to me that Quebec—we need another mechanism then, I would suggest. I do not think we can do that. Maybe we need a referendum in Quebec again. I do not know.

**Mr. Milnes:** I do not know. It is a bad document. Let us start again.

**Mr. Harris:** OK; a good start.

**Mr. Allen:** I guess we are all aware of the axial role Kingston has played in the constitutional development of the country. It may well be that we have some new initiatives developing here that may carry us into the future. One can hope that is the case. I certainly appreciate the spirited presentation and the argument within it, having been brought up also in the context of a teaching of Canadian history that has emphasized the Macdonald vision of the nation and the reassertion of that by the Creightons and the other historians of that period.

I am not certain in my own mind that Meech Lake compromises all that. I do not think what happened was that in order to bring Quebec in in section 2, somehow or other there were lobotomies and castrations performed in the rest of the document that somehow eliminated the powers of the federal government.

What I see happening in the document in the immigration area is a clear assertion of the primacy of national standards and criteria with regard to immigration, which has never been in the document before in the shared jurisdiction of immigration. I see in the spending power the first assertion in the Constitution of the right to spend money in exclusive provincial jurisdictions.

I see the maintenance of federal power to appoint Supreme Court judges from nominees presented by the provinces and the power to reject any nominees that they consider unworthy and to ask for new names. I recognize there is a possibility for impasse in that and in the Senate appointments. That may lead to the occasional tussle and that may be one way in which we resolve national problems in the future. Every nation goes through that. I do not find that a problem. I think federal power, therefore, remains really impressively strong in the document.

On the language question, it is very easy for us, as anglophones living outside Quebec, to say to ourselves that a bilingual idea is where we ought to go, as though somehow or other acceptability of the two languages in all parts of the country is the nub of the issue. It is a working relationship and a working arrangement to get that, and I think we have made great strides in that direction recently.

I do not think it compromises that for us to recognize that in a way unlike the rest of the country, Quebec functions, for the most part, in another language and that there is consolidated there a history, an approach to legal questions and what have you that is different, that is a culture; it is the base of that other language. Therefore somebody, especially the provincial government, as the most immediate and direct level of government pertaining to that whole area, has a special role to play in not just maintaining but also promoting that overall identity, which I hasten to say includes a very large and historic anglophone minority, and increasingly some other groups as well.

I see a document that says that is so and that maybe slightly tilts in new ways some new opportunities for Quebec to be the principal homeland of the French language and to defend that cultural base, which then animates the capacity of other French groups across the country in important ways to live in their language in the country as well.

**Mr. Milnes:** Within the French groups outside—

**Mr. Allen:** Why do we see that as fracturing and breaking up and consolidating two Canadas when all we are talking about is the cultural presence that is the living element of the bilingualism?

**Mr. Milnes:** What about the French Canadians outside Quebec?

**Mr. Allen:** Pardon?

**Mr. Milnes:** What do we tell the French Canadians outside Quebec?

**Mr. Allen:** What we are telling French Canada outside Quebec are some very important things. You made that point with Mr. Harris and I want to speak to that. What we have done in several provinces is in Meech Lake we have required several premiers, who previously have not been prepared to say that it is their role to preserve the French minority, now to say that is their role indeed. Up to this point, Mr. Vander Zalm or Mr. Getty has never been prepared to concede those things. So that is an advance.

1300

**Mr. Milnes:** Why is it not promoted then? Why is it not promoted, as the distinct society is?

**Mr. Allen:** Why is what not promoted?

**Mr. Milnes:** The preservation of subsection 2(1), the existence of French-speaking Canadians outside Quebec; it is just preserved. It is just, "Leave it alone; preserve it."

**Mr. Allen:** It says "preserve." That, I think, is a concession to the fact that you have not been able to get language even that strong with regard to part of the country. In Ontario I think we are past that. We are doing more than preserving already, because we have allowed the French community to govern its own schools through new mechanisms. We have allowed it a whole range of new services in dealing with government. That comes more under the French term which is used, "protéger."

**Mr. Milnes:** We have not enshrined those rights, though, have we?

**Mr. Allen:** No, and that is the important next step we have to do in Ontario, for us to say to "preserve and protect," to use the language of the French and the English versions. It is for us to insist that there has to be enshrinement of French rights in official bilingualism in Ontario. That is our duty. That is the way we should read that language and we should do that, but I think it would be impossible for us to get more than "preserve" for many of the other provinces at this point in time.

**Mr. Milnes:** If Quebec is recognized as a "distinct society", then why should there be bilingual programs in Alberta to communicate with the federal government? Why should you have to speak French to work with the federal government at all?

**Mr. Allen:** That is precisely the reason.

**Mr. Milnes:** Quebec is a distinct society because of its predominance of French language. Is Canada not the home of the French Canadians? Maybe I am a dreamer or something.

**Mr. Allen:** But Quebec is also the home in a unique way. We have been trying to find language around this. We have used the words "foyer principal," the principal homeland, and therefore it has special rights and responsibilities to play that role.

**Mr. Milnes:** Which under the current federal system has protected them for hundreds of years.

**Mr. Allen:** It is precisely because it is there and is nurtured—and it is healthy—in Quebec by a local regime whose concern is to do so that it is



important and necessary for Saskatchewan, Alberta and British Columbia to have their special arrangements and their special programs which enable them to deal with Quebec in their own language and for them to provide the context in which Quebecers, who live in that culture, can move and travel and live for a time, or perhaps permanently, in those other provinces and to find something receptive that makes life possible and livable in that area.

**Mr. Milnes:** That is just back to what I brought up, though. If Quebec is distinct because of the French language, then why would these programs have to be instilled in Alberta, in Ontario and in Manitoba?

**Mr. Allen:** Because with that foyer principal we are still one united country.

**Mr. Milnes:** OK, that is where I disagree. I see you creating two Canadas there. I was out with my teaching assistant in my politics course. We went out and I showed him my paper.

**Mr. Allen:** That is where all this came from.

**Mr. Milnes:** No. He effectively tore it apart a lot better than you guys have.

**Mr. Allen:** Who is he? Maybe I know him.

**Mr. Milnes:** He said, "Art, you are a dreamer." I do not know; I guess I am naïve. Maybe I am a dreamer, but I am a Canadian. When I go out to Vancouver, when I sit with my friend from Vancouver, yes, with his being brought up in British Columbia and my being brought up in Scarborough, there are definite differences there. Yes, I guess I would be distinct and I would still support the Toronto Maple Leafs or whatever, and he would not, so I guess I am a dreamer there too. But we are still Canadians. I cannot articulate that, but there is something there. We are more than this provincial—I am more than an Ontarian. Yes, I am from Ontario. I am a Canadian. Maybe I am naïve, but I think the Quebecer wants to feel that too.

Some day he can go to Alberta and he can go to Newfoundland. Maybe it is a dream, but unless we want to avoid Quebec's eventually separating some time, that is our only hope, that some day we can do this, where a French Canadian can feel at home in any part of the country and I can feel at home in Quebec if I start doing a lot better in

French than I am now. OK, I am a dreamer then; I do not know.

I think this dream that Laurier and Macdonald and Trudeau had is a lot better. I am just saying Meech Lake is saying: "That's it. There is no more dream. Quebec is distinct. We'll keep it like that. We'll perhaps preserve these little French minorities, but basically we are a collection of provinces. We're not a country any more. We're not Canada any more. It is just: 'I'm from BC. I'm from Ontario.'" We get together at first minister's meetings to carve up the pie every year monetarily."

I think there is more than that. There is more to my being Canadian than that.

**Mr. Chairman:** I wonder if maybe it is an appropriate time to end, with a dream. I might be allowed the comment that your dream for Canada has greater hope for realization than the dream for the Toronto Maple Leafs, unless things improve drastically.

I hope what you take from the questions is that we are dealing with some things here that are extremely complex. I suppose this country in a sense has been dealing with that French-English dichotomy and the place that Quebec, as an entity, has in all of that. There are no right and wrong answers. In our history we have struggled with that one, somehow trying to bring together the dream of a bilingual country, or at least a much more bilingual country, recognizing at the same time that Quebec is different and can be part of that, and how we recognize that in some meaningful way, understanding all of these things. That is very central to a lot of the constitutional discussions we have been involved in over the last 25 years. We do not have a concrete answer.

I think you raise questions that clearly we have to struggle with. We thank you very much for coming. I hope you will feel that you can come on other occasions, on other issues.

**Mr. Milnes:** I always have an opinion on something.

**Mr. Chairman:** I am sure. That is good. We appreciate that. Thank you very much. Enjoy your lunch. The committee stands adjourned until 2 o'clock.

The committee recessed at 1:07 p.m.

## AFTERNOON SITTING

The committee resumed at 2:12 p.m. in room 151.

**Mr. Chairman:** Good afternoon, ladies and gentlemen. We can begin our afternoon session. I would like to call upon our first witness for this afternoon, Professor Catharine MacKinnon, a constitutional lawyer and political scientist. She has taught at Yale, Harvard, Stanford and most recently at the University of Chicago and Osgoode Hall.

I understand that next fall you are going to be teaching constitutional law and sexual equality at Osgoode Hall.

**Dr. MacKinnon:** Yes, I will.

**Mr. Chairman:** I am sure this whole topic is going to provide years of teaching material if one just looks at the testimony before our committee.

I want to thank you very much for coming here this afternoon. I will let you go ahead with your presentation, following which we will go ahead with questions.

DR. CATHARINE A. MacKINNON

**Dr. MacKinnon:** Actually, the controversy on the Meech Lake accord has provided me with, among other things, an in-depth, quick immersion in the law and politics of Canada. I am deeply honoured to be asked, as a citizen of the United States, to address this committee on this deeply Canadian issue.

As an American constitutional lawyer and a political scientist working internationally in the area of sex equality, I am going to offer for your consideration a comparative perspective on the potential impact of the Meech Lake accord on women's equality.

From my observations of the debate to date on the accord, I have noticed that when women ask questions about the impact the accord may have on their legal rights, they are reassured that the issues are not legal, but political. When they then ask questions about the impact of the accord on their political status, they are reassured that the issues are legal and will be dealt with by the courts. Across cultures, this gives rise to a certain suspicion that the politics of men have in fact created the law for women, have been the law for women, at the same time that the laws of men have determined women's relative standing within the political order.

In order for this not to happen in Canada, it seems that a combination of those expertises you

have sought out—that is to say, political with legal analysis—is necessary to make a realistic assessment of the meaning of this particular provision.

Comparatively viewed, the Canadian Charter of Rights and Freedoms is advanced beyond any comparable instrument in the world today in promising full citizenship to women. Its combination of equal protection of the laws with specific nondiscrimination guarantees, together with its substantive recognition of disadvantage and support for affirmative relief on a constitutional level, singles it out in laying a legal foundation for some of the most significant advances in sex equality ever to be made for women under law.

The Canadian commitment to diversity, with the political mobilization of the women's community that the charter has occasioned, has produced a very particular equipoise among the various bases for nondiscrimination under section 15 and also an equipoise between equality rights and other rights throughout the charter. This means that women's interests, for one thing, are not divided by the charter between those based on sex on the one hand and those rooted in language, culture, nation, religion, ethnicity and race on the other. In other words, a unitary approach to social inequality is structural to the charter and possible under it.

The Meech Lake accord disturbs this structural equality among equality rights and threatens to qualify, limit and undermine both the charter's distinctive legal contributions and, equally important, the climate of political will so crucial to a realistic delivery on their promise.

In a comparative perspective the experience of the United States with sex equality rights, or more accurately I should say rather the lack of them, may be instructive. Sex equality in the United States has constitutional dimension essentially only by analogy. The equal-protection clause of the 14th amendment was passed to respond to a perceived emergency to the unity of the nation; that is to say, white America's history of imposing chattel slavery, social segregation and disenfranchisement on black Americans. In other words, the equal-protection clause was, if you will, part of a national reconciliation, the need for which had been created by these institutions of racial bigotry.

The equal-protection clause is gender-neutral on its face, although in fact part of it is actually



written to address male citizens only. But the rest of it is gender-neutral on its face, and does not mention sex, but then again, neither does it expressly mention race. Attempts to add express sex-equality guarantees to the US constitution, which would have removed at least the question of whether the US government is committed to sex equality from the contingencies and vicissitudes of shifting political winds and shifting majorities, have failed.

In 1971, the equal-protection clause was first applied to gender and has increasingly been used ever since, largely moving forward through an extremely uneven and often inadequate process of analogizing sex to race. The experience of the difficulties of attempting to achieve sex equality, not on its own terms—as is possible under the Canadian Charter of Rights—but through analogical method, has served to highlight the dangers for all women, including women of colour, of elevating some bases for prohibited discrimination over others.

Section 2 of the Meech Lake accord enters the field of rights selectively, potentially elevating some cultural rights over equality rights. Section 16 of the accord enters the field of equality rights selectively, potentially elevating some equality rights over others. By combination, the "distinct society" clause, with the guarantees and recognitions of aboriginal and multicultural rights, is then structural to Canadian federalism and equality rights are not. Some rights are more important than others and some equality rights are more equal, in Orwell's phrase, than others.

#### 1420

This poses concerns for the effective pursuit of sex equality, which is relegated to a nonstructural constitutional plane. It poses concerns for the vitality of section 15's protections from discrimination on the many bases section 15 covers, all of which are crucial for the advancement of women. It poses concerns for the coherent and predictable development, and even development, of section 15 jurisprudence. It also poses concerns for balances to be struck in cases of potential conflicts of rights, both under section 1 and otherwise, because some constitutional rights are thereby given more weight than others.

Examples have proven treacherous in this area, and this has not escaped my attention, largely because whenever the possibility of anyone treating anyone else unequally is raised, someone is insulted. No one wants it implied that he or she would institutionalize sex inequality. I think it speaks well for Canada that the value of equality is so widely held that no one wishes to be

considered, even hypothetically, as a possible perpetrator of sex discrimination.

However, the fact is that across culture, sex inequality has been more the rule than the exception. All cultures, all groups, have discriminated. Most do now—and I dare say most will at some point in the future, at some time, in some way—discriminate on the basis of sex, very often without intending, meaning or knowing that that is what they are doing. In fact, often it is not thought that the allegedly discriminatory treatment is discriminatory, because it is thought to be so important under some other set of values, for example, values like culture, religion, privacy or freedom of expression.

There are, in fact—need one point out?—two sides to every case of sex inequality and the issues are often decided between them on a matter of interpretation. It is when there is doubt about whether a case is really a case of sex inequality, and it is the nature of legal actions that there is often that doubt, that the weight given to equality rights in the ultimate equation is dispositive in the outcome. It is also a bit difficult to be required to give examples of what might happen under a particular legal state of affairs and then be told that, because these things have not yet happened under a legal regime that is as yet untested and uncertain, all these examples are merely hypothetical.

However, an example: Were a significant advance to be made in an area covered by the accord, analogies to the areas the accord does not mention would not necessarily be as available as they otherwise would, with the charter now structured as it is with these rights in clear equipoise.

Suppose that a significant advance were made in, say, the recognition of some group's cultural rights and an analogy were sought to support a parallel initiative for women's rights—women at once both having a culture and having been denied a culture through inequality, but both women and the other cultural group being threatened by the dominant culture—the accord would be persuasive in undercutting the full applicability of such an analogy as precedent in a case that was based on sex equality.

One also wonders, could, for example, hate literature laws be upheld over an expressive rights challenge as applied to, for example, Jews, with the added support of Meech Lake but not, were such laws amended to cover sex, supported as applied to women, who of course might not be found to have the support of the accord.

By another example, suppose after Meech Lake native women chose to challenge some sex inequality within the tribes and the rule that they challenged as discriminatory was defended as a necessary and integral part of aboriginal culture and aboriginal rights. One could argue that the tribal rules which are male dominant are not in fact truly aboriginal for those tribes whose inequality on the basis of sex tends to date since contact with the west. This does not address the issue, of course, of whether native women should resort to the charter, but merely, if they chose to do so, whether they would meet a deck stacked against them on the basis of gender.

It seems that the interpretation of the charter could well be structured against such a sex equality claim, not to mention the rather obvious fact that many features of Anglo culture are predicated on sex inequality and thus could be defended as part of multicultural rights.

In this area, which you might find to be farfetched, I suggest for your consideration the problem of pornography. If a statute were passed as a way of furthering women's equality rights, one of the ways it could be attacked would be not only as a restriction on subsection 2(b) rights, that is, expressive rights, but also potentially as an expression of cultural rights. If you think that is farfetched, I think perhaps you have not litigated against the pornographers as I have. Particularly for the American pornographers, nothing is farfetched.

You might note that none of these examples is specific or particular to Quebec women, whose situation under the accord, it would seem to me, is probably in no more jeopardy and—I would say, given Quebec's laws and other factors of their political culture—may be in less jeopardy than the rights of women elsewhere throughout Canada.

The point is, both litigation and legislation that is pursued to guarantee sex equality can be opposed already by other charter provisions, and the Meech Lake accord would give additional support to those other charter provisions. When this occurs, equality rights are unequally situated in a way that they are not now under the charter without the accord. To ask whether the accord overrides the charter is thus not precisely the issue. There will be conflicts of rights within the charter, and the accord takes sides in those disputes.

I have also noticed there has been something of a double standard of proof in the discourse on whether equality rights should be added to the Meech Lake accord. This committee has been

told, for example, that sections 2 and 16 of the accord are hortatory and largely symbolic; that is to say, not strictly legal. Yet one searches your transcripts in vain for concrete examples of how the "distinct society" clause, which is clearly essential to the fair deal that Quebec was promised, is concretely contemplated to change legal outcomes in particular cases.

Clearly, it was included, however, because someone thought it would make a difference. The difference has been explained in these terms: (1) It was important to bring Quebec into Confederation; they required it and they count. (2) It grants legitimacy and recognition to the distinct society. Then the rationale for section 16 is provided on a similar level. It provides (3) reassurance that the rights of cultural groups and aboriginal peoples will be respected.

Section 2 may not be adequate for the rights of French people outside Quebec, and section 16 may not be adequate for the rights of many cultural groups or for aboriginal peoples, but the voice of women was regarded in this process as so negligible that it was seen as something that could afford to be ignored entirely.

When women then ask in essence, politely but firmly as one does in Canada, "Is it not important to bring women into the Confederation?" they are treated as if their consent to this structure of government can be assumed. No one seems very worried that they might be alienated from the state or that they might regard such implied consent as coerced consent, as they have made clear they do, for example, in cases of marital rape.

Have you not, I would ask, seen evidence that women might require some form of national reconciliation? When women ask for legitimacy and recognition for women's equal place under this state, they are told it is so obvious that it would be redundant. But if it is redundant, it was redundant for at least aboriginal groups and multicultural peoples. If it is redundant, what is the harm in stating it and why is there resistance to it? Apparently, it would add something that someone who counts does not want it to add.

The only other answer to this question, I have heard, is that if women are granted equality rights under the Meech Lake accord, many other issues will have to be reopened, in other words the perennial slippery-slope question. Perhaps they should be reopened. Also, women are over half of the population. They are not like any other group and their interests are not like any other interests. They are in fact half of virtually every other group.



When women ask for reassurance that the pact the charter made with Canadian women is not being impliedly abrogated, they are told that it is only a matter of interpretation, and as Mary Eberts put it, they are told, "Trust us." Yet concrete guarantees were considered appropriate to provide a comparable level of reassurance to other groups, other groups that matter, other groups that one cannot help noting include men as well as being half women.

The accord apparently gave some satisfactory answer to the question, "What does Quebec want?" It did not, however, answer the question, "What do women want?" because as has so often been the case worldwide, those who made the decision apparently did not even ask.

#### 1430

In your hearings, you have been told that the insult of women's exclusion from the Meech Lake accord has no practical significance because the accord is merely interpretative while other sections of the charter are rights-granting. With respect, this is a false distinction in legal practice. For example, which was the Morgentaler case? Section 7 by its language does not grant women a right to abortion. But, by interpretation, section 7 was strong enough to invalidate the procedures for granting access to it as impermissibly restrictive.

Very few constitutional rights are so obvious as to be granted by self-execution. Those cases rarely go to court, in fact, but women in contested situations get rights by interpretation or we do not get them at all. To observe that the Meech Lake accord is only a matter of weight is also similarly unhelpful. In the legal arena, interpretation is everything and, in interpretation, weight is all.

After being told that it is all interpretative, as if that makes women's disquiet trivial, then the most basic canon of interpretation does not even seem to be mentioned. That is to say, exclusio unius, that which is not mentioned is excluded.

Now consider concretely the situation of women, the possibilities of the Charter of Rights and Freedoms correctly interpreted, and what it could do for addressing that situation. Women have historically been second-class citizens in Canada as well as elsewhere with indices of disadvantage including unequal pay, allocation to disrespected work and demeaned physical characteristics. Women have been targeted for rape, domestic battery, sexual abuse as children and systematic sexual harassment. Women have been depersonalized, used in denigrating entertainment and forced into prostitution. These

abuses have occurred in a historical context characterized by disenfranchisement, exclusion from public life, preclusion from property ownership, sex-based poverty, forced maternity, definition as sexual objects, deprivation of reproductive control and devaluation of women's contributions in all spheres of social life which continues to the present day.

Constitutions are both statements of belief and vehicles for actualizing those beliefs. They are aspirational as well as declarative and admonitory. In the face of this overwhelming social reality of sex inequality, the charter's equality guarantees are clearly goal-oriented and aspirational. They do not merely or simply codify or recognize an existing state of affairs. It then becomes a matter of interpretation whether the charter will treat equality as a positive goal needing to be affirmed, extended and worked towards to be realized in a way that would, say, support positive legislation even against conflicting rights, or whether equality will be treated in essentially negative terms, the state needing only to keep out of the social sphere and itself not moving to institutionalize inequality in order for charter-based equality to be considered achieved.

Perhaps the deepest cause for concern then is on the effect that the accord would have on the social process of constitution-building, a process which affects the relationship between the charter's political culture and its actual delivery of promised rights. In addition to being a species of law, the accord works politically. It works to set priorities and agendas, to affect resource allocations and to provide an interpretative understanding of the place of its values across the society. The accord, as a species of constitutional law, as a document, is also then a political act. It enters into the atmosphere that surrounds the seriousness of commitment to equality rights on a day-to-day level. That is the level on which a constitutional right either becomes meaningful or it dies as a piece of paper.

On this level, a constitution affects perceptions, actions and outcomes all the way from family court and rape trials to human rights adjudications. It shapes women's fortunes in the boardroom and at the bargaining table, in the home and on the street, in places where the charter is invoked and also in places where, formally speaking, it would seldom appropriately be raised. A political act like the Meech Lake accord either supports or detracts from a climate of concern in a way that affects the results of particular cases. It shifts the ground beneath

legal arguments. It determines those things that become persuasive. In other words, it is part of what gives life to law.

On this level, constitutional process begins as politics, but it ends as law. This is what Quebec wanted. It is why it wanted what it wanted and it is what it got in the accord. It is on this level also that multicultural groups and aboriginal peoples were regarded as needing reassurance—and they got it, and appropriately so. But it is also the level on which the equality rights of women were neglected. The place of sex equality as a fundamental commitment of the society, on this level, is as much constituted by documents like this as it is reflected in them.

Most broadly then, by choosing to reaffirm some interests and not to include gender and not to include other equality rights that are crucial to all women and to all citizens, the accord makes some rights structural to Canadian federalism in a way that excludes gender and it reduces the place of all equality rights from having a comparable place. It says simply that equality is not fundamental.

The record for women under the US Constitution makes all too clear that neglecting to mention women's rights at constitutive moments like this one is predictably not gender-neutral in its effects, particularly under conditions, like women's situation, that require active change in the status quo in order for equality to exist. Facial gender neutrality in a non-gender-neutral world does not even guarantee gender neutrality, far less actual sex equality.

I think that the damage done to women's rights in Canada, which is of concern to all women worldwide, at this point in the process will be especially acute if no remedial action is taken. Given that the issue has been so forcibly raised, Meech lake fulfils the promise made in 1982 to Quebec to accommodate its aspirations; but at the same time and in a very separate way, it also breaks the promise made to all Canadian women to accommodate their aspirations within the Charter of Rights.

Lack of action to rectify this situation by including both section 15 and section 28 in the charter or by making clear that nothing in the charter is abrogated or taken away from by the accord squarely poses the question of whether sex equality is indeed basic to the Canadian polity, and it also seriously undermines the compact that the charter made between women and the Canadian state.

**Mr. Chairman:** Thank you very much for a presentation in which frankly, even if we had all

afternoon, I do not think we would probably be able to go through all of the various points and issues that I think would build off some of that discussion. That was a very full presentation, and I should express, on behalf of the committee, it is nice to hear someone who has sat down and actually read everything that has been going through this committee. That is a monumental task as well. We do appreciate the perspective on this and we will jump into questions now.

**Mr. Breagh:** It was bound to happen; I think I have finally met a good lawyer. When I go to jail, you are going to get a call.

You are basically making the argument that there is nothing that can be done short of amending this accord to put in place something which establishes—I guess I would categorize it as saying it establishes—the supremacy of the charter. Is that the gist of the argument?

**Dr. MacKinnon:** That is the argument in its strongest form. You have, of course, heard other good lawyers before this committee who have suggested other possibilities. The possibility of a reference was raised, which would clarify these matters. I am not informed as to whether that is practical, given your timetable and the apparent reluctance of the Attorney General (Mr. Scott) to proceed with it.

There are then, of course, the clearest possibilities of, yes, actually amending it. If I may say, it is my view that that is your responsibility. In the words of Mr. Peterson, it seemed that he did contemplate amendment as at least a possibility. He said, and I believe it is a good paraphrase if not a quote, "If it needs to be changed, yes, you can change it." Of course, everyone knows both the politics of that and the tediousness of it.

I did actually have one sort of slight thought in addition to those. It may be somewhat fanciful. It is clearly a political thought. I would not put any legal weight on it, but it might in fact enter into the legal process in some way: and that is whether it might be possible to build in your desired interpretation into this accord, and as a contingency for your vote passing it, in such a way that if your interpretation were abrogated by a court, it would be clear that the approval of the accord was then rescinded.

**1440**

In other words, let us say you were to say, "All right; this is our interpretation of this," and write your interpretation out in full: "It shall not be interpreted in any way to abrogate from any of the rights under the Charter of Rights. For example..." It would be preferable to do that by amendment, clearly, but were you to feel that



that was an impossibility, to do that as an interpretation and say, "It is the will of this parliament and its understanding that only to the extent that this is not interpreted to take away from those rights do we pass it, and the moment at which it is, our vote for it will be regarded as rescinded." It would, shall I say, place any court that was looking to that possibility in the position of facing what would amount to a constitutional crisis, which you would have by design placed them in, and a bind you would have placed them in to get your concerns before that court each time it was considering that interpretation.

I would not give that possibility any legal weight, but as I was thinking how you could build your interpretation into your vote other than by amending, which is preferable, that was the only thing I could think of.

**Mr. Breagh:** Geez, I am out of jail already. Let me run through the two or three options that have been put before us and test them with you, because I am interested in your legal opinion on what might work.

We have discussed, because it has been suggested to us from several sources now, a court reference. None of us has a good feel for precisely how that would be done, how quickly it could be done and, frankly, no one is stepping forward and saying, "Here's what it would look like and here's where it would go." That option, which was suggested to us very early on, has not been pursued. We would be on our own or we would have to trust Ian Scott to do it for us—

Interjections.

**Mr. Breagh:** There is the one option. The second option appears to be the straightforward amendment which a number of people have now put to us as being the only way to go. The real difficulty with that is that it is the easiest thing in the world for me to do; as an opposition politician, I can put it on the table now, I have it, but it will not carry here and it will not carry upstairs and there are 11 other places where it would have to carry where there are all kinds of people who could jack that around until I am long in the ground, so what starts out as being a nice, neat piece of business never happens. That is precisely what happened at the federal joint committee. People said: "You want amendments? There they are." Boom. The amendment fails. "Fine. Let's go on with the accord." So we search for other options.

We have had presented to us this idea of a companion resolution which would be put to the legislatures at the same time as the accord but would stand on its own. That is a very attractive

proposition in terms of being politically something that could be done. It certainly gets us over the initial hurdle of not withholding our approval of the accord and at the same time forcing other assemblies right now to deal with our concerns.

Does it hold the same weight, though, in your view, as the amendment process, or is it just a good second option?

**Dr. MacKinnon:** Perhaps not being as informed as I would have to be of the technicalities of the relationship between the amendment process and companion resolutions, I would have to say that I would be suspicious if someone told me it necessarily would have comparable weight. I would need to be shown that it would. If you amend it, the thing itself then says what you want it to say. If you have a companion resolution, it would depend on how it was worded. If it said, "This companion resolution is the understanding of this assembly and the resolution to which it is a companion was passed only on condition that these things were also understood to be part of it," then it would have considerably more weight. As to your question "Would it have the same weight?" I do not see how it could, but it could be worded as to have a clear effect.

I guess I would say also to your point about the reference, if I recall your transcripts correctly Professor Baines offered to help frame such a reference, and it would also seem to me that the simple question "Would the Meech Lake accord abrogate any charter-guaranteed rights?" is a question to which if we had an answer we would know a great deal more than we do now.

**Mr. Breagh:** I was impressed with that, but having been in politics for a little while now, I am not stupid enough to be sitting down writing what that reference will look like and letting someone come along at a subsequent date and accuse me of being a really mean person, let alone a jerk, for excluding the specific words that have to be there. We have to see some consensus on what that reference would look like before it would be very palatable in political terms.

**Dr. MacKinnon:** Then of course I think you would want to consider including all the other questions that have been raised before this committee, such as the question of the Northwest Territories and the Yukon and the question of the Senate.

**Mr. Breagh:** I will not pursue this much further, but the attractiveness of the companion resolution is that in the first place the concept was not suggested by anybody on that committee; it came from native people. A number of groups have come before us and said: "Yes, we like the

wording of those companion resolutions to the point that we would support that as an approach to meeting our reservations about Meech Lake."

There we have a document and a technique that is proposed by one of the groups directly affected and it is now being endorsed by other groups. That is far different from any one of us writing a little resolution and saying, "Do you like this?" and six months later somebody saying, "Yes, but you didn't put in the word that I needed to make it meet all of my requirements."

That is the attraction of the companion resolutions, that in a sense we are able to take almost neutral wording that has some measure of support and test it among other groups to see whether they too find it meets their needs. We do not have such a set of words having to do with the court reference on the other matters.

**Dr. MacKinnon:** Right. I would think that it would be possible, in consultation with Canadian women lawyers and Canadian women's groups, to develop a position on that, either that this was something they wished to pursue and forward or, if it were pursued and forwarded, that this is how they would like to have it drafted.

**Mr. Breagh:** It would certainly be of great assistance to those of us who at least want to explore that idea.

**Dr. MacKinnon:** As for my particular role in it, I cannot represent to you what their views might be on either whether that strategy would be acceptable or whether any particular wording would be acceptable. I would think, however, that it would be only marginally acceptable as a fallback or second-level position to an actual amendment. In other words, women are very sensitive to second-class ways of guaranteeing rights.

**Mr. Breagh:** I do not know why, but I understand it.

**Dr. MacKinnon:** Sometimes that is better than no guarantee of rights, but it still is not the same as being fully represented in the document that represents those rights.

**Mr. Breagh:** Thank you.

**Mr. Eves:** Like my colleague Mr. Breagh, I am wrestling with the way to do it. I know the way I would do it. As I said this morning to the Ad Hoc Committee of Women on the Constitution (Ontario), personally I think its suggestion with respect to section 16 is the only way to go. That is the only way you are going to resolve the issue and take a very ambiguous section of the accord and make it crystal-clear.

Failing that, though, and dealing with the political realities that my colleague Mr. Breagh has enunciated—I hope they are wrong—some of us on this side of the committee are perhaps politically naïve enough to believe that some government members actually will act according to their own consciences and not follow the dictates of their party or of their Premier when this matter comes to a vote.

However, if that does not carry the day, I see second-rate or third-rate solutions to this problem. A court reference is one way we can at least find out what the Ontario Court of Appeal and perhaps ultimately the Supreme Court of Canada think of section 16 as to whether rights under the charter are derogated or abrogated or not.

The idea of companion resolutions, as Mr. Breagh has indicated, is one that was put forward to this committee several weeks ago by some aboriginal groups who have accepted their lot in life. They have accepted political reality in their minds. They are not getting anything right now, and the Meech Lake accord is not going to be amended to include their problems. So as far they are concerned, a second-rate or third-rate solution—better than nothing—would be a companion resolution, which at least would put their agenda on the table.

You may or may not be aware that the next constitutional round includes such highly important matters as Senate reform and fisheries but not the rights of aboriginal people in Canada. There are other issues, and you have alluded to some of them, such as the rights of people living in the Northwest Territories and the Yukon and the right of individuals from those areas of Canada to be nominated for the Supreme Court of Canada or the Senate.

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The attractiveness of a companion resolution is that it may allow Premier Peterson and others to swallow their political pride, yet still keep their deal, if you will, to not change a comma in the Meech Lake accord. I suppose it also has the attractiveness in that you can put forward many companion resolutions. Some of them may succeed and some may fail.

The problem with it, though, as I see it, and I am far from being an expert on such matters, is that a companion resolution is really nothing more than a future amendment to the Meech Lake accord or to the Constitution of Canada, and eventually you are going to have to get the approval of all 10 provinces and their legislatures, and the federal government as well. I think it is just a way of fast-tracking a future



amendment. I may be totally wrong, but that is my perception of what a companion resolution is.

Given those three opportunities, direct amendment, court reference and companion resolution, what would be your hierarchy of preference?

**Dr. MacKinnon:** It seems to me that a court reference could be pursued in tandem with an attempted amendment, so those are not exclusive. If anything, it is the disability of the reference procedure that it would take time. But if we were also pursuing amendment accordingly to satisfy the suspicions that we think we already have, while trying to get clarification on those suspicions from the court, the amendment process could be carried out.

I think to put the issue as whether one will take something or will take nothing, and also to suggest that what the concurrent resolutions would provide is an agenda for the future, places it in a position with which women are extremely familiar historically, that is to say: "Other things are more important than you are. Be patient. We will get to you eventually, some time."

**Mr. Eves:** Maybe next century.

**Dr. MacKinnon:** Right. It is the time at which one is actually doing this process, which is what Canadian women, of course, learned and did and acted on at the time when there were no adequate sex equality rights in the charter itself. It was then necessary, as some perceived, to go after the whole thing all over again and get it done when it is being done; do it right the first time.

In that perspective, being told to be patient, particularly when we think you could fix this, does not carry a lot of weight. I think people are not—at least my sense of women I have spoken with in Canada—are not terribly sanguine about the possibilities for equality yet again being placed on a middle tier, or back burner or whatever it is. A reference would provide some clarification and seems a creative idea. Amending it, however, seems the right thing to do. It seems as though it is something that should be pursued as top priority because it is the right thing to do.

**Mr. Cordiano:** Certainly everyone understands the desire of various groups that have come before the committee to have greater assurance with respect to the Constitution, to have a higher level of certainty about what things mean, and I can appreciate that.

I would like to get from you your view about the perception or the perspective that has been put forward by some with regard to section 16 of the Meech Lake accord, namely, that section 16 refers back to two clauses in the charter dealing

with matters cultural and that they are put in there because section 2 of the charter, the "distinct society" clause, deals with the whole concept of Quebec as a distinct society, as a cultural entity, within Canada. Do you accept that view or do you think that is a flimsy argument in the legal sense?

**Dr. MacKinnon:** I think it is not a flimsy argument, and it does seem to me that were I advising multicultural groups or aboriginal groups, I would urge that something like section 16, if not more, was certainly called for, given the necessity for something like section 2. The other possibility, however, would be that there were no section 16. However, I would say at this point, particularly at this point, given that it does seem to be called for by section 2 and that it is there, it would be an extremely bad move, as an attempt to solve all these other group, as they are perceived problems, to simply get rid of that one too.

**Mr. Cordiano:** There are two views on section 16, the one I have just expressed and the other that some have put forward, that section 16 was added as a last-minute effort to placate, if you will, certain groups within our society, aboriginal peoples and ethnic groups, which have a major concern with respect to multiculturalism. They are the two prevailing views, but when you try to work in the whole question of equality rights, it brings it to another level.

The people who put forward the first view I spelled out would argue that there is no need to bring in those sections in the charter referring to equality rights because the charter provisions stand on their own and are strong enough; the charter stands on its own. That is the basic argument put forward. So you would accept that in fact section 16 needs to be there because it does deal with matters cultural, and that to have greater certainty with respect to section 2 of Meech Lake, "distinct society," it is required?

**Dr. MacKinnon:** I would truly advise, as I said, those groups to seek that. I would advise them to demand it. They could not be adequately reassured without it. I would think their rights were threatened potentially without it, although that implies no concrete view on my part about how the distinct society itself might do so. I have no such a view.

I would like to add that equality rights are often in conflict with what are perceived as necessary cultural values within many cultures. This is surely not specific again to the distinct society in any way; in fact, it is more likely to be specific to other cultural groups. So that to say equality is

equality and these other things are matters cultural, is to neglect the way in which equality rights do address matters cultural.

**Mr. Cordiano:** I did not want to leave you with that impression. Professor Baines put forward the notion that women as a group have a common culture that women can ascribe to; that in fact there is a culture surrounding women's beliefs and notions that prevails throughout history. That was her view. If you take that one step further, then you could say that women would be tied into section 16, if you think of it as matters cultural.

**Dr. MacKinnon:** Yes.

**Mr. Cordiano:** That is a plausible argument perhaps. I am not sure. Who knows? But Professor Baines certainly seems to think that you could ascribe a common culture to all women.

**Dr. MacKinnon:** Yes, and I have noticed your fascination with the argument throughout the transcripts.

**Mr. Cordiano:** Jeez, you have done your reading.

**Dr. MacKinnon:** That is what I thought you were thinking about.

**Mr. Cordiano:** I wanted to see if you agreed with Professor Baines's view that there is indeed a common culture that you can ascribe to women, because that is something quite different.

**Dr. MacKinnon:** If that were actually something one could establish in law, then that would mean there would be no need to add equality rights to section 16 by means of reassuring women of equality rights because our culture of equality would be something we could pursue under multicultural. That is what you have thought about, right?

**Mr. Cordiano:** It is very vague in my own mind with respect to that because, as you say, it has never been brought forward as a legal argument.

**1500**

**Dr. MacKinnon:** Yes. I also recall that Mary Eberts suggested that she might find a way to use such an argument were the correct conditions available. I do not disagree with that. I do think that inequality is part of men's culture. It is a part of the culture men have shared cross-culturally.

**Mr. Cordiano:** Not all men.

**Dr. MacKinnon:** No, but I am saying as a cultural characteristic, sir, which does not necessarily address the efforts of individual men or women to contest that. For example, the

exclusion of women from public life can remain a general fact in spite of the presence here of women members of parliament. What I think is that women have also been deprived of a culture.

There are things that one can attempt to do to rehabilitate that lack and that deprivation and that inequality by pointing out the positive side of what women have done, what women have accomplished. But I think that does not make up for what women could have done, could have accomplished, what women could say or become as individuals and as a collective culture were it not for inequality. So I would be very hesitant to rely on what women have been able to produce as a culture under conditions of inequality as a basis for fighting against the very inequality that has created the limits and bounds of that culture.

**Miss Roberts:** This is just a comment, and I apologize for not being able to hear the first part of your presentation. You are very good at putting across your point. If Mr. Breough ever compliments a lawyer, he must really mean it.

**Mr. Eves:** Either that or he is very tired.

**Miss Roberts:** That is right.

**Mr. Breough:** That is not on the record.

**Miss Roberts:** Or else it is getting late in March.

**Dr. MacKinnon:** Perhaps he also has a very well-founded scepticism of lawyers.

**Miss Roberts:** That could be very true.

It would appear to me that equality rights, legal rights, all the charter rights that are there are going to be attacked from time to time, each time we look at the Constitution. That is something that Meech Lake has certainly pointed out very clearly.

**Dr. MacKinnon:** Yes.

**Miss Roberts:** We have to be—and I use that in the sense that all people have to be—on guard with respect to that particular attack. Your coming here today and expressing your point of view is very helpful for us to realize how that attack is occurring; but how do we deal with that attack? You will note that from time to time, in the transcripts as well, I have dealt with this process. How do we deal with that attack?

Meech Lake does not occur—take that scenario—and there is going to be another presentation, and your points of view and your expertise in the area is required to help us, as legislators, deal with the problem. Do you have any wisdom with which you can help us with respect to that? How do we tap your expertise without being here at this particular time?



**Dr. MacKinnon:** Were that to occur, it would be rather important to regard the existing provisions of Meech Lake as themselves essential to whatever the next document were to be; in other words, so that one would not in fact put the whole thing back to where Quebec did not know if there was going to be a "distinct society" clause. It seems to me the things that were in there would have to begin as non-negotiable and the question only what could be added. At least that is how it would seem to me. It just does not seem acceptable to once more subject those clauses that are acceptable and necessary to Quebec to further negotiation and possible political compromise. That is just the first thing that occurs to me off the top of my head, not having considered this specific possibility.

In answer to your question about input and expertise, Canadian women are better organized both on the legal level and on the social and political level in terms of having clearly organized groups that expressly voice women's concerns in ways that are really rather difficult not to hear if the process is set up merely to make them accessible. In other words, the very process through which, for example, Quebec was represented in the Meech Lake situation, the process through which multicultural and aboriginal rights were brought to the attention, however inadequately, of the drafters, might seem to me to be the kind of process that should be made available to all groups that wish to have input into the further changes that would then be added to that basic document.

I may not be expressly addressing your underlying concern.

**Miss Roberts:** Your comments are very helpful, in particular your first comment with respect to what should occur, maybe, in the next draft. Thank you.

**Mr. Chairman:** There is one point I would like to underline, which flows from Mr. Eves's earlier comment. I feel safe in making it, because while I am there, I am also here on this side, so I guess I have a foot on both sides of the—

**Mr. Breagh:** A classic Liberal position.

**Mr. Chairman:** It is the yin and the yang.

**Mr. Morin:** But it works.

**Mr. Eves:** It is fine if you have long legs.

**Mr. Chairman:** It seems to me we have had the question today and on several occasions as we struggle with various alternatives in moving forward. It is important to make the point to you and in fact to some others who were here this morning that, clearly and understandably, we

recognize that the option the women's groups which have been before us would like to see is an amendment to the accord.

Whatever our problems might be in dealing with the Meech Lake accord, whether as government members or as opposition members, what we have tried to say is that as we come at this issue as a committee, we have to still try to, in a sense, eliminate those other background noises and at least in our own minds determine: do we think this is a bad accord, not just because of the reasons you have raised, but do we think it is bad? If not, do we think it is all great? Are there parts we do not like? How bad are those? How should we go about it?

There are a whole series of questions, it seems to me, that I, as a legislator, have to wrestle and struggle with. Obviously, we are dealing in a broader political process, and a lot of things have been said outside this room which at some point in this whole business we are going to have to come to grips with. I think as we have talked, particularly with women's groups and individuals, as we said this morning, some very clear and specific recommendations have come forward. It is perhaps quite understandable that a committee would be looking at or trying to search for what the options are, what the alternatives are, in dealing with this.

I think for us in a sense to be trying to get you to say, "I would give this nine out of 10 and this seven out of 10"—clearly, for the women's organizations and groups that have been before us the preference by far is that if this is what in fact is meant then let us do it and get the whole thing over with. I guess in the whole balancing act of all the other things that are surrounding this issue, at some point we will have to make a decision and try to go with that. I just wanted to be clear that that message has come through. However we deal with that in the end, it is clear what the first priority is. I think you have made that clear and I think the groups this morning and others have made that clear.

That is just by way of a preamble or comment on everything that has been said. I would like to thank you very much on behalf of the committee for coming in this afternoon.

**Dr. MacKinnon:** Thank you. I would just like to say to your last remarks that I hope I made as clear as I wished to that all equality rights are crucial to the advancement of women. In other words, one can say that section 28 should be added as parallel to 25 and 27 under section 16. I think, however, if one has at heart the interests, not only of all people but more particularly of all

women, that the equality rights included in section 15 having to do with race, nation, religion, mental and physical disability and so on are also crucial to women getting out from under the situation we are in.

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**Mr. Chairman:** I think you made that quite clear but I appreciate the underlining. Again, thank you very much for joining us this afternoon.

**Dr. MacKinnon:** Thank you very much.

**Mr. Chairman:** I would like next to call upon the representatives of the Canadian Association of Law Teachers, Professor Jacob Ziegel, the co-chair of the committee on judicial appointments, and Professor Gerald Gall, who is also co-chair of the committee on judicial appointments. Gentlemen, we welcome you to the committee this afternoon and appreciate that you could be here. We recognize that at least one of you has come from a long way away to be here with us. I will simply turn the floor over to you to take us through your presentation and we will follow it up with questions.

#### CANADIAN ASSOCIATION OF LAW TEACHERS, SPECIAL COMMITTEE ON JUDICIAL APPOINTMENTS

**Mr. Ziegel:** Thank you very much. My name is Jacob Ziegel. I am of the faculty of law and co-chair of the special committee on judicial appointments of the Canadian Association of Law Teachers. My colleague, Professor Gall, is a fellow chairperson, and as you have already intimated, he is a member of the faculty of law at the University of Alberta.

We are grateful for this opportunity to appear before the committee today. It is not the first time we have had occasion to make submissions on a particular aspect of the Meech Lake accord. We appeared last August before the federal committee, but we deem it important that our views also be expressed before this committee, and so far as appropriate, before other provincial committees with similar terms of reference.

As our brief makes clear, it is solely concerned with those aspects of the Meech Lake accord that deal with future appointments to the Supreme Court of Canada. Our committee's terms of reference do not extend to any other aspect of the Meech Lake accord and we offer no opinion about the desirability one way or the other. We do, however, have some very keen views about those provisions in the accord dealing with future judicial appointments to the Supreme Court.

As I am sure the members of the committee are aware, there has long been concern among the provinces that under the existing Constitution Act there is no participation by the provinces in appointments to the Supreme Court of Canada. The Meech Lake accord attempts to address that long-standing concern by giving the provinces a voice in the future selection of Supreme Court judges.

Our committee has absolutely no quarrel with the concept of provincial participation in these judicial appointments. Quite the contrary; we think it is right and proper. We do, however, have strong concerns about the mechanisms, or perhaps the lack of mechanisms, envisaged under the Meech Lake accord for expressing this provincial participation, and generally with respect to the lack of sensitivity in the Meech Lake accord about past concerns about the method of judicial selection in Canada at all levels.

It was those concerns that led to the appointment of our committee in 1985. Members of the committee may recall that prior to and during the last federal election, much concern was expressed about the role of patronage, both in appointments to the federal bench and in other patronage appointments to other offices made by the then government. As a result, the Canadian Association of Law Teachers decided to establish our committee to review the general method of appointment of judges in Canada and to make appropriate recommendations.

By happy coincidence, the initiative of our association coincided with a similar initiative taken by the Canadian Bar Association, thus reflecting the concerns of two major legal bodies in this country about the method of appointment of judges. Both committees reported in 1985. Our own committee reported at the end of May. The Canadian Bar Association committee reported in August. They both came to strikingly similar, if not identical conclusions, both as to the nature of the problems and the desirable solutions. Both committees found that there were systematic defects in the existing system of judicial appointments in that the role of patronage and political influence is much too large and the overriding goal was not designed to select a person solely on the strength of merit and aptitude.

It was with a view to correcting this very serious defect, one that has afflicted the Canadian polity almost since the beginning of Confederation, that both committees strongly recommended the establishment of what, in our report,



is called judicial nominating councils and what the CBA report refers to as advisory committees. The purpose of both these bodies, as envisaged in both of these reports, is to have independent committees scrutinizing the prospective candidates, drawing up a list and then making appropriate recommendations, in this case to the federal government of Canada.

As members of the committee will appreciate, under the Canadian Constitution the federal government has exclusive responsibility for judicial appointments to all the higher provincial courts and to all the federal courts, including, of course, the Supreme Court of Canada. This means the federal government is currently responsible for the appointment of over 750 judges who exercise, both individually and collectively, an enormous power, one that reaches into every aspect, public and private, of the lives of Canadians and the life of Canada at large.

Our concern is that the Meech Lake accord does not adequately, or even at all, reflect the concerns in either of the two reports about the method of selecting judges. It merely requires that the federal government, in making future appointments to the Supreme Court, must select a nominee from a name put forward by the government of the province where the prospective candidate resides. It gives no clue how the provincial government is to go about making its nomination. It provides no direction, no guidance, no principles and no criteria how the federal government is to be guided in responding to the provincial nominations.

Our concern is that we may have more of the same. It may be that both levels of government will be guided by the highest possible motives of the good of the country and wholly exclude political and other irrelevant factors. On the other hand, it is just as possible that one or other level of government will be guided by narrow, partisan considerations in either making its nomination for appointments, or in the case of the federal government, deciding who is to be actually appointed.

This is not idle speculation. There is much documentation about appointments at all levels of courts in Canada, including the Supreme Court of Canada. There is overwhelming evidence that in the past narrow partisan considerations have played a powerful, if not a dominant role in the selection of individuals. It is precisely those narrow partisan considerations that we are concerned about and that we wish to exclude in

future appointments to the Supreme Court of Canada.

What we say in our brief is that there is a way out and it does not involve a formal amendment to the Meech Lake accord. The solution lies in the federal government publicly stating now that it accepts the recommendations of the Canadian Bar Association committee and of our own committee, and that it will proceed to establish these advisory committees or nominating councils at the several levels at which we have recommended they be established, so that in future the nominations of the particular provincial government and the actual appointments by the federal government will be based on recommendations made by impartial and highly qualified groups of individuals.

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We think this will ensure not only that the best qualified people will be appointed to the most important court in Canada, but also that the appointments will be seen to follow the path of utmost integrity and maximum objectivity.

That, putting it in a nutshell, is the thrust of the brief we have put before you today. My colleague, Professor Gall, would like to supplement my opening remarks with a few additional comments.

**Mr. Gall:** It is a pleasure to appear before you. As you know, I come from Alberta, which had no hearings, so I had to seek out a place where there were hearings. That is not quite true. I do have an affinity to Ontario. I was born here, grew up here and was educated here. In fact, I remain to this day a member of the bar of this province, so it is not really a foreign jurisdiction.

**Mr. Chairman:** Leaving your options open, as they say.

**Mr. Gall:** One could look at it that way.

I would like to supplement the remarks with a very brief comment. The Canadian Association of Law Teachers and the Canadian Bar Association have argued for a broad-based appointment process, a process which takes into account the Meech Lake provision that the provinces will be represented in the appointment process, but also takes into account that there will be a broader range of input in the appointment of judges to the Supreme Court of Canada, including that of the public. We prefer that system with respect to all judicial appointments, including the Supreme Court of Canada.

One of my concerns with the Meech Lake provision is that the provinces, in nominating candidates to the Supreme Court of Canada, will

take into account somewhat parochial concerns in relation to their nominees. It is understandable that a given Premier will want a candidate on the Supreme Court who is viewed to be in sympathy with the best interests of the province; and so he should be. That is a basis upon which provincial premiers presumably make all of their decisions.

Having regard to federal-provincial disputes, obviously the provinces will want to nominate someone who will take a "provincial rights" point of view. There is nothing sinister about this. It is just a fact of life, the same as our present system, where it is possible for the federal government to nominate persons who are centralists.

However, the better system, we feel, is one employing broadly based advisory committees, with representation on the committees of various interests. It is somewhat ironic that after Meech Lake, if there are no changes in the accord, the provinces will now have a constitutionally entrenched role in the appointment of judges to our most important and truly national court, whereas the provinces will continue to have no constitutional role whatsoever with respect to the appointment of judges to their own superior courts.

The answer, it has been explained, is that maybe some people regard it as more important to appoint the league commissioner than the umpires, but in any event, the provinces will have no role with respect to the appointment of judges in their own courts.

I have a couple of other remarks but perhaps we can spend the time more profitably in answering questions.

**Mr. Chairman:** Thank you very much for zeroing in on a particular part of the accord. You might be interested to know that we had Professor Peter Russell who spoke to this issue in his presentation and we had another organization which specifically addressed the question of the Supreme Court and suggested another, not all that dissimilar, approach to this as well.

We have recalled that earlier this year the Attorney General (Mr. Scott) had suggested some opening up of the process through which provincial court judges were appointed. I think this is very much an issue whose time has come. It is something we should try to wrap our brains around and try to come up with some proposals. I think this is very useful.

I was not aware of a lot of the background information that is here.

**Mr. Breagh:** We have discussed this briefly on one or two other occasions. A couple of points

perhaps will suffice. One, we are a little uncomfortable, but not with the notion that this kind of a concept be put in place; I think there is general agreement, by me anyway, that it would be a really good idea.

The missing piece I struggle with a bit is, then what does the federal government do with these nominations? Is it appropriate to bring into Canadian parliamentary procedure some form of—if it is not really an approval process, I suppose we would design some kind of a polite interview process. After this august group put forward someone's name in nomination and the federal government decided to proceed with it, what then? Do we send these people off to a parliamentary committee that interviews them?

Just to give you a little bit of my personal feeling on the matter, up until now, we have kept our hands off the judiciary in a very real, strong sense. People who were ministers here got bounced out of the cabinet for daring to telephone a judge. But if the Supreme Court of Canada is to become more and more a player in the lives of Canadians and if it does not just adjudicate a case heard before it but its decisions have ramifications right across the country the next day, and that now is the case, then it does become more and more important that we have some understanding of who these people are, what their backgrounds are, what their feelings are, and to be sensitive in a politically appropriate way to what their point of view really is.

Although you are not asking them to give out what their decisions will be, you are asking them to give some knowledge of who they are. Right now, I think it is not unfair to say that the members of the Supreme Court are not known entities to the Canadian people. They do not know who they are.

How do you feel about some kind of process? I noticed that both you and the bar association stepped back from that just a touch. Would you step into it just a touch?

**Mr. Ziegel:** Sure, I would be glad to. Our committee did not address its mind to a particular parliamentary process to approve the appointment of judges to the Supreme Court. We did discuss briefly the general question of whether there should be a parliamentary screening process for federally appointed judges in general. Our committee generally did not endorse it because it thought it would politicize the process too much. It would be very divisive. It would be uncomfortable for the judges. It would introduce an entirely novel mechanism into the appoint-



ment of judges following the Anglo-Canadian tradition.

Speaking to the issue of Supreme Court appointments specifically, and I can only speak for myself, I personally would not be averse to having something similar to a US Senate ratification type of process. I share your concerns that the public at large knows nothing about nominees to the Supreme Court. They are entitled to know. The people's representatives in Parliament should have an opportunity in an appropriately decorous and mature fashion. It is not necessarily a reflection on the integrity of the federal government that puts forward the recommendations. It is simply, as you very properly put it, a reflection of the fact that the Supreme Court today is a major participant in the government of the country, and as is true of any major participant there ought to be a high degree of visibility and a high degree of accountability.

If you would allow me to make this additional point, I do not think the recommendations of these two committees really bear on your concerns. I think those are severable concerns, because whether you have recommendatory committees, as recommended in the two reports, or whether you have the federal government proceeding unilaterally, which is presently the case, I think the problem would still arise of whether there should be a further screening process before the appointments are ultimately made.

The basis of the concern in the two reports is that up to this very moment the federal government has no accountability. It is not the practice in the federal Parliament for the government to be cross-examined about the appointments it has made; it is generally said that it would be improper. In any event, it is not the practice to do so. The federal government is not accountable and does not account. That is what we are deeply concerned about because of the overwhelming evidence that in making past appointments, the federal government often has taken partisan factors into consideration rather than the factors of merit and integrity.

1530

**Mr. Gall:** May I add to those remarks? I certainly appreciate the introduction of your question because the previous witness, and I am sure many witnesses, addressed uncertainties. What will "distinct society" mean? What will be the effect of section 16? Who is going to decide those issues? If you have a reference, who is going to decide the reference? The Supreme

Court of Canada ultimately is the institution in society that is going to resolve these issues.

Think back to seven years ago, when the charter came into effect. Who would have thought that "security of the person" in section 7 meant no abortions? It is not predictable how the Supreme Court will decide. Ultimately, they will make the decisions. Short of ironclad amendments, they will make the decisions, so it is important to focus on that institution. It should not get lost in the Meech Lake process, because ultimately it will make the decision.

You are right. That is one of the significances of the Morgentaler decision, and the Big M Drug Mart; the Lord's Day observance. People are saying, "Who are these nine unknown, unelected people in Ottawa, whose names I don't know, who are affecting my personal life and who are affecting my value system?" The cases are as important for abortion as they are institutionally for the realization that these men and women in Ottawa are affecting the population at the grass-roots level.

Having said that, I agree with your introductory remarks. I think Professor Ziegel is correct. Our committee did not address the question of a confirmation hearing. It addressed the question of refining the appointment process up to the confirmation point. I am not sure I would like to see in Canada a Bork-Ginsburg-type circus as we saw in the United States, but that is just a personal opinion. Our committee did not address that; we addressed the question of refining the appointment process up to the issue of confirmation. I guess you have to walk before you can run in the sense that if we can get that much done, we will have improved the system significantly.

**Mr. Breauth:** I think the problem we all struggle with is that I would advocate we do not want to put someone on the Supreme Court of Canada and then yank him out of there because he is getting real dumb. We always want to maintain the position, I suppose, that anyone who might be nominated is eminently qualified and will be eminently fair in his decisions.

The problem is that as their decisions become more and more integrated into everyone's lives and the Canadian political process, it becomes absolutely crucial that we at least have some understanding of who these people are and what their backgrounds might be. If we are going to put them on the Supreme Court for life, so to speak, which for all intents and purposes we do, and we have no means of recall, or at least the recall process is very difficult, it seems to me that

is the last chance anybody has even to ask politely for some measure of accountability.

Let me just pursue one other little point with you. You have enclosed as an exhibit with your presentation today a copy of a letter from the Premier (Mr. Peterson). I must say I read it. I have received similar letters myself. It is kind of like saying, "Take the next bus." I read both these submissions. I see them being as right in line with the accord. I see them as embellishing one of the major recommendations of the accord; that is to say, if the provincial governments are to do the nominating of judges for the Supreme Court, the next question is how we do go about doing that nominating? It seems to me you would turn to wise folks in the land and seek their counsel on what kind of process you would put in place.

It seems to me that the Attorney General, who is still a legally practising lawyer in Ontario, put forward much the same kind of idea not too long ago, so I was a little taken aback that the Premier of Ontario decides this is a revolutionary thought that cannot be considered while this thing is under way. Have you had any further correspondence from him or any rational explanation why he is so paranoid about thinking about your report? It is not exactly a revolutionary document.

**Mr. Ziegel:** I am glad you recognize that. No, I have not had any further correspondence with the Premier. We did meet with the Attorney General a year and a half ago to discuss our initial recommendations, and of course, we welcome the Attorney General's indication that the provincial government intends to broaden the base of future selection and to establish a committee somewhat along the lines we recommend, though somewhat differently structured.

I want to be fair to Mr. Peterson. I did not read his letter as repudiating our recommendations. I think what he was trying to do is protect the Meech Lake accord while at the same time expressing some sympathy for our views, but saying those views could be considered at a future meeting of the first ministers. Our point is we should not have to wait for future meetings of first ministers. Our recommendations can be implemented now and can be implemented without having to change the Meech Lake accord.

We have real concerns that unless the federal government commits itself to implementing the recommendations in the two reports before the Meech Lake accord becomes the law of the land, we may have to wait yet another half century

before anything is done. Astonishing as it may seem, it is now almost two years since the two reports were published, yet to this day the federal government has given no public indication of its position. We have had several false alarms. The first Minister of Justice promised that the federal government would unveil its position two years ago. The two years passed and nothing happened.

We met Mr. Hnatyshyn just over a year ago. He was not willing to give any indication when the federal government is likely to state its position. I find this remarkable. Here are two very important reports bearing on a critical aspect of federal and provincial governments in Canada, and yet the federal government is not even willing to say what it feels. To me, this suggests that it either thinks this subject is too politically sensitive or it is not willing to say publicly that it rejects the recommendations for whatever reason it may have.

It is precisely this long delay in the expression of federal government opinion causes us concerns and strengthens our view that it is important that the federal government be pressured to agree to the implementation of the two committees' recommendations before the Meech Lake accord becomes the law of the land.

**Mr. Breaugh:** Although, to be fair, they have been very busy keeping the cabinet out of jail, so they may not have had time to get to the appointment of judges to the Supreme Court of Canada. In case you have any doubts, this is a standard "get lost" letter from the Premier's office. I have received many of them and I can assure you that is what it means.

Interjections.

**Mr. Cordiano:** If it is addressed to you that is what it means.

**Mr. Breaugh:** When it is addressed to me it says, "Get lost, jerk."

**Mr. Chairman:** We have discussed a number of times the question of whether Mr. Breaugh should be elevated to the bench and I think, after his interpretation of the Premier's letter, we understand at least not at this time. I think there are other interpretations of the letter and Professor Ziegel's is undoubtedly closer to the truth. Certainly, this committee looks at that approach as one that really merits a lot of exploration.

1540

**Miss Roberts:** Perhaps I might, gentlemen, speak to you briefly. Besides Mr. Breaugh, I will be another person whose name will not be recommended immediately.



**Mr. Chairman:** When?

**Miss Roberts:** Immediately if ever, I hope. Are you saying that the provincial governments should all have the same process, exactly the same process, so that they can bring forward—I have not had a chance to review all your recommendations in great detail. Are you saying it is important that process be entrenched in the accord along with the suggestion that the list should be there for provincial appointment? Should we all have the same process?

**Mr. Ziegel:** No, I think you slightly misunderstood our brief, Miss Roberts. What our original report recommends is a series of judicial nominating councils. One would be for nominations to the superior courts of the provinces. In that case, each province would have its own nominating council, but only for federal appointments to the higher courts of that province. There would be a second judicial nominating council for appointments to the federal courts of Canada other than the Supreme Court of Canada. Appreciate that there are a range of courts now at the federal level. Finally, there would be a third nominating council to fill vacancies on the Supreme Court of Canada.

Since it is envisaged under the Meech Lake accord that the federal government's choice will be limited to nominations arising from the provincial government of that particular province, what we are saying in the case of vacancies on the Supreme Court of Canada is that we would have a judicial nominating council which would encompass representatives from various groups, from the federal government, the provincial governments, law societies, as well as members of the public at large.

They would make recommendations. Because their recommendations would be based on the views of a broadly based constituency, the federal government should not have much difficulty in selecting one of the recommended names where the recommendations include more than one name.

**Miss Roberts:** I understand all that. What I am asking you is, do you believe it should be the same in each province, that final council, that it should be exactly the same in each province, that there is no reason for there to be any difference and that it is important it be the same; in fact, so important—

**Mr. Ziegel:** No. Do not forget, when we made our initial recommendations in 1985 there was no Meech Lake accord, and we did not have to address ourselves to the slight complication introduced by the Meech Lake accord. Our

overriding concern, as I say, was to strive for integrity in the appointment process and to ensure also that recommendations be broadly based. Within those broad parameters, I think there is lots of room for flexibility. If, for example, Ian Scott believes there should be a larger number of lay persons on the various committees, that is fine with us; we have absolutely no difficulty with that.

I think what you have to bear in mind—perhaps this is not sufficiently emphasized in our brief—is that when judges on the Supreme Court reach a decision, it does not affect just one province and the federal government; in almost every case it affects every province and the whole of Canada. That is why it is important, therefore, that the selection process of every judge of the Supreme Court of Canada be as broadly based as possible.

If I may say so, I think that is one of the serious weaknesses in giving Quebec an entrenched right in appointing three judges. The assumption appears to be that those three judges will give a particular Quebec perspective and Quebec has primary interest in matters affecting Quebec. That would be fine if those three Quebec-recommended judges were only concerned with Quebec issues; but they are not, 95 per cent of their time will be concerned with interpretation of federal issues, of charter issues and questions involving other provinces.

That is why we feel it is terribly important that a nominating council concerned with appointments to the Supreme Court of Canada be broadly based so that a national perspective can be brought to bear on the filling of the vacancies, not merely the perspective of one particular territory or region, however valuable its perspective is.

**Miss Roberts:** My only other comment is that I think most people who apply for judgeships now would be somewhat terrified by that particular prospect, because they are not elected people. They have never been elected people and they have never really been scrutinized by a committee of people who are going to be asking them questions.

What is the use of having a broadly based—I do not want to get into any argument, but you understand that in our judicial system the lawyers who are out there are going to have to be aware of that and be prepared to deal with that type of scrutiny as well, which I think is excellent. I am not saying it is wrong. I am just saying you are going to have to prepare our legal community for that, and also for some type of confirmation, whether it is in front of that council or in front of

someone else. That is going to be a point as well. The legal community will be under more scrutiny than it has been before.

**Mr. Gall:** I think you are correct. There is really nothing wrong with that.

**Miss Roberts:** No, I am not saying there is.

**Mr. Gall:** Now we have an entirely secretive process. No one knows how judges are selected. There is no accountability once they are selected.

**Mr. Ziegel:** Let me add, Miss Roberts, that there are ample precedents. We were not innovating. Both Quebec and British Columbia have had various types of nominating committees for a good many years, British Columbia the longer of the two. British Columbia has a judicial council which is exclusively responsible for recommending names to the provincial government. The system has worked extremely well. They interview every candidate. It has not caused any difficulties. Quebec not only interviews every candidate; it openly advertises that there is a vacancy and invites applications.

Every university professor is scrutinized by some sort of committee before he is appointed. Every president of a university and every senior government official is scrutinized by someone. I fail to see why a prospective judicial appointee should be concerned or apprehensive about submitting himself or herself to a process that is really pervasive in modern society.

**Mr. Offer:** My supplementary, almost a question but it is just a supplementary: I am still trying to get an understanding as to the nominating council with respect to the Supreme Court of Canada. I just want to clarify that you seem to be suggesting that, yes, each province will have some sort of organization, some sort of council in place, but the council itself may be different.

**Mr. Gall:** For the Supreme Court of Canada, our particular recommendation is one council consisting of the Chief Justice of Canada, a nominee of the Canadian Judicial Council, a nominee of the federal Minister of Justice, a nominee of the Attorney General or Attorneys General of the province or provinces from which the candidate is likely to be selected, because there are certain conventions as to where judges come from, two members of the bar to be selected on the same basis as a bar member of the federal judicial lobbying council and a member of the public to be nominated by the other members.

**Mr. Offer:** You have this national type of nominating council, but who sits in some of the

chairs of the council would be changed depending upon where the judge is chosen from.

**Mr. Gall:** Precisely.

**Mr. Offer:** Having said that, the list from the province would go to this council and it would scrutinize it and go back to the province for submission to the federal government. How would that work? Is it the council that makes the final determination or does the council just somewhat look over the particular person and send a report in essence back to the province saying, "This person is okay," and he gets a little stamp of approval, so to speak. I am just wondering, who makes the actual appointment?

**Mr. Ziegel:** The actual appointment obviously would be made by the federal government because that is mandated under our Constitution. Your question is perfectly legitimate. Remember, our report was issued before the Meech Lake accord and therefore did not take into consideration the additional complication introduced by the Meech Lake accord.

In terms of your actual question: yes, there are alternatives. It could be that the provincial government will express so much confidence in this national nominating council that it will say, "So long as we are represented through our Attorney General, through our bar, through perhaps a public representative, we have so much confidence in the integrity and adequacy of this body that we will be very happy to accept its recommendations and, in turn, put them forward to the federal government." If this is regarded as perhaps a little premature or a little unduly optimistic, then it will be open for a provincial government to say no, in addition to the federal body.

**1550**

We feel we would like to establish a body of our own which, in a sense, would parallel the federal body. My own preference would be to have one body to screen names for appointments to the Supreme Court rather than a multiplicity of bodies, because it would emphasize the national role of the Supreme Court rather than a provincial or regional role.

**Mr. Offer:** I have a just a short question. I think the confusion with respect to the Premier's letter was that it was read as if this type of national nominating council would be almost an amendment to the accord.

**Mr. Ziegel:** That is not correct.

**Mr. Offer:** I think that is how it might have been misunderstood, as opposed to your saying, "Keep the accord intact, but if we could possibly



have an understanding that this is something which might be approached in order to carry out the section, that would suffice."

**Mr. Gall:** It could be very complementary to the accord. It could almost have a lock-and-key arrangement with the accord. It is possible.

**Miss Roberts:** Just a point of clarification, because I am not knowledgeable in the law in any way, shape or form. Is it your opinion that Meech Lake as it stands right now in respect to these appointments suggests that we are moving towards the circus that goes on with the Supreme Court appointments in the United States? Did you suggest that?

**Mr. Gall:** No.

**Miss Roberts:** Do you think that?

**Mr. Ziegel:** No, not at all. As I say, we never even considered that our nominating councils would hold public hearings or ventilate names of candidates in public. As I mentioned earlier in response to your question, we have precedents in Canada, Quebec and British Columbia. There are 30-odd jurisdictions in the United States that operate what we call a Missouri-type plan, which also involves nominating councils. Those councils all operate in camera, so it is a long cry from the Senate confirmation proceedings in the United States.

Let me add that I do not disparage the American proceedings. I do not regard it as a circus at all. I think it is extremely healthy. But I am expressing a personal view, not the view of the committee. I think there is a tendency in Canada to feel terribly superior about us, and there is absolutely no justification for it whatever, in my view. The Americans are just like us. They have outstanding judges, they have average judges and they have some pretty poor judges. We are not different in those two respects. Certainly the quality of judges is not measured by the fact of whether or not you have public hearings with respect to appointments.

**Mr. Gall:** The bottom line is that our nominating council would conduct its proceedings in camera.

**Mr. Chairman:** Thank you very much for your presentation today. I would just note for the record that, in addition to your oral comments, we do of course have the fuller brief that you have submitted, and we will look at that carefully. I think this adds to several concerns that have been expressed, not so much on what Meech Lake does in a constitutional sense but really to a broader issue, whether it is the federal government or the provincial governments involved, as

to how we open this process up with the advent of the charter and so on so we really have some better understanding of who our judges are and so people have a better sense of the process and what is happening.

I am pleased we were able to work this in, especially today, because I know there were various problems with other days. I am very glad it did work out, and we thank you very much for coming here this afternoon.

**Mr. Ziegel:** Thank you for giving us an opportunity to appear.

**Mr. Gall:** Thank you, Mr. Chairman. We enjoyed coming.

**Mr. Chairman:** Have a safe flight home.

J'invite M. André Bordeleau à approcher pour présenter son mémoire. C'est un plaisir pour nous de vous souhaiter la bienvenue cet après-midi. Nous avons une copie de votre présentation. Alors, je vais simplement vous passer la parole. Vous pouvez faire la présentation, puis après, nous allons vous poser des questions.

ANDRÉ G. BORDELEAU

**Mr. Bordeleau:** Mr. Chairman, ladies and gentlemen, first I should point out that I am not exactly an eloquent speaker, nor am I accustomed to speaking in public, whatever public there is left, so please bear with me.

Je ne suis pas un orateur élégant et je n'ai pas l'habitude de parler devant un public. Alors, je vous prie d'être patients.

I understand we are running late, so rather than read the entire brief and bore everyone to death, I will address only a couple of points and then I will yield for questions.

As a French Quebecer, I oppose the Meech Lake accord, particularly the "distinct society" clause, on the grounds that it would alter the nature of Canadian federalism in creating "deux nations," and it is unfair to linguistic minorities across Canada, particularly the Quebec anglophone community.

Avant tout, je veux éclaircir un point. Le Québec fait partie de la constitution depuis 1867. Même si le Québec a refusé de signer l'accord constitutionnel de 1982, les articles de cet acte s'appliquent au Québec autant qu'aux autres provinces. Le Québec s'est isolé de son propre chef. Il ne tient qu'au Québec de « se joindre » à la famille constitutionnelle canadienne.

It was a fallacy, in my view, to dub the Constitution Act, 1982, a new Constitution. As far as I am concerned, it was merely a constitutional document added to existing documents that we already had in our Constitution

since 1867. It was also false, in my view, to claim that Quebec was out of the Constitution.

Let me put a rhetorical question to this committee. Should Jacques Parizeau accede to power in the next provincial election in Quebec and declare himself dissatisfied with the Meech Lake accord, is Quebec out of the Constitution again until his demands are met?

En tant que Québécois francophone, je refuse d'accepter que le Québec soit une société distincte ou que ce statut soit nécessaire à la pleine participation des Québécois au fédéralisme canadien. Ce statut est une insulte aux Québécois, une célébration du tribalisme, du nationalisme local et régional. D'ailleurs, on peut certainement arguer que le Québec a été une société distincte pendant 200 ans avant la Révolution tranquille. On connaît les résultats: La province était arriérée, pauvre et mal éduquée. Je vous en donne un exemple. En 1961, 80 pour cent des jeunes Ontariens âgés de quatorze à 17 ans étaient à l'école, moins de 50 pour cent du même âge au Québec. Pourquoi faut-il maintenant une société distincte basée sur la langue plutôt que sur la religion?

Clause 2(1)(b) could affect the Charter of Rights through section 1 of the charter. For instance, would it be reasonable for a distinct society to restrict the use of English on signs? One should know that subsection 2(3) of the Meech Lake accord refers to the "distinct society" clause, not subsection 2(1), which recognizes the francophone minorities in Canada and the anglophone minority in Quebec.

There is no doubt in my mind that the "distinct society" clause will be interpreted as underlying the French aspect of the province of Quebec and will not necessarily include the anglophone culture. Quebec has shown in the past that it equates protecting the French culture with humiliating the anglophone community.

**M. Morin:** Pouvez-vous parler un peu plus tranquillement, pour permettre aux interprètes, et à mes collègues aussi, de pouvoir comprendre ce que vous dites?

**M. Bordeleau:** D'accord, je m'excuse. Ici, je désire exprimer mon appui le plus complet et total à D'Iberville Fortier. Les lois pour protéger la culture francophone ne sont, selon moi, rien d'autre qu'une douce revanche envers les fantômes anglophones d'autrefois. Pourquoi le Québec veut-il toujours se battre contre des revenants? La Loi 101 est raciste, antidémocratique et un affront pour un pays officiellement bilingue — tout ça au nom de la pureté linguistique.

I also want to address briefly what are the legal implications of recognizing Quebec as a society. In the past, Gil Rémillard demanded that Quebec should have a United Nations seat recognizing Quebec as a society. Will it help grant him that wish? That means Quebec could have its own representative at international seminars and conferences.

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The second point is that I find it rather ironic that the only true Canadian statesman right around the country is Frank McKenna. I applaud his conditions for improving the Meech Lake accord, although I do have some problems with them. The first one is that, as Premier of the only officially bilingual province, he should have some very deep concerns about a distinct society and should also demand that all levels of government be constitutionally obligated to promote bilingualism. Second, he should insist that the spending powers of the federal government not be curtailed. Finally, as well as demanding protection of women's rights, he should also demand protection of the native people and a fairer treatment of the Yukon and the Northwest Territories.

Finalement, pourquoi promet-on de réviser tout un ordre du jour constitutionnel qui inclut les droits des femmes, des autochtones, du Yukon, des Territoires-du-Nord-Ouest, de la communauté anglophone au Québec et des communautés francophones à l'extérieur du Québec, après que l'accord sera devenu partie intégrante de notre constitution? Pourquoi faut-il attendre qu'il y ait dix droits de veto dans la constitution avant de discuter ces points importants sur cet ordre du jour-là? Selon moi, c'est tout simplement pour être capable de faire des demandes pour obtenir plus de pouvoir du gouvernement fédéral en échange de plus de droits aux autochtones, ou aux Territoires-du-Nord-Ouest, ou au Yukon.

I would like to close with this remark: I appeal to Premier Peterson to revise his support of the accord. I wish he would demand drastic and important changes to it before he supports it.

**Mr. Chairman:** Thank you very much. As you have noted, we have your written paper, which expands upon the different points.

**Mr. Bordeleau:** I did not want to waste too much of your time with a lengthy verbal presentation.

**Mr. Chairman:** Perhaps we can look at some of those in our question period.



I take it that you do not feel there is any need for a statement in the Constitution with respect to "distinct society."

**Mr. Bordeleau:** None whatsoever, sir. Once you start, could you not agree that New Brunswick is a distinct society? Could you not agree that British Columbia is a distinct society, that the western regions are several distinct societies, the Maritime provinces? Where does it stop? Why do we have to determine that a distinct society is strictly along linguistic lines? I think this is a step towards complete decentralization, and I am very, very concerned about it.

**Mr. Chairman:** Traditionally, over a great number years, that has been one of the requests, demands—call it what you will—of various Quebec governments. It has been said that the five points that were set out by Mr. Rémillard two years ago were in fact a very minimal set of demands. Assuming that the present government of Quebec believes that the recognition of a distinct society in some form or other is part of any arrangement that would have to be entered into for them to sign the Constitution, where do we find some common ground? In your view, where would we go? Clearly, at least at the present time, the political option to the current government in Quebec would be a separatist government under Jacques Parizeau, and really, regardless of what the Constitution does say or does not say, the separatists are not going to be bound by anything that is there.

If we were to reject the accord, where then do we go? I guess we are conscious here that, as legislators, we can make a report, but the day after we have made our report, have we somehow helped, have we assisted in carrying on the process of dialogue and discussion? I am just not sure what you would replace the—

**Mr. Bordeleau:** I can live with clause 2(1)(a), but I really do not see the need to add "distinct society." Clause 2(1)(a) recognizes that Quebec is, in the majority, a French province with an anglophone minority. I accept that. That is part of Canada, just as it is part of Canada that the rest of the provinces are mostly anglophone with pockets of French minorities across the land. I can live with that section, but I really fail to see how it enhances federalism to add that Quebec is a distinct society. Coming from Quebec, I do not feel that it is a distinct society and I do not feel that I need that in order to function in Ontario, in Quebec or in any other province.

**M. Morin:** Au troisième paragraphe, à la page trois, vous dites: «In the name of linguistic purity, Quebec has taken measures to "protect"

French which were not only undemocratic», etc.

**M. Bordeleau:** Troisième paragraphe?

**M. Morin:** Troisième paragraphe, c'est le dernier paragraphe, à la fin de la page trois.

**M. Bordeleau:** Oui, d'accord.

**M. Morin:** D'accord? C'est au sujet de la Loi 101. Franchement, c'est quelque chose qui m'inquiète aussi, la question de protection. Cela n'a pas encore été défini par la loi, par les tribunaux. Qu'est-ce que le mot «protéger» veut dire, réellement? Mon inquiétude, c'est que le mot «protéger» aurait pour fin de donner des droits et d'établir des mesures qui s'appliqueraient seulement au Québec, aux dépens des minorités. Comprenez-vous bien ce que je veux dire?

**M. Bordeleau:** Oui, puis je vous dis que la société distincte fait exactement la même chose.

**M. Morin:** Sans employer les mots «société distincte», c'est la question de promouvoir. C'est une responsabilité qu'on ne donne pas aux autres provinces, de promouvoir.

**M. Bordeleau:** C'est pour ça que j'ai dit...

**M. Morin:** Justement. Je suis un peu d'accord avec vous, je partage votre opinion là-dessus.

**M. Bordeleau:** Je comprends ça.

**M. Morin:** C'est que la Loi 101 m'inquiète réellement; c'est qu'elle semble répéter des erreurs commises dans le passé, dans d'autres provinces.

**M. Bordeleau:** Exactement.

**M. Morin:** À mon point de vue, si on veut réellement progresser et établir l'unité que nous recherchons tous, franchement, on oublierait le passé; on prendrait le passé comme expérience, d'accord, mais on ne répèterait pas les mêmes erreurs, puisqu'on n'avancera jamais.

**M. Bordeleau:** Nous autres, on a le même point de vue sur la Loi 101, Monsieur Morin.

**M. Morin:** Justement. J'ai vécu au Québec, moi, il y a des années, il y a déjà 37 ans passés. Alors, disons que je suis maintenant Ontarien pure laine mais, par contre, j'ai vécu, j'ai été éduqué au Québec, et puis c'est une chose, franchement, que j'ai de la difficulté à accepter. S'il y avait peut-être la possibilité d'expliquer, d'exprimer tout simplement qu'il y a une société distincte et de permettre aussi de promouvoir, puisque c'est la seule façon de promouvoir, d'être capable de conserver, de protéger la culture, il n'y a rien de mal là-dedans. Au contraire, c'est une chose qui doit être encouragée, de maintenir le statut français, franco-

phone, canadien du Québec; ils l'ont toujours fait. Mais de le faire d'une façon aussi catégorique, aux dépens des minorités... Je veux en venir à ceci: Avant que l'accord soit ratifié, qu'il y ait un moment de répit, un arrêt temporaire, pour pouvoir réellement avoir une définition, avoir un jugement donné par la Cour.

**M. Bordeleau:** La Cour suprême du Canada?

**M. Morin:** La Cour suprême. J'ai l'impression qu'à ce moment-là, ça enlèverait énormément de doutes et de craintes dans le reste du pays. Avez-vous des commentaires là-dessus?

**M. Bordeleau:** Oui, je peux accepter ce point de vue-là. Je ne suis certainement pas contre une référence à la Cour suprême du Canada. D'ailleurs, Pierre Elliott Trudeau l'a fait avec son accord constitutionnel en 1981...

**M. Morin:** Oui.

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**M. Bordeleau:** ...1980, particulièrement. Je suis d'accord avec vous, certainement, au sujet de la Loi 101 et de ses conséquences, mais c'est précisément le point que je soulignais: C'est qu'avec la Loi 101, bon d'accord, on a eu tel traitement pendant tant d'années, mais là on va renverser les rôles et puis ça va protéger le français.

D'abord, selon mon point de vue, je connais des personnes dans l'ouest du pays, puis il y a bien des personnes là-bas qui m'ont dit qu'une des raisons, peut-être pas la raison principale mais une des raisons de la résistance au Manitoba, en 1982 ou 1983, au projet de loi de M. Pawley visant à renforcer les droits des minorités francophones, était qu'il y avait beaucoup de ressentiment au sujet de la Loi 101 au Québec. Ce n'était peut-être pas la seule raison, je suis sûr qu'il y en avait d'autres, mais c'était une des raisons pour lesquelles il y a eu autant d'intolérance à ce sujet-là.

Mais vous avez parlé d'une pause?

**M. Morin:** Une pause tout simplement pour dire: Mais voici, avant de ratifier, avant de signer l'accord — on a jusqu'en 1990 pour le faire — s'il y a réellement un doute là-dessus, pourquoi pas avoir une opinion?

Un des témoins que nous avons eus ici, M. Ramsay Cook, n'est pas d'accord du tout. C'est la responsabilité des législateurs de prendre des décisions et de bien expliquer exactement la définition et l'interprétation d'un terme. Moi, ce que je demanderais tout simplement avant de ratifier l'entente, c'est d'abord une interprétation de la Cour: Qu'est-ce que ça veut réellement dire, «promouvoir»?

**M. Bordeleau:** Je suis d'accord. Puisque vous parlez d'une pause, je vous renvoie une question. Accepteriez-vous, pendant cette pause-là, d'avoir une autre conférence constitutionnelle au sujet de l'accord du lac Meech et d'avoir la possibilité de faire des changements?

**M. Morin:** C'est une question à laquelle je n'ai absolument aucune conclusion, absolument aucune réponse. C'est certainement un problème que nous allons discuter, tous nos collègues, pour être capables d'apporter des recommandations qui seront peut-être acceptées par l'ensemble des provinces. Nous sommes les premiers à donner le ton, présentement, c'est la première fois que des audiences sont tenues, et j'ai l'impression que les autres provinces vont certainement analyser de très près les recommandations et les suggestions que nous ferons. Alors, de vous donner une opinion, je n'oserais même pas faire allusion à quoi que ce soit.

**M. Bordeleau:** D'accord.

**M. Morin:** C'est tout, Monsieur le Président.

**Mrs. Fawcett:** Mr. Bordeleau, are you saying that we should scrap the accord and start over again?

**Mr. Bordeleau:** I would prefer that, yes.

**Mrs. Fawcett:** You would prefer that.

**Mr. Bordeleau:** I would prefer that. Mind you, if you want to take the basic skeleton of the accord and make all kinds of changes to it, fine. But it seems to me it would be much easier to negotiate a new package that would be fairer to women, fairer to the anglophone minority, fairer to the Yukon and Northwest Territories, fairer to the aboriginal people and fairer to the recognition of this division of power between the federal government and the provincial governments. If you want to retain the Meech Lake accord and make all those changes within that accord, fine, I have no objection. But it seems to me that if you make all those kinds of changes in depth, you radically change the direction of the accord.

**Mrs. Fawcett:** What are your thoughts on the idea that some people have suggested here, that of the companion resolutions? Even the aboriginal people brought us the suggestion that possibly the accord could be ratified along with these companion resolutions.

**Mr. Bordeleau:** I am not familiar with that suggestion. Would the companion resolution have the same force of law in the Constitution as would the Meech Lake accord?

**Mrs. Fawcett:** They would go along with the accord so that we could at least have Quebec into



the Constitution at this time and then some future consideration—

**Mr. Bordeleau:** As I said before, as far as I am concerned, Quebec has been in the Constitution since 1867, and the only time Quebec had asked Quebecers, "Do you want to give us the mandate to negotiate to get out of it?", the answer was no. That is the first point.

I have no problems, again, with a companion resolution, but then I would make it companion resolutions, in the plural, dealing with the various points mentioned before. At that stage you may end up entrenching one accord and eight different companion resolutions, and which has priority over which under which circumstances may create a bit of a headache to the courts.

**Mr. Allen:** I wanted in particular to focus for just a quick minute on page 3 of your brief. There you deal with the whole question of what appears to be happening in Quebec with respect to the desire for a greater assertion of provincial roles with respect to protecting and promoting the distinct character of Quebec in fact in recent years and so on. I am quite puzzled by what you say, because you appear to portray any such undertaking as accompanying the sovereignty-association project of the Parti québécois and the more recent expressions under the Bourassa government of Quebec nationalism as though that is somehow tribalist and backward-looking.

You give the example of Quebec dominated by the church, which you apparently did not think a particularly happy experience, one which was retrogressive, and you wonder why one would want to repeat that experience on a linguistic basis. I have some trouble with the analogy between religion and language but, apart from that, who, in your mind, have been the people in Quebec who have been promoting this new assertiveness of Quebec in the Canadian Confederation, and why have they wanted to do that? Clearly it was not the clerics this time around. Who was it?

**Mr. Bordeleau:** No, it was not the clerics. Basically, to me, focusing on Bourassa for a second, who in the 1970s and the mid-1980s has been a factor in Quebec nationalism, from my point of view, Bourassa's brand of nationalism says: "Fine, we will stay in Confederation if it is the fédéralisme rentable of the early 1970s, but at the same time we need more power. We need a distinct society and we need to be recognized as a separate entity. We need more powers to deal with culture; we need more powers to deal with the internal affairs of the province."

Why? To me, it is basically a deep-seated feeling of alienation from the other provinces. It is like: "This is our home. We will stay within Canada, but let us make this our home." Maybe I am being unfair to Mr. Bourassa and his colleagues, but I see this not as much as a fear but as basically being told that Quebec is different from the other provinces. It is, linguistically, but I have been living in Ontario for 11 years now, and as far as I am concerned I feel just as much at home here as I do going back to Quebec. For that matter, when I go across the country I feel just as much at home travelling through the western provinces as through the eastern provinces.

**Mr. Allen:** I feel at home in Quebec, but I also feel different. I think that is the difference.

The question is an important one, because political élites really are there on the surface—the Bourassas and the Lévesques and the bureaucrats who surround them—but underneath them something is happening that is very common through those regimes. That is why we keep getting similar kinds of demands, somewhat in different guises, sometimes more extreme and sometimes less extreme, but they are all there.

Most commentators I have read suggest that the driving force of the new Quebec has been the rising commercial and professional élites in Quebec, who have been seeking a greater expansiveness, larger arenas to play in, and have found themselves very much impeded by the dominance of Quebec life by anglophone groups who maintained the managerial élites in the commercial world and generally pulled the levers in so many other respects. For them to become new, outward-looking, dynamic players in a new world at home, in North America and around the world, it was necessary for them to stake out some new terrain and to grab hold of it pretty dramatically. They are still doing that.

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What I am wondering out loud with you is whether we are not seeing something that really is quite the contrary of being tribalistic, inward-looking, regressive, socially reactionary, etc.: something that is very progressive, dynamic, outward-looking and is trying to find its place in a larger world, not only Canada and North America but the world. This is their way of doing it and they necessarily are going to push upon the structures of Confederation. But, for the moment the debate goes on, and we keep on finding ways, as we have five times already in our history, to sort of find a new structure for all that to live in. It takes a different shape each time we do it, but none the less we get a bigger framework, we get a

bigger world for all of us out of it and we still seem to manage to hang on to our country.

Is that not a much more hopeful way of looking at what is happening in Quebec than the picture you give on page 3?

**Mr. Bordeleau:** It depends on your point of view, sir. First of all, the example you gave at the beginning, that of the anglophone pulling the levers, keeping the French Canadians down and preventing them from going outwards, to me, is a very, very old cliché and, as far as I am concerned, it no longer exists. It has not existed in years, not that I am aware of anyway.

Again, yes, Quebec might be reaching out, but all the social actions that have been taken in that province, say since 1976, have been directed inward. To me, Bill 101 is not a statement of a people, of a culture trying to reach out and finally expand into the world. It is a statement that this is our home and this is the way we want it; with very, very little forethought, not only to the anglophone minority in Quebec but to the impact it might have on the francophone minorities outside Quebec. I do not see that at all as being outward.

**Mr. Allen:** I would say it is a necessary part of the process of taking charge and it established a sense of confidence among the population in Quebec to have Bill 101, which is, after all, challengeable by anybody who is aggrieved with it in the courts, and that process is still under way. Whatever the judgements may be, they will be legitimately taken with respect to other aspects of the Constitution that affirm the wholeness of the country and educational rights and all sorts of other things that are there.

I think unless you appreciate that that is what was happening, that there was a sort of taking charge, you do not then appreciate some other things that were happening in Quebec at the same time: why, at the very same time as that was happening there was a good deal of relaxation taking place in the interpersonal relations between English and French in Quebec. A lot of old animosities were in fact draining away. The confidence they secured enabled them then to move into what we have seen happening in Quebec socially: for example, the massive enrolments in English conversation classes by Québécois. It is an apparently contradictory phenomenon, but none the less I think that is a sign of the extent of what has been going on through the agency of the Quiet Revolution, the PQ and the Bourassa regime so that you get a new, outward-looking Quebec.

That is obviously going to put pressure on us, but I do not think it is necessarily our role to be too defensive about that and to think that, as those things consolidate themselves in Quebec and then put that pressure on us, somehow we are going to end up with the two-nation proposition and we are suddenly going to find ourselves in two nations. The more defensive we are in response to that, the less likelihood there is that we will survive, surely.

**Mr. Bordeleau:** First of all, for a culture moving outwardly, why would it need a "distinct society" clause? What is its purpose? What outward purpose would it serve?

**Mr. Allen:** I think that, on the one hand, it has a symbolic value which says that the rest of Canada does at last recognize that (1) there is that culture there; (2) it is distinctive; (3) the government that governs the province does have some distinctive roles to play in protecting it and promoting it over against the North American milieu, which is dominantly anglophone, and over against the world at large, which is increasingly English-speaking. We all know what is happening to the linguistic pattern of the world at large. I am not sure I see a problem with us saying that, recognizing it, and then getting on with the business of living together tomorrow.

**Mr. Bordeleau:** But that distinct society that you mention as necessary also threatens the anglophone minority.

**Mr. Allen:** Not necessarily. We have heard significant testimony that tells us that is why "distinct society" is in a different clause than the dualism clauses, and that "distinct society" refers to a broader range of phenomena than language, or to a single language group, or to the dualism question. It does commit the government to promote a society that has had a historic English minority, and it does commit it to promote the other aspects of that society that are nonlinguistic—the civil law, for example—and the defence of other unique characteristics of the culture quite beyond the issue of language per se.

**Mr. Bordeleau:** I understand your point.

**Mr. Allen:** I am just answering your question.

**Mr. Bordeleau:** Yes, I know. I understand your point.

**Mr. Chairman:** Perhaps, in a sense, we have placed that on the record. I think part of the purpose of the hearings, in effect, is to bring those views forward where we can try to wrestle with them and take meaning from them.

I would like to thank you very much on behalf of the committee for coming today. I would be



remiss if I did not also offer you the committee's best wishes. I understand, as one aspect of outward-looking, you are hoping to be in Seoul, Korea this summer as a member of the Canadian Olympic team. We want to wish you the very best in the pursuit of that goal and hope you make it. We thank you for taking time out of—I believe it is risky that you are involved in, is that correct?

**Mr. Bordeleau:** Yes.

**Mr. Chairman:** Thank you for not bringing the gun here today.

**Mr. Bordeleau:** I was tempted.

**Mr. Chairman:** We wish you all the best. Thank you very much for coming and sharing your thoughts with us.

**Mr. Bordeleau:** Thank you very much. It is nice to get a day off from training.

**Mr. Chairman:** If I might then call upon the representatives of the Council of Christian Reformed Churches in Canada. If they would be good enough to come forward; Aileen Van Ginkel, the research and communication associate, and Rev. Arie Van Eek, the executive secretary of the council.

We want to thank you for joining us today. We have circulated a copy of your submission and, in the interest of giving you as much time as possible, let me just turn it over to you. If you will, go ahead and make the submission and we will follow up with questions.

#### COUNCIL OF CHRISTIAN REFORMED CHURCHES IN CANADA

**Mrs. Van Ginkel:** The committee for contact with the government, which we represent here today, is a standing committee of the Council of Christian Reformed Churches in Canada. Our committee seeks to hold before Canada's political leaders the guiding principles that apply to major issues of our day.

We believe that governments are responsible to God in the exercise of their calling to do justice, and that the proper administration of justice will assure all citizens of their personal safety and of the opportunity to develop their individual and communal character. Hence the task of the state in pluralistic Canada must be directed toward the total wellbeing of all people within the framework of just and nondiscriminatory laws.

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In constitutional terms this means that our governments, federal and provincial, must use their authority to establish and maintain a public

order within which the various communities across Canada can assume their own societal responsibilities: for example, providing education for children, caring for the elderly and those who are disadvantaged or disabled, encouraging cultural and artistic expression and supporting family and human relationships to name just a few. We do not believe that these tasks ought to be assumed by government alone.

Our vision for Canada is characterized by neither a collectivist model nor one based exclusively on the predominance of the individual. Rather we see a country rich in a diversity of communities, each of which contributes to the wellbeing of the realm generally and its citizens individually.

We believe that governments should extend to aboriginal peoples the full protection and free exercise of their rights to care for their own people and to promote their distinct identity. Governments should also encourage the rights of parents and communities to educate their children according to their own basic convictions without financial penalty and should enable citizens to form and support trade, business and professional organizations of their own choosing.

Neither the present Canadian Constitution nor the amendments proposed in the Meech Lake constitutional accord recognize the full diversity of communities in Canada nor do they establish the framework needed to encourage such diversity.

Section 2 of the proposed Constitution Act 1987, which it rightfully recognizes Quebec as a distinct society, presents a truncated picture of what constitutes Canadian society. As an interpretive clause, section 2 should include two other fundamental characteristics of Canada: namely, recognition of the aboriginal peoples as founding and distinct societies in Canada and recognition of the other faith-related, cultural, geographic and/or linguistic communities which are part of the Canadian mosaic.

Just as Quebec is given the right to preserve and promote its distinct identity in subsection 2(3) of the Constitution Act 1987 so the aboriginal peoples and the various communities of Canada should be given the right and the necessary power to carry out their own responsibilities as they see them.

We recognize that the concept of aboriginal and community rights must be worked out more fully within the context of the Canadian Charter of Rights and Freedoms. Here again the Meech Lake accord reflects a missed opportunity.

Aboriginal and communal rights as well as the broader concept of pluralism in Canada should have been included in the agenda for future constitutional conferences.

On the basis of our concern that the Canadian Constitution reflect and encourage the Canadian reality we respectfully suggest that the select committee on constitutional reform recommend to the Legislative Assembly of Ontario that the Constitution Act 1987 not be ratified without amendment to those sections of the act which deal with how the Canadian Constitution ought to be interpreted—section 2—and with future development of the Constitution—section 50.

**Mr. Chairman:** I think we had some time ago in our hearings—I am just trying to remember the group which escapes me at the moment—a group which also discussed the concept of pluralism and how that ought to be recognized in the Constitution.

I am wondering if you could perhaps just expand a bit this notion of communal rights and pluralism and how it would reflect that in the Constitution. Yesterday we had a very interesting discussion with the president of the German Canadian Congress in terms of how multiculturalism might be reflected. For example in section 2 is the phrase “a fundamental characteristic of Canada.” What would be a Canadian’s understanding of this? Again, here in terms of pluralism and communal rights, I think we all have a certain sense of what those might mean, although relative to some other terms that we are now using in the Constitution they are newer.

Could you expand a bit on what you would be intending to include in those concepts?

**Ms. Van Ginkel:** I think by talking about multiculturalism we would include multiculturalism in our sense of pluralism.

**Mr. Chairman:** Yes.

**Ms. Van Ginkel:** That suggests that Canadian society or the Constitution ought to reflect more than simply the fact that there are people of various cultural heritages in Canada.

It seems to us that at this point it does not go much beyond saying, “Well, isn’t it wonderful that you’re a German Canadian and that you’re an Asian Canadian?” We would want to say, “Let’s go one step further and allow that cultural heritage, or in our case we would consider it to be more of a religious heritage, to be expressed in certain ways; and how each community would express it would, I think, vary according to that particular heritage that it represents.

So the kind of communal rights that would be important to establishing the Constitution would

have to be fairly wide-ranging, I would think. In some communities, language rights would be paramount. In other communities, it might be rights to worship on a particular day. A Muslim community, for instance, might want to protect the right to worship on a Friday. In our community, we consider educational rights to be very important.

I think that what we would like to see is a country in which communities take on more responsibility than they do right now for looking after some of the social needs of individuals throughout the country. In other words, it seems to us sometimes that we have a country made up of various individuals with a government looking after them, looking after their social needs, but no intermediate structures to do that, perhaps in a more personal way, in a more holistic way.

**Mr. Chairman:** I suppose, in terms of the way a number of those communities are defined, there is a religious aspect. Particularly with the emphasis on everything being “public” and nondenominational, then those groups, and I think in your own case in terms of the educational system, feel that while there might be certain aspects of that system which would meet some of your needs, there are things that it does not do and that you want to do, and so you would like to see those somehow defined or placed in the Constitution. That would then provide you with some protection, for example, in terms of religious education for your children.

Would that be one specific example of what you would be thinking of there?

**Mr. Van Eek:** I think, Mr. Chairman, if I may, it would be fair to say that what we want to see is that be recognized which is constitutive of the strengths of Canada beyond multiculturalism. Quebec, for example, is arguing for something much more deep-seated in terms of its history and in terms of its current life.

Whereas Quebec is arguing for something that is communal, we on the anglo side are much more inclined to think individualistically, and in so doing threaten to lose sight of the communities which together can work, and in a great measure do work, for mutual enrichment.

So we are not particularly arguing for something that we do not have yet in legislation. It goes rather a lot further. The multiculturalism of yesteryear should be replaced by an acknowledgement of the deeper streams, religious, philosophical, and their expression.

**Mr. Chairman:** In that sense really viewing the concept of pluralism as a much broader term than multiculturalism?



**Mr. Van Eek:** Yes, really no community would be outside of its scope.

**Mr. Chairman:** Yes.

**Mr. Van Eek:** If it is incorporated—

**Mr. Chairman:** That is an interesting element.

**Mr. Allen:** In one form or another, the Christian Reformed Churches in Ontario make representations to our legislative committees with some reasonable frequency and usually in a very thoughtful way, and in briefs that are well researched. I know that your Citizens for Public Justice, for example, which is not simply Christian Reformed but at least is initiated by your own community, has done some very important social justice work in Ontario. I want to mention that.

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I am also personally pleased to receive a brief that does make some reference to the religious dimension of our life together. I think we often do not spend much time thinking about what deity means for politics any more, however we may apply that in our life together. It certainly does suggest that we all should maintain some overarching commitment to a concept that there is something as ultimately true and something as ultimately right. We may not in our everyday experience all find total agreement with what that is, but it remains a very central part of our life together.

One question I have with respect to what you suggest with regard to a new recognition of groups and communities in our society in our Constitution is whether there ultimately is not implied a very dramatically different kind of society than the one we presently have. I am not saying I am opposed to that, but it is something that begins to take a different shape and form.

I think, for example, of what is happening in Ontario with respect to native peoples, aboriginal peoples, where some of them are now entering into contracts with government departments to offer the services that otherwise would be offered by voluntary or community organizations of another kind. Children's aid, for example, in some of the northwest reserves is now taken over by those communities, and I think that is very wholesome and healthy.

I am wondering whether when we start building cultural communities like that, one after the other, into the Constitution, we are saying that ultimately those are the agencies that should be handling not just education in one case, not just children's aid in another, but whole panop-

lies of social programs for distinctive communities on a semi-autonomous, self-governing basis in Canada. I get an image of a quite different kind of Canada in structure and delivery of programs, governance—the whole business.

My concern is that we are not quite ready to put that constitutionally yet, because I am not sure that we are quite certain what all that means, or indeed if that is what is implied in moving from recognition of aboriginal cultural identity and rights through to other kinds of cultural identities and rights in Canada. Are you asking us something quite specific with respect to new ways of behaving in that sense? Or are you asking us something that still is at more of the level of recognition of multicultural enhancement in a more general and low-key kind of way?

**Mrs. Van Ginkel:** I think it is probably a little bit more of the former. We probably are looking at something that is quite different. We are probably looking at a government which would, in one sense, give up some of the responsibility it now has for various social programs. But the government would still play a very necessary role in enabling communities to take up responsibilities, and in co-ordinating making sure there are proper standards, making sure the communities work well with each other and so on. The government would still have a very important role.

But all of that is in the way of speculation, and I suppose we are suggesting that we really could not expect more of the Constitution at this point than that it recognize that there are other distinct societies in communities in Canada besides French-speaking and English-speaking. We would, for instance, want to say that the aboriginal peoples of Canada represent a distinct society on their own. I do not think that we would say that our community is a distinct society. There is probably another category there that we are looking at but we have used the word "communities."

In that sense, I suppose we would suggest that the constitutional accord simply reflect the fact that Canada is made up of a diversity of societies and communities. Beyond that we would like to see in the agenda for constitutional reform some very detailed and specific examination of how Canadian society could be restructured so that these various communities can develop their character and potential and, hopefully, enrich the Canadian nation as a whole.

**Mr. Allen:** My sense is that the reason we are able to, now at last, begin to think in terms of distinct society for Quebec and entrenching

dualism in the Constitution is that we have had long, long experience trying to wrestle some of those problems of Quebec, Canada, bilingualism, etc., to the ground.

We have a fairly clear focus as to what it means in some institutional terms, what it implies for immigration, what it means for shared-cost programs and optings-out and all those things. I have a sense we are not quite at the point where we have developed enough of a sense of what you are pointing us to that one can meaningfully put much more in the Constitution than is there now. Is it fair to observe that?

**Mr. Van Eek:** Well, not 100 per cent. What we are at is the point where we see that society becomes increasingly fragmented, partly under the influence of a strong push in the direction of putting in law the rights of individuals of whatever persuasion, but that that is not balanced sufficiently with the recognition that individuals do not constitute a society and that society is made up of groups of individuals who have covenanted together through various processes to do things communally.

I am perfectly comfortable with our provincial and our municipal governments handling the matter of enforcement of criminal law, say, but I have a lot of sympathy, Dr. Allen, with the native people saying, "We have our own history and our own ethos and our own understanding of how to apply retributive justice." I should have a lot of sympathy with such communities receiving the freedom to structure themselves that way.

As you know so very well, we have a very strong feeling that the responsibility for education ought to be as closely brought back to the original educators, the parents, as is possible, and consonant with the rights and the duties of the state for the creation and maintenance of an orderly society. We find that in the marketplace we apply this kind of situation where there may be a certain competitiveness about all of that that we do not apply in other cultural areas which are really more significant for determining the kind of life that you and I experience in our beautiful country.

It applies differently; but minimally, we are going all out for the rights of native people

because there is a history, there is a culture, that is really being threatened at this point in its life in a way that we do not experience as people who determine everything perhaps a bit more directly out of a shared religious conviction that is being practised and taught and so on. For example, why should native people not have an opportunity to teach their children their view of history? You know it will be markedly different, but so is the view of history of the Québécois vis-à-vis the English and other conquering people.

**Mr. Chairman:** As we draw to the end of our sixth week of hearings and on the eve of Good Friday and this weekend, it is appropriate perhaps that we end on a note that speaks about some much broader elements and aspects of our country, including the religious component which, while very diverse, is one that we so often somehow do not deal with or do not raise in this whole area. I think it is an area, as Dr. Allen has suggested, which is quite new in many respects for us to grapple with in a constitutional sense.

You have underlined some thoughts that we do want to think about and reflect on in terms of how we would go about trying to recognize those kinds of differences in a positive way and in a very pluralistic society, unlike over 100 years when we were primarily a country whose background was the Christian faith. Today we have a good number of different religious groups, not to mention different cultural groups and racial groups. In that sense, our country is really in the forefront of trying to come to grips with both the challenges and the problems that puts forward.

In that context, this is a good way to end our hearings this week. We want to thank you very much for coming here today and sharing your thoughts with us.

**Mr. Van Eek:** Thank you very much for the opportunity. We hope you may have a happy holiday season.

**Mr. Chairman:** The same to you. The committee stands adjourned until 9:30 a.m. on Wednesday of next week.

The committee adjourned at 4:51 p.m.



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No. C-23

# **Hansard**

# **Official Report of Debates**

## Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Wednesday, April 6, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 6, 1988

The committee met at 10:11 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. We can begin today's session. I would like to invite George Radwanski to come forward and be our first witness this morning. Welcome. Since you have reorganized our education system, it is a pleasure to have you here this morning to help us through the mysteries and vagaries of constitution-making. Our procedures are fairly simple. If you would like to go ahead and make your presentation, we will then follow up with a period of questions.

GEORGE RADWANSKI

**Mr. Radwanski:** Thank you. Good morning. I appreciate the opportunity to be here today and share some thoughts with you on the Constitution. I am appearing to speak from the perspective of someone who, first of all, has lived the majority of his life in Quebec; has a very good knowledge of that society; has worked as a journalist both in Quebec and in the federal system in Ottawa, as well as here in Ontario; has also studied constitutional law and hence, I hope, has a certain kind of perspective to bring to all this.

I also recently agreed, once I was free of my government responsibilities, to serve as chairman of the Canadian Coalition on the Constitution, which, as you know, is a national group of people who have various concerns about this accord. But I am speaking today really in my capacity as a citizen rather than in any formal way on behalf of the coalition.

I would like to preface my remarks also by saying that, like anyone who has read the media, I am well aware of all the speculation that the work of this committee is, in a sense, an irrelevancy, that the outcome is preordained and that when all is said and done, it is just going to be another rubber stamp. For what it is worth, I want my request to testify and my presence here to be both an expression of faith that that is not the case and, as well, a plea that it not be the case.

I operate from the premise that all of you who are here and who chose to run for public office did so for reasons beyond simple ambition or

desire for the easy life that, of course, being an MPP entails—said I sarcastically, I hasten to add, so as not to appear in Hansard as though I was saying that with any seriousness. I honestly believe that however long you are in public life and elected life, each of you will never have a responsibility greater or more fundamental than the one with which you have been entrusted on this committee.

Given the way the accord was reached, which is to say 11 men meeting into the late hours of the night in all good faith but with insufficient opportunity either to consult broadly or even to think through in detail all the implications of what they were doing, and given the requirement that this be approved by all the legislatures, you, who are really the only sustained scrutiny there will be in the Ontario system before Ontario makes its decision, have an absolutely historic role, each of you, because we are dealing here not with some technical piece of legislation but with, as you know, the fundamental law of our country. I guess, as a student of public office, a student of public life, I cannot believe that, as individuals, any of you would put that responsibility for the whole structure and future of our country second to matters of party discipline, political ambition or any other considerations. I believe the constitutional future of our country is not a political matter but a fundamental matter of conscience, and I approach it in the faith that this view will ultimately be shared.

In terms of the issues I want to raise with you today, I guess it is no secret to anyone who saw the articles I wrote in the *Star* some time ago that I believe the accord is fundamentally flawed in all its major provisions. I will speak briefly about why I feel that way, but rather than dwell on that, which you have been hearing about from a great succession of witnesses, I would like to focus primarily on this whole perception, which certainly has been fed in some quarters and which I am sure is troubling the committee, that we are in some kind of emergency situation where, good, bad or indifferent, this deal has to be passed because to do otherwise would have some kind of adverse implications for national unity, or that it would be so badly received in Quebec if this were turned down, or that somehow, by hook or by crook, with all the urgency at our disposal,

we have to "bring Quebec into the Constitution." I do not share the view that that is our present situation and I would like to focus a little on explaining why not.

First of all, I think it is simply an absurdity, both in legal terms as well as in political and even moral terms, to say that Quebec has to be brought into the Constitution, as if Quebec were not now in the Canadian Constitution. Legally, the Supreme Court declared with all the clarity at its disposal on December 6, 1982: "The Constitution Act, 1982, is now in force. Its legality is neither challenged nor assailable." So legally, Quebec is in the Constitution. We do not have to bring it in.

Politically and morally, I think the issue is no less clear. It is true that a separatist Premier of Quebec refused to sign an instrument of nation-building and that the Legislature supported him in that act. But it is no less true that the same constitutional deal, the Constitution that came into effect in 1982, was approved in December 1981 by 72 out of 75 of the duly elected members of Parliament from Quebec. To say that these elected representatives of the people of Quebec somehow have less legitimacy than the provincially elected ones or that somehow Quebec politically has not approved the accord, even though virtually all the elected federal representatives from Quebec did support it, is to take a very peculiar view of the legitimacy of the federal representation of Quebec. It is certainly a view that I do not share.

Then more broadly in terms of the public constituency, I think it is also important to note that there simply is no evidence—I will go more strongly than that—there is evidence to the contrary, that a majority of the Quebec people were not dissatisfied with the provisions of the 1982 Constitution and in fact did not support the decision of the then government not to endorse it.

For instance, a Gallup poll published on December 10, 1981, found that only 34 per cent of Quebecers agreed with Lévesque's refusal to sign the constitutional accord in November, 46 per cent disagreed and 20 per cent either had no opinion or were unfamiliar with the issue. Another Gallup poll published on June 19, 1982, found that only 16 per cent of Quebecers disagreed that the new Constitution would have positive effects for Canada.

By the same token, we need only look at the political phenomenon that occurred in Quebec following the passage of that Constitution. I think the evidence is clear that the people of Quebec did not rally around the Parti québécois

and say: "Well, Quebec has been shafted. Therefore, we must move in the direction of greater nationalism, greater separatism. We must throw our weight behind this governing party." Quite the contrary. We know that government was defeated.

We also know, if you look at the polls subsequent to the Meech Lake accord, that there was not even a momentary upward blip in the months following that accord in the popularity of the Mulroney government in Quebec. Surely if this accord were the breakthrough that Quebecers were waiting for, the great bringing into the Constitution that they had awaited, we would have seen that reflected in some expression of electoral enthusiasm for the Prime Minister and the party that had brought them this great constitutional reawakening, and it was not.

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The reason it was not, and the reason I think there is a misperception of the issue, is that one has to distinguish between the political élite in Quebec, a relatively small group—the so-called political, even artistic, élite; very much a minority—and the great mass of Quebecers. There is, and historically always has been, a very strong sense of inward-looking provincial nationalism among a certain political and intellectual élite in Quebec, but anyone who has lived in Quebec and who is familiar with Quebec will tell you that that sense does not extend to the great mass of Quebecers. Indeed, I think it is no exaggeration to say that constitutional issues are not the kind of preoccupation of the average Quebecer that we somehow, in the rest of Canada, tend to think they are.

It is a preoccupation of Quebecers that the rest of the country be open to them, that they not feel like second-class citizens, that they be cared about and so on. It is not a preoccupation of the ordinary Quebecer that Quebec be granted additional special powers or that the Constitution be turned on its head to accommodate some special wish of Quebec.

Again, the phenomenological, if you want, evidence of that is the succession of times in which certainly the Liberal government of Mr. Trudeau and, even before, that of Mr. Pearson were elected with substantial, overwhelming majorities in Quebec despite a very clear-cut position that Quebec should not be given exceptional or additional powers in the Constitution.

Having said that I do not believe Quebec has in any way been excluded from the Constitution and therefore does not need to be urgently or



dramatically brought in. I think it is also profoundly insulting to Quebec—unintentionally so, of course—to believe that, as a society, it is still so politically immature that a decision by the rest of Canada or by any Canadian province that this particular deal is not a good deal and should not go forward would cause Quebecers somehow to rise up and question their commitment to federalism or would provoke some kind of separatist crisis. To say that is to say that Quebec is an immature society in a way I do not believe it is.

In 1971 we had a national deal, the Victoria accord. The Premier of Quebec, the same Robert Bourassa, was a signatory to that deal. He went home to Quebec, consulted some people and said: "Well, on reflection, it's not such a good deal at all. We withdraw our approval." The rest of the country did not turn on Quebec and say: "In that case, the hell with them. We question whether we want Quebec in Canada," or: "So much for them. We are not going to do anything more for them."

In a reverse situation, if one or several provinces say, "Look, this deal just is not in the national interest and not even in the interests of Quebec, from our perspective," to say that in those circumstances Quebecers would rise up in indignation is really to do a disservice to Quebec and I think to fundamentally insult them.

It also, I believe, is an error to think that this deal, as it stands, would somehow once and for all put separatism to bed and remove the problem. Quite the contrary. The separatists, and even the nonseparatist, strong Quebec nationalists, are very much on record as saying this deal is not good enough, does not satisfy them, on one hand. On the other, Mr. Parizeau and his party are on record as saying that even though they do not think it is a good deal, by golly, if they ever come to power—as I imagine, being the only effective opposition in Quebec, eventually they will again—they will do everything to use the provisions of that deal to the detriment of national unity and to advance the separatist cause. So to think that we are somehow ending separatism with that stuff, I think, is a profound error.

Setting aside the fact that I do not think it needs to be brought in in that sense, it makes profoundly little sense to talk about bringing Quebec into the Constitution of 1982 through an accord, through a set of provisions that, in effect, turn that Constitution of 1982 inside out, reverse its direction and really dismantle its whole thrust. What do I mean by that? The Constitution of

1982 was designed in a spirit of pan-Canadianism. Its fundamental premise was one of saying that we are all one country, we all have to reduce the barriers to the two languages nationwide and our 10 provinces essentially equal one central government—a broad pan-Canadian vision of Canada.

The Meech Lake accord is based on a dualistic vision of Canada instead of that pan-Canadianism. It says there are nine provinces and there is Quebec, and we will reinforce the differences instead of strengthening the bonds of unity. The 1982 Constitution, as I said, was predicated on the notion of a strong central government that would ensure that while regional interests certainly had full play, the broad national interest would prevail over narrower, self-seeking parochial concerns. The Constitution that we would have under the Meech Lake accord fundamentally weakens the power of the central government and brings a steady erosion of power to the provinces.

The Constitution of 1982 had as one of its centre-pieces an enshrinement of the fundamental rights and freedoms of all Canadians from coast to coast in a way that was intended, as much as possible, to be above other considerations. The Meech Lake accord creates two classes of constitutional rights, one in the rest of the country and another in Quebec, and in Quebec permits fundamental individual rights and freedoms to be subordinated to a notion of the rights of the collectivity.

When one looks at all these fundamental differences, then the rhetoric of bringing Quebec into the Constitution, I think, is at best a misnomer and at worst a sham. You cannot bring Quebec into the Constitution by gutting the Constitution. Why are we doing all this? Not because there was some emergency in Quebec that required it. Yes, it would be desirable to have some government of Quebec eventually sign either the existing Constitution or some modified constitutional deal. But it is not urgent, it is not imperative, it is not an emergency, first of all.

Second, when one looks at the specific provisions of the deal, whether touching on the Supreme Court, the Senate or the federal spending power and so on, there has simply been no demonstration with regard to any of those provisions that it meets a national need: if the Supreme Court were working badly or unfairly or in a biased and dishonest way so we had to change the way the justices are chosen; or if the current workings of the Senate were contrary to

national unity or were profoundly unfair to the provinces so we had to change the composition of the Senate; or if the federal spending power had worked against the interests of ordinary Canadians and the interests of the wellbeing of our country in such a way that, by God, we had to put chains on it and stop the federal government from ever being able to do that kind of thing again.

There has not been that demonstration. In the absence of it, one has to ask, what are we doing to this country of ours? I fear that what we are doing is not only fundamentally reversing a great deal of what we have accomplished, not only over the past decades but over the century plus of our existence as a country, but quite literally risking putting our nation on the route to disintegration.

Now, there are people who say: "The accord does not mean very much. It just enshrines what is already the case." If that is so, why bother? In view of all the concerns you have heard here, the concerns that have been raised before the federal Parliament and so on, if it does nothing, what is the almighty urgency when so many Canadians are frightened of it? If it does something, then we have to ask ourselves with great seriousness, what is it that it does? What does it mean if it means anything? Let us look briefly at some of those things.

### 1030

The "distinct society" provision: Either it means nothing or it means something. If it means nothing, in that case it is a hoax being perpetrated on the people of Quebec and on public opinion in Quebec, who are being told by their leaders that it does mean something. Then when they find out it means nothing, they are not going to thank us and certainly their spirit of national unity will not be strengthened, because they will feel that they have been taken to the cleaners with a lack of candour or that a deal that once was made and accepted by every province and by the federal government, if the process goes through, is being reneged on in some way.

If it means something, what can it mean, Quebec as a distinct society? If we look at the nature of Canada, every Canadian province is in some ways a distinct society. I do not think I need to elaborate on this theme, but Newfoundland society is as distinct from Alberta society, certainly, as Quebec society is from Ontario society, in a great many ways. You could say that of every province.

It is precisely because we regard all our provinces as in some way distinct societies that we are a federal state and not a unitary one. It is precisely because of this that we have a division

of powers under sections 91 and 92 of the Constitution, under which we have said that those powers that are relevant to reflecting the distinct nature of each of the provinces, of each of the societies in Canada, should be wielded by those provinces, whether it be powers over education, over the delivery of social programs, the regulation of trade and commerce within the province and so on and so forth. That is why they are under provincial jurisdiction.

At the same time, we have said that because we want the whole to be greater than the parts, then other powers which pertain to maintaining our country as a whole should be in the federal domain. Having said that all provinces are distinct and therefore have certain powers, if we now pass a constitution and say, "Yes, but Quebec is more distinct than all the other provinces, and not only is it more distinct but the government of Quebec has an obligation under this new Constitution, not only to maintain that distinctness but to promote it, to make Quebec ever more distinct," what does that mean?

What can it mean other than if Quebec is to be more distinct than all the other provinces which have powers to reflect their distinctness, then Quebec must wield more powers than other provinces, and where are those powers to come from except from the powers that now accrue to the centre in the name of the national interest?

Yes, one can say that is a far-fetched view and it does not mean that. Then we have the remarkable paradox that while the Premier of Ontario and other premiers say, "It is just a reflection of the status quo and it means nothing," The Premier of Quebec stands up in the Legislature of Quebec and says, "This is a great breakthrough and it means a great deal." Both cannot be true.

If it means anything, it means a circumstance in which, increasingly, Quebec, in the name of this distinctness—I am not talking about next year or the year after but over years, over decades—will accrue unto itself more and more powers and in which, increasingly, what is important to Quebecers will be regarded as a domain of the government of Quebec, and in consequence Quebecers will increasingly have reason to look inward rather than to the country as a whole. Coupled with the effects of free trade—I could talk a lot about that but I will not for now—in consequence, federalism will become less and less relevant to Quebecers. That does not strengthen national unity; it sets a time bomb at its very heart.



To understand that, I think one has to understand that historically in Canada, there have been two rival nationalisms. There is a Canadian nationalism, the belief in Canada that most Canadians have, and there is also a French Canadian or Quebec nationalism that certainly has been historically promulgated, at least by an élite in Quebec.

Those nationalisms are irreconcilable and diverging, except for one formula—at least I can see no other—and that is a formula that has been in effect or that has been increasingly advanced over the last several decades, which subsumes French nationalism within Canadian nationalism, which says, “Masters in your own house, yes, but your house is the whole of Canada.” Hence the commitment to minority rights across the country, contrary to the kinds of horrors and idiocies we are now seeing in Saskatchewan. Hence telling French Canadians that not only their government in Quebec, but the national government is responsible for the maintenance and promotion of the distinctness of the French language and the French culture within Canada and so forth.

To move away from that and say that only Quebec and the Quebec government is a protector of the French fact and the French language, and that kind of idealism, is basically to put the two nationalisms on a collision course that eventually risks spelling the end of Canada. Now, it may be said: “It will not happen. It means nothing. It is just another technical reiteration of what already exists.”

The very least that can be said is that we do not know. Who will know? How will we know? When the courts decide. And what courts? One of the other provisions of the accord is that, henceforth, the Supreme Court which is the ultimate arbiter of what this thing means will at some point in the future be wholly the creature of the provinces. Why are we transferring the power to effectively select the justices of the Supreme Court from the federal government to the provinces? Why is that attractive to the provinces? Why does it matter?

I do not believe it is because of concern about making sure that the justices have a certain view of property law, or civil law or, “By golly, what will the justices of the Supreme Court say about divorce law, so we had better make sure we can pick who it is?” If that is a plum for the provinces, if that is a meaningful concession, it is precisely because of the issues of national unity and federal-provincial relations. It is precisely attractive to the provinces, if at all, to enable them to

put forward only nominees that share a certain provincialist, if you will, bias in terms of the balance of powers federally and provincially, a certain predisposition to regard the intent of the Canadian Constitution to be one of giving maximum scope to regional diversity and provincial interests.

Quebec, when this thing comes to full bloom, is to have three justices on the Supreme Court chosen effectively by the government of Quebec, put forward only by the government of Quebec. They are not going to be chosen for their belief that the “distinct society” provisions mean nothing. I think I can tell you that with some conviction. With those three justices, only two more from the other six, probably provincially oriented justices on that court, and “distinct society” will mean a very great deal indeed.

How do we sit here with any confidence and say it will not? For that matter, when one looks at the composition of the Supreme Court that at some point it will have, the same is true of any issue that tests the capacity of the federal government to govern in the national interest if a province or several provinces would prefer it not to make that particular decision. Building in a provincially biased Supreme Court again strikes at our capacity to function as a sovereign, unified, commonly directed nation.

Then we have that remarkable provision regarding the composition of the Senate. Again, the provinces are going to choose senators. Fine; whom are they going to appoint? Presumably they are going to appoint people with links, at least of sympathy, to the provincial government, to provincial interests. I am not saying people of low quality necessarily, probably not at all, but people with sympathy towards the provincial view. Why else is a provincially selected Senate a meaningful concession? At some point, when all this comes to full flower, there is going to be a Senate composed primarily, and then totally, of people chosen that way by the provinces. What do we think will then happen to the federal power when you consider that this Senate has an absolute veto over every piece of legislation passed by the House of Commons? Not a suspensive veto; an absolute permanent veto.

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I have used the analogy that this arrangement is really a rough constitutional equivalent of putting the federal power under provincial trusteeship. The federal Parliament will not be able to pass legislation that is not regarded as attractive by the provinces, even in its own areas of jurisdiction. That again strikes at the very

heart of our conception of a country that, yes, has provincial and regional interests, but a broad national interest that the central government is mandated to reconcile. One can say similar things about the spending power, the effect on the Charter of Rights, and so on. I will not belabour those points. You have heard testimony about them already.

I will say only one more thing before we move to any questions or discussion and that is really to heap, I guess, all the ridicule I can on the notion that has come out in some of these debates that while this deal is not perfect, let us pass it for now and then we can improve it and we can address these concerns in the next round.

Bearing in mind that in the next round every province will have an absolute veto, and that the status quo will be this transfer of power to the provinces and this creation of a distinct society in Quebec, can we with any semblance of credibility or intelligence say: "Yes, we can negotiate after and tidy that up. Quebec might agree after to circumscribe what "distinct society" means if we do not know now. The provinces will agree at some point to limit the veto power of the Senate that they will have the ability to create in a later round if they will not agree to it now. The provinces will later agree unanimously to strengthen the federal spending power."

I think we have to face up that once this is done, once this becomes law, there will be no possibility, unlike previous pendulum swings back and forth, for a reintegration or a restoration of essential federal powers if they are found to be lacking. Any constitutional change for which unanimity will be required will only be possible in one direction, and that is to transfer further power to the provinces, if there is to be any transfer at all. Recapturing the essential structures of national unity that we have had, if we let them go, will be impossible.

I guess all I can say, as one concerned citizen, is to literally plead with the members of this committee individually not to let it happen, to say: "No, it is not good enough. Yes, it was signed in good faith. Yes, the Premier made a commitment that he himself would not take an initiative to re-open this deal and make changes. But the Constitution does not belong to the Premier or to 10 Premiers and the Prime Minister. The Constitution belongs to the people of Canada and this just is not good enough and should not be allowed to happen."

End of formal remarks. I would be happy to discuss it in any way that you like.

**Mr. Chairman:** Thank you very much for a global look at the accord. It has been interesting for us, as we have gone through this process, that some people have tended to focus on particular parts and some have looked at the whole. I think that was a very full review of how you saw the intent and the end result. Sometimes when one is looking at individual parts, there is the old business of the trees and the forest. I think you have also underlined yet again the issues the committee is facing and is going to have to face at the end of its hearings.

I can only say that we are certainly trying to wrestle with those in terms of what we really do believe to be in the best interest. Needless to say, it has not been made as easy as it might have been, but that is our task and we are going to have to wrestle with that. I think that was a very useful overview from that particular perspective and set out a number of the issues we can now follow up on with questions.

**Mr. Allen:** Let me echo the chairman's remarks for a very thoughtful presentation of the opposition case. It summons most of the central arguments, and though you did not touch upon the aboriginal or territorial issues, I can see where you would fit them in quite logically in your presentation.

Before I get to the central thrust of my question, perhaps you could clarify for me, once again, your proposition with respect to the Senate and the way in which the existing suspensive veto becomes an absolute veto in the course of the restructuring that Meech Lake implies.

**Mr. Radwanski:** No, there is not at present a suspensive veto except in the case of constitutional change. At present, with the exception that there is a constitutional change with a six-month suspensive veto, the Senate has an absolute veto. If it is not passed by the Senate, it does not become law. The Senate has not been using that with any regularity, partly, I guess, as a political matter, because there has been a feeling that it does not have the legitimacy to thwart the will of the elected representatives and that it is an outdated body and so forth. Having been given new life by a provincial appointment procedure or selection procedure, hence a renewed constitutional legitimacy, there is no reason on earth to assume that would not be used.

I think you need only look at traditional, log-rolling kinds of approaches and voting behaviour and so on to see that it would not be long before that evolved into a circumstance where what one province does not like will be opposed by the other provinces in exchange for it



being done for them and so forth, but the absolute veto already exists.

**Mr. Allen:** Your argument is, essentially, that whereas now the restraint on the use of that veto is essentially a political one, a survival one as far as the Senate is concerned, because the federal government could initiate action to eliminate the power of the Senate under the new amending formula, with the Senate included in the unanimity principle regarding amendments of federal institutions, and the Senate being one, it would be impossible for that restraint to be exercised any longer and therefore the Senate would have a free-wheeling use of the veto power.

**Mr. Radwanski:** It would.

**Mr. Allen:** That is your essential argument, I gather.

**Mr. Radwanski:** It would. The intent of being provincially selected is to give the provinces a say at the heart of the federal system. Hence, it would be of explicit intent. Hence, it would be a veto power that is used for the purpose of advancing or protecting the perceived provincial interest against the federal power. That is why I say it is an effective form of provincial trusteeship over the federal government.

To analyse the absurdity of the concept, we need only ask ourselves what Ontario or any other province would say about a proposal that, in each province or in a province like Ontario, we create an upper House, a second chamber, selected by the federal government with absolute veto over legislation passed by our Legislature to ensure that the national interest is suitably reflected in everything we pass. Imagine what the provinces would say if that proposition were ever put forward, and yet we are willing to do just that in the federal arena and thereby handcuff the federal government.

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**Mr. Allen:** The question I wanted to come to is that it often seems to me that in many of the presentations with regard to the overall thrust of the accord, there is a certain shading of perspective that seems to tilt things one way or another with regard to some central propositions in the accord. You have certainly taken the individual rights, charter-equality-provisions-base, constitutional-accord-of-1982 approach to the Meech Lake accord, and I understand that.

I submit that notwithstanding that, there was—at least the practice of two subsequent Quebec governments suggests there was—a remaining outstanding agenda, not in terms of separatism *per se*, but in terms of a concept of

federalism and a functioning of federalism on an ongoing basis. There appear, from the agenda of at least the 1970s and 1980s, even in the Trudeau years, to have been a number of outstanding items, pertaining to the recognition of some special role for Quebec vis-à-vis its own society, that remained unfilled and unresponded to. Whether that always showed up in polls, or what have you, it certainly kept recurring in our politics and it certainly recurred in the politics of Pierre Elliot Trudeau, who tried in the course of his years to wrestle that to the ground from time to time and in some cases, such as in the white paper of 1976, packaged a number of proposals that seemed to move in the direction the Meech Lake accord appears to move. You shake your head. It may not have been in total or cumulatively with the same impact.

**Mr. Radwanski:** Not even on a relatively similar order of magnitude.

**Mr. Allen:** But I want to submit to you that at the end of his era, he did not resolve the problem of the relationship between the rest of the country and Quebec, neither to affirm the distinct society, nor to give Quebec the power to promote that; I heard you using almost the same language when you said the possibility of remaining *maîtres chez nous* in the context of Canadian federation.

Notwithstanding the dualism built into section 2 of Meech Lake accord, with various provinces having responsibilities for maintaining, preserving, and protecting the dualistic structure of the nation, I cannot quite see how that departs so dramatically and so far from the notion of a nation in which the French people in Canada, with a *foyer principale* in Quebec, essentially have reasonable opportunities for maintaining their language, their culture, their society and feeling at home in the nation at large. In other words, after all the testimony, I do not personally share your conviction that the Meech Lake accord appears to move sensibly on to the separatist, ultimately two-nation, agenda. That appears to me what you are saying.

**Mr. Radwanski:** It is what I am saying, and I respond with some trepidation, in the sense that if all the testimony which has been before this committee has not persuaded you of that, I doubt I have the magic words that will. I will say the following. First of all, when you say there has been this constant theme in the Quebec Legislature, and among Quebec parties of an unresolved agenda and so forth, my answer to you is yes, and there always will be in the normal course of events.

With this accord, the theme would not disappear. The separatists and various nationalist elements in the Legislature denounced the accord, said it does not solve the problem. The reality is that in a federal state there is a constant tension between centralists and provincialist forces. It is in the very nature of federalism, and of our system in particular, that there are constantly centrifugal forces that have to be resisted or the whole thing just flies apart. It is in the nature of the Quebec Legislature and to some degree we are seeing similar phenomena in other provinces—some of the western governments, for instance—to seek maximum power for themselves.

I guess maybe in some ways it is in the nature of most legislative bodies to want as much power as they can have. To believe that with this accord we can end that and have everybody say, "Good, now we are satisfied,"—not only do I not think that will happen, we have simply raised the plateau from which the demands will now depart and we have created circumstances where now people will say, "Well, if we are a distinct society we must be entitled to do this and that." And the debate will continue.

Now, if you say that agreeing to this distinct society simply gives Quebec some affirmation of things and so on, as I understood you to say, terrific. Let us define what it is we are acknowledging. Let us specifically get an understanding to which the Premier of Quebec and the Legislature of Quebec and those of the other provinces subscribe saying, "We recognize the distinctness of Quebec society as meaning the following and as not meaning these other things." If we can agree on that, terrific, let us enshrine it.

But let us not get ourselves into a kind of a mug's game where we say we agree to the distinct society concept and a bunch of premiers stand up in English Canada and say: "Not to worry, it does not mean very much. It is just a recognition of the status quo." That is sort of what you are saying. And meanwhile the Premier of Quebec stands up in Quebec and the federal government and the Lowell Murrys of this world stand up in Quebec and say: "We are giving you something new that you have never had before. Yes, it is invested with real meaning and real content. No, we do not want to talk right now about what that is because we might spook the anglos so let us keep it our cozy little secret for now."

You cannot do both. If you do both somebody is getting suckered to begin with. Secondly, it is

either meaningless as I said before, in which case, why proceed? Or it is meaningful and if it is meaningful, by its nature it creates a dualism which runs counter to the whole spirit of Canada that we have had so far and a dualism that is dangerous, not because dualism in the abstract or in theory is a bad thing, but because the more and more that everything that is important to Quebecers is perceived to be in the ambit of the provincial government, the less relevant is the federal system and then it does not take great leaps of imagination to understand what happens.

If the "distinct society" is represented by the Quebec government and that is where all the tools are, the best Quebecers are not going to run federally. They are going to run provincially. The best bureaucrats are not going to be interested in going to the federal system in Quebec. They are going to go into the provincial system.

The result is that, not only is more and more concentrated in Quebec but the quality of Quebec representation in Ottawa diminishes. Hence the federal government becomes in some ways less responsive, less sensitive to what is going on in Quebec and to the needs of Quebecers. The cycle is reinforced. At some moment Quebecers say, "Well, we want this additional power". Somebody either says no or somebody says, "Go ahead and take it."

And at some further moment Quebecers end up saying—particularly when you look at the effects of free trade at the same time which moved the focus north-south instead of east-west—but at some point Quebecers say: "What the hell do we need this for? Why do we not go that extra step? The country has been irrelevant to us for the last 25 years."—I am talking maybe 25 or 50 years from now—"All the action is here and all the action is in our other relations. What do we need this for? Let us just go the rest of the way."

At that point nobody is going to be able to go into Quebec as was done in the referendum campaign and say, "But the whole country is yours, you do not want to walk away from all this." They'll say: "What are you talking about? We have not had much to do with that for the last 10 years" That is where what we decide today may mean that our children do not have a Canada and that is the direction of my analysis. I do not know that I can persuade anyone who has heard these arguments before and has not subscribed to them, but I can tell you that I believe it with every fibre of my being.



**Mr. Allen:** I guess it sounds to me like the give them an inch and they will take a mile kind of argument.

**Mr. Radwanski:** No, no, I would not want it characterized that way. It says—

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**Mr. Allen:** Because I accept the tensions, I accept there to be ongoing struggle that will be part of federalism. I think that is not going to be overcome by the Meech Lake accord, and anybody who thinks that is the case, I agree with you, is living in a fools' paradise. But this deal tips that balance with regard to Quebec so severely that the train of events that you are projecting—let me ask you if you would try to give us your sense of a scenario that follows if we do not accept. Again, I am not particularly persuaded there is a doomsday scenario there, either. But obviously some events will follow and what will they be? We have not had Quebec at the table, although legally in the Constitution they should have been, for a number of important decisions that have had to be made, not the least of which was the aboriginal rights question. What happens if politically in Quebec the accord is rejected? Do we then get a major provincial election called on that battleground? Where does that lead us? Does anybody down the road pull in their horns in Quebec from what is now the common agenda vis-à-vis what must be accomplished in constitutional reform? What happens in that context? Does that not lead to as dangerous and difficult a scenario for the re-emergence of separatism, as some people do say? What do you see as the alternative course for politics in Canada if the deal is rejected?

**Mr. Radwanski:** I see it as a fairly straightforward one. What happens if the deal is defeated? There will be a hell of a nasty editorial in *Le Devoir*, some nasty resolution in the Quebec Legislative Assembly—the National Assembly, as they choose to call it. The separatists try to walk both sides of that street, too and say, "Well, you see, it was a lousy deal which we opposed but those bad guys will not let us have it", which is an interesting posture, though not an unusual one for the separatist party. Then what happens? What happens is what happened when Mr. Bourassa scuttled the 1971 Victoria accord. There is a period of some disgruntlement though the mass of Quebecers will not take to the streets anymore than they did when this "imposition" of the 1982 Constitution took place; people shrugged and said, "Uh." Something roughly similar will happen.

Somebody will take an opinion poll in Quebec and it will show that 'X' per cent of Quebecers are upset that the Meech Lake accord did not pass. Bourassa will call himself an election on it and get a new mandate. Good for him if he does. It is another mandate that the separatists did not get. Does Parizeau fight an election to try to get some kind of mandate for greater separatism based on the failure of the Meech Lake accord? I mean, you can call an election but does he win that election because he wants greater separatism? I think Parizeau is a long way from winning elections at this point, and I do not think it will be that kind of outrage. What happens then? What happened after the failure of Victoria; we negotiate some more. It took 20 years to negotiate the Constitution of 1982, lots of false starts, lots of people disappointed, lots of people proclaiming the end of the world at every twist and turn. We are still here. The process will go on.

There will be disgruntlement, but I do not think we need to disrespect Quebecers to the point of saying that they cannot handle disappointment, that they are like little children and my God, if you disappoint them, they will run away. Nothing will happen, in a word, except the usual process of politics. And then eventually at some point, we will get a deal. Maybe there will be a reference to distinct society, but maybe we will understand what we all want it to mean. We will not reach a deal where we are saying: "Hey, let us give them a concession. We do not know what the hell we are conceding, but eventually we will all figure it out." Maybe there will be some restriction on the federal spending power, but we will all understand what is being restricted and why. Maybe we will find a different process for choosing Supreme Court justices, but maybe we will understand why we are choosing that process. Maybe we will work in some mechanism for resolving a deadlock so that we do not have a situation as we do under these rules where if a separatist government of Quebec put forward a blatant separatist or several blatant separatists as candidates for the Supreme Court and they were turned down, the Quebec government could literally claim there was no more Supreme Court because there is no deadlock resolution mechanism.

Maybe we will eventually do it right. That is really all that will happen. The world will not end. Canada will not fly apart. But what we will not have done is put into place something we ourselves do not damned well understand even as we are putting it into place.

The fact that you can sit there, sir, and say with some great conviction what you think the accord means or does not mean, and I can sit here and say with equal conviction that it means something radically different, means it is bad law. You do not pass a law, let alone the fundamental law of the country, that is so unclear in intent, content and application that intelligent people of good conscience can reach totally different conclusions as to what the devil is being done. For that reason alone, one says, "Let's hold off until we know what we're doing." End of response.

**Mr. Elliot:** There are a couple of things I would like to discuss with you. One has to do with the appointment of the Supreme Court and the other has to do with the unanimity type of provision that is there in some of the things that have to be decided constitutionally beyond this point.

As a prelude to the comment I have to make: at this stage of our hearings, I think most of us, because of hearing in excess of 250 people or at least reading submissions from 250 groups or persons, are sort of framing up our point of view on the various points in the accord. We have a great deal of expert testimony before the committee at this point.

The kind of thing I would like to comment on with respect to both the appointment of the senators and the Supreme Court—I think you stated fairly explicitly that you felt the provinces would be in complete control of those two areas at this point, from the way you interpret the provisions of the accord. I submit, on the basis of testimony I have heard with respect to the Supreme Court, for example, that there is another point of view that might be looked at here. I would like you to comment further on this after I express a couple of points.

I think the fact that the Supreme Court appointments have to be made from provincial lists that are supplied is the reason you made the statement that the provinces would be controlling that. I submit that the federal authority does not necessarily need to lose anything by that kind of thing being involved. The Canadian Bar Association, for example, has come before us and has volunteered Canada-wide to really make the selection or have some input into the selection of the Supreme Court justices.

I submit that having lists supplied by the provinces might be just one of the things that are considered, with respect to the Supreme Court, to be in the best interests of Canada. The very best possible nine people should be sitting on the

Supreme Court of Canada. I think the point of view with respect to that kind of thing in the accord has to be, in the context that we are Constitution-building here and a lot of things have happened very quickly, and in the context of the accord, that the kind of thing that has been suggested, that the provinces should have some more say and there should be a specific number of them from Quebec, is a very important consideration.

I submit that what this committee might be able to do beyond the hearings, at the point when we stop listening to people and start deliberating on what we have heard and make suggestions, is that with the Canadian Bar Association in, with the provincial submissions, with the federal people still assuming their true responsibility in this regard, that what might evolve might be a more powerful way of coming up with a much better Supreme Court than we have at the present time.

**Mr. Radwanski:** The only way I can respond is that one can always wish and one can always dream, but the reality of what is being put in that constitutional language, what is being put in the accord, is simply that the justices of the Supreme Court will be chosen exclusively from names put forward by provincial governments.

I come back to asking, first of all, what are we remedying? Is the Supreme Court not now functioning well? Is it unfair to the provinces? One can point to a whole lot of decisions that have been adverse to the federal government, including even the Supreme Court's ruling on the federal power to amend the Constitution. Latterly, you will recall that they really socked it to Trudeau with that "legal but unconventional" stuff. That certainly was not a federally biased judgement, so what are we fixing? That is the first question.

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Second, whatever the bar may volunteer to do, that is not being constitutionalized in any way. All that is being constitutionalized is that the federal appointment may come from nowhere except from names put forward by the provinces. It does not say how many names the provinces have to put forward and it provides no mechanism for resolving the situation that arises if the federal government does not like in the national interest the names put forward by the provinces.

In fact, one of the very interesting quirks, which I do not know if anybody has picked up on, in the wording of that whole Supreme Court section, and I commend it to your attention, is that when dealing with the part that has to do with



Quebec, the language says, first, that the Supreme Court "shall" consist of nine justices, of whom three "shall be" from Quebec. It says that the three justices from Quebec "shall be" appointed by the federal government from names put forward only by the government of Quebec, but then it says that the government of Quebec, when a vacancy occurs in one of the Quebec seats, "may" put forward names of candidates: "may" not "shall."

Is that an accident of wording? I do not know. Is it profoundly meaningful? It sure as hell is. What it means is that the court shall consist of and hence the court does not exist unless there are three justices from Quebec, but if a name put forward by Quebec is turned down by the federal government, there is no requirement—because it is not a "shall," it is a "may"—that Quebec shall put forward names until somebody is chosen.

Parizeau could put forward Pierre-Marc Johnson as a candidate for the Supreme Court. The federal government says: "No, thank you. We are not going to put an avowed separatist on the Supreme Court." The government of Quebec says: "We put forward a name. We do not have to put forward anybody else. It is 'may.' But if you do not name him, the court does not consist of nine justices, of whom three are from Quebec. Therefore, there is no longer a Supreme Court until you name our choice." The bar association is not going to be able to help you. Nothing is going to be able to help you.

Take just that one example. Mr. Vander Zalm is going to take a justice to the Supreme Court. I do not care if he puts forward one name or five names, what are those justices going to be like and what is their orientation going to be? What is the bar going to be able to do about it? Who is asking the bar? You know, one can say, "Gee, in the best of all worlds, all kinds of misty things will take place." But when you are creating a Constitution, you look at the words you are putting on paper and you say, "What abuses is it open to and what consequences flow naturally?" and not "What other good things can we hope will happen?" because the good things may not happen and the worst may.

**Mr. Elliot:** By way of a supplementary comment with respect to that, and this leads right into the second point I want to make, I think if we take that attitude with respect to Constitution-building, we are not going to accomplish very much very quickly.

With respect to the unanimity part of it, the kind of thing that bothers me with respect to, out of hand, saying that the unanimity requirement is

in those parts of the Constitution that require it, a lot of the things that would be negotiated among the provinces and the federal government do not require unanimity at all. The old amending formula would still hold there in all but 10 items, or maybe 11, depending on how you interpret the thing.

I submit that the attitude towards the negotiation with respect to unanimity has a lot to do with the success down the line. My background is education and I think from your background that an example I might use in the present context to get a focus on what I would like to emphasize here is that the classroom situation nowadays is quite different than what it was when I started 30 years ago in teaching.

I was pretty good at teaching mathematics, I think, up until last June. The reason I was good at it was that, unless you got unanimity in a classroom before you tried to teach them mathematics, you were not very successful in getting the concepts through to the students in the class. When you are dealing with 34 or 35 young adults in a grade 9 or a grade 10 mathematics class, if you spend sufficient time at the beginning of a credit laying the ground rules on how you are going to go about teaching mathematics so that the behavioural problems and the other students who are necessarily part of every group you have in front of you now are all on side and you are going in a general direction, you are going to have some success at teaching mathematics.

I submit that we are breaking new ground in Constitution-building in Canada from this point on. I think the provincial premiers and the Prime Minister cannot any longer do the kind of thing that was perfectly legal up until now, to go into a room somewhere and come up with a constitutional amendment like the one that has been proposed by Meech Lake. I think what is going to have to happen is that they say, "In these areas, we need unanimity." If you are negotiating a constitutional amendment on the basis of the fact that unanimity is required, it is going to be a lot different than it is if you are aiming at getting seven provinces and 50 per cent of the population.

**Mr. Radwanski:** You are right.

**Mr. Elliot:** I submit that our Premier and our Prime Minister are reasonable people. If they go at it from the point of view of requiring the unanimity, they will probably come up with a reasonable approach to constitutional amendments when it is necessary.

I think society demands that out there now. If we revert to the old process which basically said, "Let's get seven provinces and 50 per cent of the population on side" and ram the thing through at the expense of the people who are against it, we are going to be in trouble.

**Mr. Radwanski:** But with all respect, I think you are missing the fundamental point. Unanimity is neither a good thing nor a bad thing in itself. To me, the fundamental point is this. If you want a Constitution that is close to set in stone, i.e., that it is going to be very hard to change, yes, nobody will be able to impose anything on anybody else and everybody has to agree. Unanimity is fine if you are happy with what you have got and you say, "Boy, unless everybody agrees, we don't want to move it another inch."

But if you start off with something that is very unclear in its meaning, in such a way that some people might be delighted with what it means—for instance, Quebec might be delighted if it turns out that the "distinct society" stuff or other provisions are interpreted by the courts, let us say, in a way that gives Quebec dramatic new powers and the others might be appalled—unanimity means that will never be changed.

If the Constitution operates in such a way that the restriction on the spending power is not a big problem for eight provinces but is really shafting two of the have-not provinces, for example, or any of them, it is going to be extremely difficult, as you yourself seem to acknowledge, to remedy the defect, because whoever likes what is happening because that province's interests happen to be served will veto a remedial change.

So what it says is, if we have a good Constitution, unanimity is fine, if it keeps anybody from ramming anything down anybody's throat, but if we have something that is unclear as to intent to begin with and hence subject to all kinds of problems, then unanimity means we cannot comfort ourselves that if it is not working as we hoped, it can always be fixed.

That is where your fundamental problem comes in. That terrifies me because I do not believe you will ever get all 10 provinces and the federal government agreeing on anything that diminishes provincial power. Some province will always say, "Why should I give up this power?" That means that either you get no constitutional change or you can get unanimity only on those changes that increase power to the provinces if the federal government goes along.

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So that is my problem with this unanimity argument. It is not that, "Gee, we are all one big

happy family and let us not do anything to anybody." It is that we risk locking in a deal that we ourselves do not understand right now, on which opinions differ, and if we discover, "Gee, that is not what we wanted it to mean after all," unanimity is going to prevent us from fixing it because whoever is getting what we did not expect them to get is not going to let us change it.

**Mr. Elliot:** I would like to thank you very much for your testimony here today because the kind of argument you put makes us consider seriously the kinds of things that we will have to address in the next month or so.

**Mr. Radwanski:** I hope so.

**Mr. Elliot:** Thank you very much.

**Mr. Radwanski:** Thank you for that. One worries, in hearing some of these questions being framed—I hope I am wrong—that they reflect a disposition to try to say, as the old Portuguese proverb has it: "The worst will not necessarily happen. Let us look on the bright side."

I am saying to you yet again, do not gamble with the future of Canada. If we cannot be sure of what it means send it back for a rework. When I was an editor, I would not have accepted a story that was ambiguous, where two people could read it and think that two different contradictory facts were stated. I would send it back and say: "Get your facts straight. Do it again. Get it clear. Let us make sure that at least we know what is being said before we present it to people." Surely that is the responsibility of the legislative scrutiny process.

**Mr. Chairman:** Just before turning to Mr. Pope, I will just note, in terms of the questioning, that I think at this point in the hearings what often happens is, depending on the point of view of the witness, one tests out some theories by coming from another direction. I just make that comment.

**Mr. Radwanski:** Sure.

**Mr. Pope:** I want to test out some of yours.

**Mr. Chairman:** Good.

**Mr. Pope:** As a matter of fact I understand the rationale of this argument and your concern that this accord could be the instrument for those who might want to undermine the national fabric.

I would like to understand better some of your assumptions behind that concern or rationale, specifically with respect to the Senate and the Supreme Court. You appear to be saying that the Meech Lake accord will lead to a process of proposing names for these appointments that will see provincial governments testing either what principles of constitutional interpretation will be



applied by prospective candidates or what principles of constitutional law or restriction on federal powers will be applied by candidates for senators' positions.

As you know, the federal and provincial governments both now make appointments. I am not aware of any process by which legal dicta or rationale or principles that would guide decision-making by these people are being vetted before names are proposed. I would like to know on what basis you think and what evidence you have that there will be that kind of process put into place as a result of Meech Lake. Is it clear to you and on what basis is it clear that the cabinet of Ontario, for instance, will only put forward nominees for the positions on the Supreme Court of Canada or the Senate on the basis of their attitudes vis-à-vis provincial powers as opposed to federal powers?

**Mr. Radwanski:** OK. There are two parts to the answer to that. The first part is that we are being presented with a departure from the status quo. Out of nowhere, all of a sudden, the provinces are being offered this power to put forward the names for the courts.

**Mr. Pope:** But you understand that even before, there was consultation between the provinces and the federal government?

**Mr. Radwanski:** There was consultation, yes. But now there is something much more than consultation. We have to look at the logic of the situation and ask: "Why is that being done in response to what wish? What is the nature of the gift to the provinces? What is the boon? What is the benefit?" One can be cynical, I suppose, and say it is nothing except patronage. The boon to the provinces is that they can appoint worn-out cabinet ministers to the Supreme Court to get rid of them.

**Mr. Pope:** I do not think I like the way this is heading.

**Mr. Radwanski:** I do not know that that would be a good thing. I doubt that is the intent. There must be some other advantage to provinces from, let us say, being able to put forward the Supreme Court names. You are quite right that, up until now, one can argue that the selection process has been relatively neutral in terms of those kinds of biases. I would not argue entirely, but relatively. The attempt has been made to find the best possible people, legal eminents, and so on, to sit on the national federal court.

Now we are saying that is not good enough any more. For some reason the locus has to shift to provincial selection. It is hard to understand that

as being a meaningful benefit to the provinces. They are going to have to do all the work of screening the appointments; they are going to have to have a process, and they are going to get some people mad at them for not putting their names forward and all that. It is hard to imagine what the logic of the provinces wanting that is unless, generally speaking, they can use that to advance their own interests.

To be honest, in some ways I am less worried about Ontario in that regard because, historically, even though I am not sure that understanding has been reflected in the agreement to this accord, Ontario has always benefited from a strong central government. That in itself could give this committee pause, but that is another story. Other provinces have a much more centrifugal view, presumably. It takes no great legal scholarship to know which justices or which lawyers have an essentially provincial rights, decentralized, "community of communities" view of Canada and which believe in a relatively strong central power.

A province that itself has centrifugal tendencies, a provincial government that really believes in an accrual of its own powers would be downright stupid to put forward justices who are going to rule against it. In that sense we are creating a new circumstance where, all of a sudden, something other than simple quality becomes a factor. Otherwise, why would you make the change, unless you can argue that the quality of the justices of the Supreme Court until now has been low? I have not seen that demonstration made, so why the change? Presumably to inject some other element, and it has to be an element of provincial orientation.

I think a similar argument can be made with regard to the Senate, and maybe even not by way of bias, maybe just by the nature of the process. Who is going to be provincially appointed to the Senate? Is it going to be that different from the current federal process? By and large, with some exceptions, people with links to the federal government in power are appointed to the Senate, whether you call it patronage or whether you call it a belief that people who think the way the government thinks are going to contribute to the national governments in the Senate.

By and large, people with links, whether it be former ministers or former advisers to a Premier or former or current fund-raisers for the provincial party, whoever, are going to be the ones put forward for the federal Senate provincially. The odds are that they will be people who think along the lines of the provincial government in power,

who will represent and understand that they are going to the Senate to represent the provincial interest.

That is why the whole thing is being shifted around. It is a logical conclusion that their behaviour there will be as representatives of the provincial interest in the Senate. That is why we are having this change. I do not think it requires any assumption of machiavellianism or anything else, to say that if we are changing the way in which these people are chosen to let the provinces effectively choose them, it must be with a view to giving the provinces something, and quite explicitly that something is a greater say at the centre, a kind of a hold over the activities of the federal government.

**Mr. Pope:** I have a supplementary. I do not understand the assumption that, because the provinces will participate in the appointment of senators and Supreme Court nominees, they will participate on the basis of establishing a provincial orientation. I take at face value the assertion that what is wanted is that the province will participate in the development of these national institutions, and I cannot follow the jump from that position to this assertion that they will be presented by the provinces on the basis of a provincial orientation.

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In Ontario, the Attorney General seeks advice on appointments from something called the Judicial Council for Provincial Judges, and an Attorney General disagrees with the recommendations of the judicial council at his peril. I have never seen any evidence, having very briefly been Attorney General, that the kinds of questions asked of prospective candidates for appointment relate to constitutional interpretation, and I do not see that evidence at the federal level either.

**Mr. Radwanski:** You are right. That is what I am saying.

**Mr. Pope:** Why do you say it is going to happen?

**Mr. Radwanski:** Otherwise, why are we making the change?

**Mr. Pope:** Because the assertion has been made that the provinces will participate.

**Mr. Radwanski:** But why? What does "participate" mean? They are not going to participate if they are going to have the exclusive—

**Mr. Pope:** By nominating candidates.

**Mr. Radwanski:** The only candidates who can be considered are the ones they put forward.

**Mr. Pope:** But how do you jump from participation of the provinces to provincial orientation as a given?

**Mr. Radwanski:** Because I say why are we giving it to them or why would they want it other than because of the advantages it could have?

**Mr. Pope:** How about because they want to participate, period?

**Mr. Radwanski:** What do you mean by "participate"? The government is not participating enough? It needs a few more chores?

**Mr. Pope:** Maybe that is their point of view.

**Mr. Radwanski:** I do not buy it. I do not think that would be the natural instinct. Certainly, if you look at Quebec—set aside the others for the moment—surely it is a stretch to think that the Quebec government is going to put forward a centralist for the Supreme Court given that the meaning or lack of meaning of that "distinct society" stuff, for instance, will depend on the rulings of the Supreme Court. Surely something more is involved there than a nice warm glow of participating.

**Mr. Pope:** So the assumption is it just seems logical to you that would happen?

**Mr. Radwanski:** Yes it does, and it seems to me inherent in the whole spirit of the offer that you guys can pick the Supreme Court. It is not because anybody grumbles at you that they do not like the Supreme Court's ruling on property law or what have you. It is to counter the grumbling there has been on occasion, although I do not think the evidence sustains it, that the Supreme Court is federally biased, so, by golly, you guys pick them and it will not be federally biased any more. You are right. You will make sure it is biased the other way.

**Mrs. Fawcett:** Am I right in assuming that you would gut the Meech Lake accord? Do you want to scrap it and start over? Would you be happy with amendments, or just which direction would you go there?

**Mr. Radwanski:** As a practical matter, it strikes me as extremely unlikely that a committee like this or any committee is going to simply pass a recommendation to forget the whole thing. I think a recommendation for major amendments would certainly have the effect of reopening it in a circumstance where all these laws could be considered. If you are asking me personally, I look at those provisions and every one of the central provisions to me is such a botch in terms of, at best, lack of clarity, and in some instances simply lack of thought of the implications and



consequences that, boy, it will take an awful lot of amending.

How do you amend the "distinct society" provisions? I guess you would have to amend them by defining what "distinct society" can permissibly mean and what it cannot. Do we then have a deal?

If Mr. Peterson is right that this does not give Quebec any new powers and does not change the status quo, then presumably yes, or presumably Quebec would not object. If Mr. Bourassa wants to stick to his guns and say that this gives them new powers, then obviously we do not have a deal. We circumscribe it very clearly and say it does not, or you specify what it can or cannot mean.

Likewise, the Supreme Court provisions if a change were recommended. To do what? To constitutionalize a role for the provinces in putting forward names or to create a circumstance where the provinces can put forward names, but if they are not acceptable to the federal government, then another process takes place. Parliament has the overriding authority or some impartial dispute resolution mechanism steps in. Do we still have a deal? If we do, that is very nice. If we do not, back to the drawing board.

I would recommend a drastic change to the Senate. Do you want to provincially select the Senate? I can see an argument for it. Then reduce all powers of the Senate to a six-month suspensive veto, subject to overriding by the elected representatives. If something is regarded as unpalatable to the provinces and you want the Senate to be able to hold it up for a sober second thought and provoke a national debate, terrific, but make sure they cannot handcuff the national government for ever. If that is accepted, do we have a deal? Maybe.

I would want to see drastic fundamental clarification on amendments in virtually each of the key provisions. Look at spending power. What do we mean by "national objectives"? Do you want to define that? If you can define it and still have a deal, terrific. Amend it to define it.

I guess I would say the responsibility of this committee is not to recommend passage of this thing with a sentence that each of you on the committee is not comfortable defending to your conscience, to history, to your children, 20 years from now. They say: "Geez, look at this mess. You voted for that thing?" If you are comfortable with every word and every sentence of that thing, then vote for passage. If you are not, recommend that it be changed or that that provision is

unacceptable and I guess thereby do what you as representatives of the people are supposed to do for a Constitution that belongs to other people.

**Mrs. Fawcett:** I think constitutions are living things and they eventually have to change.

**Mr. Radwanski:** Sure.

**Mrs. Fawcett:** You are being so specific in so many areas where it has to be thus and so before it should pass.

**Mr. Radwanski:** Because we are also talking about a process that strikes at the living character of the Constitution, as I said in response to Mr. Elliot before, by carving it in stone. That is one of my other problems with this whole deal. Historically, we had a pendulum swing in this country between periods of considerable centralization and periods of considerable decentralization. We have been able to do both and we have had compensating mechanisms.

By creating this kind of a Constitution with all the flaws or potential flaws it has, say there is only a 50 per cent chance that the kind of concerns I am expressing are correct, but there is that 50 per cent chance and we have an amending formula that requires unanimity to change a comma in the essential provisions afterwards. It is not a living thing. It is a fossil that we are going to be saddled with and our children will be saddled with, come what may, because you will not get unanimity if some provision serves the interests of one or more provinces but does not serve the national interest. You are right. A Constitution is a living thing. For Christ's sake, let us not kill it.

**Mr. Chairman:** Thank you very much. I was thinking that I would say thank you very much at the end, and as you kept building and I saw my children, my grandchildren, my great-grandchildren and my great-great-grandchildren, I began to feel, why did I do this last September 10? None the less, you remind us, and I think quite properly and quite rightly, of what it is we are doing.

I suppose we are wrestling with a number of things, including, and I think with reason, not just the accord itself, but where do we go after that? I think we also have a responsibility not only to the particular person who lives at the end of the second floor in the east end of the building in that regard but also, in a sense, to the country.

One of the things that is fascinating about the process we have gotten into here is that whether Meech goes through or not, in terms of future constitutional amendments, provincial legislatures are going to have a role somehow, and I

hope a role which is going to be one before things are signed, but there is going to be a role in this. I think we have recognized that one of the inherent problems is that we are a group of individuals who are elected within a provincial framework but we are really dealing with national issues and whether we are here in Ontario, Saskatchewan or Newfoundland, we are going to have to find ways of understanding that national perspective as part of our provincial function, if you like.

It is a kind of side-effect that I found of interest, as we sit here, not to be just looking at this as, "Is it good for Ontario?" and what that perspective is, but by the same token trying to differentiate what is often a criticism of Ontario from the west, from Quebec and the east, "You Ontarians tend to confuse yourselves with the national view or the national government."

That is a reflection on the comments you have been making, which I think are ones that do focus

us on the totality of the accord. They are issues that certainly have arisen, that we are grappling with and that we are going to have to come to some determination about at some point over the next several months.

On behalf of the committee, thank you for putting us on the spot but in a very full way and in a very articulate way that does nail down some of those thematic questions we have to think about. I appreciate the opportunity to exchange some thoughts on that. Thank you for coming.

**Mr. Radwanski:** Thank you very much.

**Mr. Chairman:** The committee will adjourn until 3:30, when we will come back here. Our second witness was unable to be with us this morning.

The committee recessed at 11:43 a.m.



## AFTERNOON SITTING

The committee resumed at 3:30 p.m. in committee room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good afternoon. I would invite Doris Dobbin of the New Experiences for Refugee Women, if she would be good enough to come forward and please take a chair. We want to thank you very much for coming this afternoon and joining us. I think I will simply ask you to proceed with your comments and we will follow that up with a period of questions.

### NEW EXPERIENCES FOR REFUGEE WOMEN

**Mrs. Dobbin:** I guess I am supposed to say at the beginning that I hope your questions are not too tough, because I do not know too much about constitutions.

**Mr. Chairman:** Apart from having sat and learned a lot over the last little while, we are by no means experts. I think you are going to bring a focus on the subject that will certainly be more than we have, so we appreciate your being here.

**Mrs. Dobbin:** OK. My name is Doris Dobbin and I work at New Experiences for Refugee Women. I would just like to let you know about our program briefly so you will know what I am doing.

New Experiences for Refugee Women is a nongovernment organization working with women from Latin America who have come to Canada as refugees. Our primary objective is to promote the social, cultural and economic integration of refugee women into Canada's multicultural society. We offer a six-month training program that consists of orientation and information, employment preparation and counselling, on-the-job training and English as a second language. The women have arrived in Canada either as government-sponsored refugees, as private or church-sponsored refugees, as asylum seekers or as part of the family reunification program.

We have many concerns about the Meech Lake accord, but there are some points which our organization feels are of major importance to the women we serve.

First, the effect of this accord on refugees: We are concerned with the effect the Meech Lake accord will have on refugees, who have the least

rights of any people in the whole world. Many have no country to call home, even if they are allowed to remain within the country to which they arrived seeking asylum or to be resettled.

Canada has a long and well-deserved international reputation as a world leader in the humane and effective treatment of refugees. Refugees are living proof of the worldwide struggle for human rights which we in Canada often take very much for granted. But an affirmation of the inalienable rights of the individual in the form of our Charter of Rights and Freedoms is at the very backbone of our Constitution. We see the Meech Lake accord as it now reads as a step backwards, a step which will take away some of those basic rights from people who had already been stripped of them before they arrived in Canada and who turned to Canada to gain them back.

In terms of refugee claimants, the present refugee determination procedure is long and cumbersome. Delays of months or years will be added to it if this part of the accord is not worked out clearly and humanely. Will the refugee determination be made by the federal government or the provinces? If the federal government continues to make the determination, which province will he or she be allowed to live in, since the provincial governments have the right to choose which immigrants and refugees come into their province?

What about refugees who are selected abroad? Provinces will be allowed to participate in this selection, but what will this mean for those refugees waiting in refugee camps, some for many years? Will they have to apply to all 10 provinces or choose which province they would prefer? Will each province have representatives overseas interviewing refugees? How will refugees know which province is likely to accept them? Would selection be based on race, on potential to settle or what? Once they are accepted by one province, will they be forced to live only in that province once they arrive? The selection process, as with the determination process, will be slowed down because of this two-tiered federal-provincial system.

What about refugees coming to Canada through the family reunification program, which the federal government has stated is the backbone of its immigration policy? If a refugee who wants to sponsor his or her family happens to live in a province which has filled its quota for refugee intake, does the person have to wait until the

following year to sponsor the family, even if the province next door is still accepting refugees?

Services to refugees once they arrive: In regard to services to refugees, we have great concerns regarding the fact that the provinces will be able to opt out of shared-cost programs. There is no requirement, as I understand, in relation to immigration settlement and reception services, that the provinces carry on a program or initiative which is compatible with the national objectives. Why are there no imposed standards in these areas?

The quality and quantity of services and programs will differ from region to region. If a refugee settles in Ontario, I can assure you that the type and quality of services offered to him or her will be quite different than in another province where there is already a negative attitude towards refugees. Settlement agencies in some other provinces are very worried that their provincial governments will be irresponsible in their response.

Even if there were imposed national objectives in regard to the treatment of refugees, what would they be based on? The objectives which would be agreed upon by all provinces? As was mentioned by another organization, would this mean the lowest common denominator for provincial compliance?

Because we work with refugee women, we feel they will be in double jeopardy if the accord is passed in its present form: first, because of the points mentioned above, and second, because they are women. As I am sure people have mentioned to you already, the accord expressly states that there is protection for some charter rights. What about those rights which are not mentioned? Why not delete section 16?

Presently, a group of organizations is putting together a charter challenge to Employment and Immigration Canada's subsidized language training program. Women have been left out of the program for a variety of reasons. They have not been allowed what we believe to be also a basic human right: the right to communicate. Can you understand the frustration of a mother whose children speak only English or French and who does not understand them, nor is she able to speak with them?

The accord, as it reads, will make the lives of refugee women even harder than they are now. Will we live up to our international obligations if refugee women find life in Canada even more difficult?

In conclusion, as an organization which has been involved in the process the federal govern-

ment used to introduce refugee legislation, we were upset by that process. How the Meech Lake accord has been introduced to Canadians is also upsetting to us. Governments must listen to the people of Canada. If women are saying there will be problems for us with the present version of the accord, the government should really listen. If refugees are saying there will be problems for them with the present version of the accord, the government should really listen. The accord is meant to enhance the lives of those living in Canada, no matter what their gender or immigration classification.

We ask you to listen to us, because we know the effects of government policies on our day-to-day lives and on the lives of those with whom we work. We ask Premier Peterson not to accept the accord without clear, meaningful and humane amendments.

**Mr. Chairman:** Thank you very much for zeroing in on a particular area—in fact, I suppose really two: the shared-cost programs as well as the question of refugees. We did have, I think some four or five weeks ago, another organization which appeared in London from Kitchener-Waterloo, I think, with the Kitchener Young Men's Christian Association, which expressed a number of similar concerns around the same issue. I think you have underlined some of those as well, and we can follow that up with some questions now.

**Mr. Harris:** You talked about the national cost-shared programs. There are really two things. You were talking about services for immigrants. When we have been talking about national cost-shared programs, we have been talking programs, I think, other than services for immigrants. I assume you are talking more about the opting out, where, as I understand the agreement, it would allow Quebec—and any other province, by the way, who could work out a deal—to deliver the orientation, if you like, or whatever services are going to be delivered, and the federal government would pay for them. That is the part you are concerned about—

**Mrs. Dobbin:** Yes.

**Mr. Harris:**—more so than the other clause that deals with national objectives and cost-shared programs, I presume.

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**Mrs. Dobbin:** I am concerned about the national objectives too, because if they are not clearly stated in terms of—I mean, I am being fairly specific about refugees, and immigrants as well, but certainly with refugees, if they do not



have these clearly defined national objectives, then any province could say it is providing that service, because it is a sort of a wishy-washy wording.

**Mr. Harris:** I disagree with those who say that. I cannot imagine that the federal government, if its funding and that whole process is conditional on the province's meeting national objectives—if I am the federal government and I am coming out with a new federal program, included in the program are going to be the national objectives. I would say, "Here's my program to do X, A, B, C and here are the national objectives of this program, 1, 2, 3, 4, 5." I think they will spell it out very specifically for that program. Then I would think that the province will have to demonstrate to the satisfaction of the federal government, obviously, and eventually, if there is a dispute, to a court, that in fact it is meeting these national objectives or the intent of them or whatever. I am not so worried about that.

I am worried, though, about what you raised on standards, if you like, vis-à-vis immigrant services and what is going to be provided. The Premier (Mr. Peterson) of this province says: "All we've done in Meech is put into the Constitution what is already the practice. It is the Cullen-Couture agreement," or whatever it is, "and it has been used now for years."

I want to know, first, if you agree with that, and second, have you had any problems in the last few years, because we are now constitutionalizing, according to the Premier of this province, what in fact has been going on for the last number of years with Quebec.

**Mrs. Dobbin:** With Quebec. Well, I do not know if I can completely answer that. First of all, on the first part of your statement, I still do have concerns about what you said. I think right now the federal government has a policy about how to deal with refugees, and I can assure you that, depending on which office in Toronto you are in, the treatment of refugees is different; depending on which city you are in, the treatment is different, and certainly depending on the province that you are in, it is already slightly different.

**Mr. Harris:** Yes.

**Mrs. Dobbin:** It is the same with, for instance, the welfare system, although the federal government does give a certain amount. I believe they pay half the costs of refugees who are receiving welfare. If you happen to be a refugee who lands in British Columbia, you do not get that welfare until a certain point, whereas

Ontario has been very generous in allowing them to get on to welfare immediately.

So I am really concerned that if everything is put into the hands of the provinces and that is what they are doing already with—and maybe I should not get into federal politics or something now—but with having to deal with the services to refugees and the way the whole treatment of refugees has been over the last few years, I am very concerned with what the federal government will say the national objectives are and how it will word them. I do not think they are always as clear as you are saying they would be.

**Mr. Harris:** I do not want to debate that. We are going to hear lots of opinion on it. I tend to hear you saying, "We're not happy with what the feds do." Maybe you should leave it to the provinces then. Maybe they will do a better job.

**Mrs. Dobbin:** Well, maybe. This one might.

**Mr. Harris:** Let us not engage in that debate, though.

The Cullen-Couture agreement, which now, I understand, allows Quebec to have a say in who will immigrate into Quebec, I am told, including the five per cent, is already in place. Has that caused you a problem or any—

**Mrs. Dobbin:** The five per cent? Sorry, I did not hear you.

**Mr. Harris:** They are entitled to their share of the population plus five per cent. I am told that is no different from what has happened over the last 10 years.

**Mrs. Dobbin:** I do not know how it affects Quebec. Ontario itself has about half of the refugees who come into the country.

I do not think I understand quite what you are asking.

**Mr. Harris:** You do not like Meech. The Premier of this province says Meech—

**Mrs. Dobbin:** It is the same as before.

**Mr. Harris:** —is the same thing as what we have been doing for the last 10 years, so what do you not like? That is all I am asking.

**Mrs. Dobbin:** I think it is the transfer of power, to start with. Certainly in terms of selection of refugees, the determination of refugees, I do not think that is spelled out in the accord at all.

**Mr. Harris:** I do not know whether the Premier is right or not. I have problems, by the way, and I am not trying to ask you difficult questions. This is one section that has caused my party problems right from the very beginning, and I still have problems.

When we asked the Premier these questions, he said: "That's the deal now. That's the deal that Quebec has with the federal government, so there is no change. We are just constitutionalizing it."

**Mrs. Dobbin:** And each province will have that deal.

**Mr. Harris:** Each province has the option of having it, but the Premier says we have the option of doing that now.

**Mrs. Dobbin:** If they have, I do not believe they do that.

**Mr. Harris:** Right.

**Mrs. Dobbin:** Quebec has quite a different way of dealing with refugees than the rest of Canada.

**Mr. Chairman:** Just for the record, there are six agreements, but Ontario has not entered into any formal agreement with Ottawa.

**Mr. Harris:** So the Premier is saying there is nothing to have stopped us from entering into an agreement now, or Meech is saying we can enter into one. It is the constitutionalizing of what has been practised in Canada.

**Mrs. Dobbin:** Yes, but I am concerned with how that will be entered into, not so much whether—because it is going to be a little bit different power, I think, later than we see now.

**Mr. Harris:** OK.

**Mr. Allen:** I want to say the spirit of my questions is precisely that of Mr. Harris's questions. I am not going to ask you questions to try to make it difficult for you, but just simply because we have a big problem on our hands.

**Mrs. Dobbin:** Yes.

**Mr. Allen:** We are trying to pick people's brains as best we can.

Your last response is where I want to take off from. You said you were concerned with how it would be done, not whether it could be done. Could I just ask you whether you think the "how" really can be written properly into a Constitution? As you know, our Constitution sets out a lot of things that the provinces have responsibility for and the federal government has responsibility for. It lists all those items, and it is everything from the census and statistics to sea coast and inland fisheries, weights and measures for the federal government and the province, the establishment of 10-year provincial offices and the payment of provincial officers and the establishment of hospitals, asylums, charities. But none of that in our Constitution tells us how those things are to be done. That is the political task,

after you decide who has responsibility for doing what.

The problem of the Constitution, then as now, is to decide who has responsibility for what and under what sort of broad rules, which we have tried to establish in the charter, we can provide grounds for appeal in terms of the principle of the way in which they are applied. None of that gets into the exact mechanics of how it is done and whether one province is going to be slightly fairer or better than another, etc., or whether the federal government is superior or not. Are you aware that that is the way the Constitution functions? That is the first question, I guess.

**Mrs. Dobbin:** Yes. Then the procedures are written on how—

**Mr. Allen:** Some things are political and some are constitutional.

**Mrs. Dobbin:** Yes.

**Mr. Allen:** So we have to work with that.

Second, do I gather that you are not satisfied with the section on immigration even though it does say that there will be national, overriding objectives and standards, and obviously those will include international treaties with regard to the acceptance and treatment of refugees? It does specifically affirm that the Charter of Rights shall govern everything that is done in the arena of immigration. Notwithstanding all those, you still have a problem.

**Mrs. Dobbin:** Yes, I do, because at the moment, that is how the Constitution reads; the country as a whole has these rights and obligations. As I said a minute ago, if you go from one part of the country to the other, how refugees are being treated in each province is quite different, and some of them do not measure up to what we have set as our national objectives.

**Mr. Allen:** Perhaps if I could just interrupt you at that point, though, you see, at the present time, there is nothing in our Constitution that says that one level of jurisdiction is, in fact, superior to the other. The federal government could not now appeal to the Constitution and say, "We have a prior right to determine what you do in the provinces." It says it is a shared jurisdiction. There is nothing about anybody's being superior to anybody else.

What Meech Lake does is say that there shall be national overriding objectives, that the charter shall apply and that nothing, either provincial or federal, shall breach those considerations. My sense is, and I want you to respond to this, that is much stronger in terms of federal control than we



presently have in the Constitution of Canada. Yes? No?

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**Mrs. Dobbin:** I still feel the refugee policy is part of the whole immigration umbrella. I think there is going to be some watering down of that somehow when the provinces individually take over parts of that whole immigration umbrella. Yes, maybe the federal government will decide we will take so many refugees in one year or we will do the determination, but I still have really a hard time understanding how the Meech Lake accord assists the provinces, or Canada as a whole, to deal with that in such a fragmented way.

For instance, what if the provinces decide that they will take so many immigrants per year? As it stands now the refugees are part of the immigration levels; they are not in addition to what the government has already set as levels. There are maybe 20,000 refugees included in the immigration levels. As I said earlier, how are the provinces going to decide who they are getting? I do not know how this is all going to assist them in deciding that.

You are right; those are the technicalities of it all, but if the tone is not set properly, then the technicalities will really hurt a lot of people's lives.

**Mr. Allen:** Technicalities always can. That is true.

**Mrs. Dobbin:** But that is what we live with and that is what I said at the end.

**Mr. Allen:** But as you said yourself—

**Mrs. Dobbin:** Yes, if they are not more specific with the objectives, so that people do not have any question about them and do not misunderstand them, they will hurt those of us who have to live every day with what these policies are and what the Constitution is. The Constitution has been good for a lot of people, including refugees. I do not think we want to lose that and all of a sudden make things a little confusing so we have to decide and debate whether this is correct or that is correct. People's lives are at stake when we are talking about refugees. It is not how many we are going to get this year. Yes, that is important too.

**Mr. Allen:** I certainly can see the importance of all of your concerns, both in principle and in fact. I do not have any problem with that at all. I am still wrestling with where the primacy lies and whether you are not much stronger with Meech Lake, which says the charter quite clearly must

apply to all immigration decisions. That gives you a lot of appealing power in the courts.

**Mr. Offer:** Thank you very much for your presentation. You have raised some very important issues. I think your last comment, with respect to how it might impact on people's lives today, immediately, is extremely important for us to appreciate. As the hearings have gone on, and the chairman has already alluded to a particular presentation in London, that has been brought home. You have once more, very importantly, done so also.

I am having some problems in that your concern with the accord seems to be not so much with what is in the accord and the view that the accord, as part of the Constitution, might set a particular framework of understanding of a relationship between the federal and provincial governments, but rather how the particular participants, the federal and provincial governments, will use that framework in dealing with policies today and in the future.

My problem is that this is something which will come up in terms of policies, politics and issues, and I guess I do not see it as part of the Constitution. I see the framework, and I think we have that in the accord. I think Mr. Harris and Mr. Allen, as I interpreted them, were saying basically the same thing, that it is a framework and that in addition to the framework there is some very specific protection surrounding the whole question of the immigration items in the accord.

Having said that, my question is this: In response to some questions today, you have raised the whole question with respect to refugee service and your concern with respect to refugee service. I am wondering if you can tell us what that service is now and how you believe it would be impacted upon by this particular accord. I think that is where your major objection is to the accord.

**Mrs. Dobbin:** At the present time, as I said, Quebec has a certain way of dealing with refugees, but the rest of the country does not, despite the fact there is a national policy on refugees and supposedly national ideas about how to treat them.

A small example of one service they have would be working with refugee minors, who would be children who come here and have no family with them. Presently the rest of Canada, as far as I understand, just turns these children over to children's aid or to anyone whose phone number they have, whereas in Quebec if children under the age of 16 come in, they have a house set

up for them, they start English classes in that house, they begin to give them orientation and adaptation classes right there in the home until they find a Canadian family which then can look after them. I think they are there for about three months. Nowhere else in Canada do I know of a government doing that kind of service. That is one of my concerns. Even something as basic to me as the care of children has to rely on the goodwill, I guess, or the attitude of that province at the time.

**Mr. Offer:** In response to that, here you are using the government of Quebec as an example for all the other provinces to follow because of the service which it provides in that respect. I am wondering if it could be argued that this accord would allow organizations such as yours, and others, to lobby provincial governments now because of the accord, which has brought out in a very clear sense the right of a province to have this type of agreement, to say, "We want you to follow this particular model," so that particular service, which is now only in Quebec, could be found in other provinces. I am just wondering how you would react to the argument that says the accord is proper for the very reason that you are concerned about it.

**Mrs. Dobbin:** In my experience with refugee work, refugees are not exactly a popular issue. Governments do not exactly think that they can always get points. I hate to be so much this way, but I am afraid this is what has been happening. Refugees, as I said in my speech here, have the least amount of rights of anybody. They do not have a lobby except for individuals like us who are trying to do that. For us to try to force a government to do something like that—we have been trying to get the federal government to do that for some time, to respond to some very human issues.

I feel that there are some provinces right now that are even less likely to respond than even the federal government is doing. I am not sure where Quebec's attitude comes from. I have not studied that. I have not studied its government in terms of why it does these things, but the rest of Canada could do something. Even Ontario could provide the service for young people. Any province could do that right now and they are not doing it. Why not? Why would be they more likely to do it just because now they have a little more right or power to do it?

**Mr. Offer:** That very reason, possibly.

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**Mrs. Dobbin:** When you are dealing with something very—what is the word?—humane, or

something, as children, I do not think that you have to wait to get the power to do it before you do it. These are children. This is one example.

**Mr. Offer:** No one is going to question the necessity for the service. No one is going to question the ongoing analysis of the service to make certain that it continues to meet particular needs. I do not think anyone is ever going to question that. I am going to go back and say that I see this accord as allowing groups, again, such as yourselves, to throw the ball to the province and say, "Listen, the accord now says that you can enter into these agreements."

**Mrs. Dobbin:** You can enter—not that you must enter into them, not that you must do something about it, but you can if you want to.

**Mr. Offer:** And that is extremely important. Now the provinces will have that responsibility or obligation to meet that very crucial issue. I know you and I could probably discuss this all day, but I just want to thank you very much for the presentation. It is a very important point, especially dealing with the refugee service and some of the very important issues within the service, which it must address.

**Mrs. Dobbin:** As I said, maybe I am not very well versed in being able to express it, but I want you to think about this aspect of it.

**Mr. Chairman:** Some of the testimony we have received on some other issues and even, as we have learned today and from the Kitchener-Waterloo organization in London, on some aspects about the overall treatment of refugees, whether we were talking about Meech Lake or not, raises a number of questions about what is happening now, regardless of whether we were talking about constitutional change or not.

Certainly for me, and I suspect for many members of the committee, you have underlined some of the points and some of the problems; for example, I was completely ignorant of the treatment of refugee children in terms of just what happens. I think this is testimony which we would want to pass on to some of our colleagues who have some responsibilities there, because I think you are quite right that there is a problem. In many of those areas it may not even be necessarily clear who has the responsibility, and sometimes it is where the political will is; then something can go ahead.

**Mrs. Dobbin:** It is that juggling of who has got the responsibility that is very alarming. People are in the middle while you are deciding who is in charge.



**Mr. Chairman:** When these questions came up before, I dug in to try to find out a bit more about what the immigration sections might mean, and there was one interesting thing here that I think is better than the current situation. This comes back as well to Mr. Harris's question.

Right now the agreement that the federal government has with the different provinces is a sort of governmental agreement that they worked out. The one thing that I think is a step forward here is that any agreement that is worked out would have to be passed by the House of Commons and the Senate. The one thing that does mean is, then, that would provide for more public input, in effect. Certainly it would provide those organizations that are involved with immigrants and with refugees, through either the House of Commons committee or whatever mechanism was set up, with an opportunity to go into a lot of these particular issues.

Whether Meech Lake goes ahead or not, that is one component that might be of interest to groups that are active to get it from being more of a closed shop, government-to-government negotiation and into, in this case, the House of Commons, where finally they would have to approve a certain arrangement which, because of the public debate and so on, would be much clearer, in terms of numbers, how different programs were going to be done. That is not so much a comment directed to Meech Lake as it is to a general approach to a given with these issues, because I think, as you point out, sometimes people tend to want to put refugees off to the side or not have to think about them.

I want to thank you very much for coming this afternoon. I think that, contrary to what you said at the beginning, having people who are directly involved in these kinds of programs, believe me, there is an expertise there that we certainly do not possess and we appreciate your comments.

I call upon the representatives of the Women's Legal Education and Action Fund, I guess more popularly known as LEAF: Beth Atcheson, the past vice-chair; Denise Arsenault, the vice-chair; and Christie Jefferson, the executive director.

Welcome. Some of us had the opportunity to attend a conference with Ms. Jefferson earlier in March. It is nice to see you again. We have also chatted with Ms. Atcheson on a number of occasions. We welcome you here this afternoon. To maximize our time, if I can turn the mike over to you, please go ahead with your presentation and we will follow up with questions.

## WOMEN'S LEGAL EDUCATION AND ACTION FUND

**Ms. Arsenault:** We, the representatives of the Women's Legal Education and Action Fund, are pleased to appear before you today to speak to why our experience with the development of equality rights for Canadian women convinces us, and should convince you, that amendments to the Meech Lake constitutional accord are essential.

I am Denise Arsenault and I am the current vice-chair of LEAF. Contrary to what many people assume, I am not a lawyer; I am a chartered accountant by profession. I am involved in LEAF because I dearly want to see the end of sex discrimination in Canadian society. Today I will provide you with some background information about LEAF.

To my right is Christie Jefferson, who is LEAF's executive director. Ms. Jefferson has a long history of working with disadvantaged groups. She has been the executive director of Opportunity for Advancement and of the Canadian Association of Elizabeth Fry Societies. Ms. Jefferson will address the issue of equality rights in the charter and equality litigation.

Finally, on my left is Beth Atcheson, who is a lawyer. She is the former vice-chair of LEAF and co-chair of our Meech Lake committee. Ms. Atcheson will explain why LEAF has very serious concerns about the accord's impact on equality rights and will present LEAF's recommendations to you.

Our presentation will take about 15 minutes and we would be happy to respond to any questions from you following our presentation. We will leave you with copies of LEAF's most current litigation report at the end of our presentation as well.

LEAF was founded in April 1985, and one of LEAF's primary objectives is to achieve equality for women by means of litigation, using the guarantees of the Canadian Charter of Rights and Freedoms. LEAF is governed by a national board and includes at least one representative from every province and territory in Canada.

In our view, LEAF is uniquely qualified to put before you the issues which I have outlined. Our qualifications can be demonstrated by reference to the criteria LEAF uses in the selection of test cases which it supports. In particular, LEAF's cases must substantially promote equality for women. In addition, the case must be of importance to women. Ideally, a LEAF case would result in significant gains for women or in gains for a significant number of women.

Since LEAF began operation, it has opened over 250 files. The inquiries cover a very broad range of areas of law. To date, LEAF has adopted 53 cases. We have appeared in cases in superior trials in the Courts of Appeal in 10 of the 12 provinces and territories and in the Federal Court of Canada. Also, we have been granted intervenor status in five major equality cases before the Supreme Court of Canada.

The Ontario government already knows and supports LEAF's work. On October 16, 1985, the Ontario government made available to LEAF a fund of \$1 million to finance equality litigation for Ontario women. We are very grateful for that support.

Our experience in the development of our cases has demonstrated the desirability of a very wide consultation process. LEAF therefore consults with community groups concerned with specific subject matters in a particular case, as well as with experts in the theory of equality in the substantive areas of the law and in other disciplines such as sociology and economics. LEAF operates this way because the reality is that equality issues are theoretically and practically complex.

Many communities share an interest in any one issue, and it is very difficult to correct mistakes once a case is before the courts. Developing case strategy requires a sure vision about the meaning of equality and how that vision should be made concrete in any particular instance. In LEAF's experience, that vision cannot be arrived at in isolation; hence our participative approach to case development.

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The way in which the accord was drafted and publicly presented, and probably negotiated, suggests that these realities were ignored. Our first ministers indulged in the conventional exercise of adjusting federal and provincial powers in a way to achieve what the honourable Senator Lowell Murray has called equality of the provinces, not simply the entry of Quebec into our constitutional family, as is often stated.

Apart from the broader political debate as to whether the accord overall is desirable, the Constitution is no longer a matter of the distribution of decision-making power nor is it the sole preserve of first ministers.

I would like to turn it over to Christie Jefferson now.

**Ms. Jefferson:** It is a pleasure to be here. It is nice to see you again, Mr. Beer. We should stop meeting this way.

**Mr. Chairman:** It is on other issues, though.

**Ms. Jefferson:** That is right, a change of pace.

I am going to spend, hopefully five to six minutes dealing with the issue of equality rights in the charter in a general sense. For simplicity's sake, it may be useful to divide the development of women's rights into three broad phases of evolution.

The first phase was the struggle for formal legal equality between men and women, that is removal of any common-law or statutory distinction between men and women. The results of this, of course, were women getting the right to vote, to hold public office, to participate in the professions, to hold property and the right to equal custody and guardianship of their children.

For some people, this apparent gender neutrality is still viewed as the meaning of equality, and we will be talking a bit more about this in a moment. This is an important issue because, however the achievement of formal equality, it can obscure the fact that women as a group are still profoundly disadvantaged in Canadian society. I am sure, for example, I need not remind the Legislature of Ontario that poverty has a female face, both in this province and in Canada as a whole.

The second phase of reform was the struggle for equal opportunity as protected under federal and provincial antidiscrimination codes. These codes are directed towards individual instances of discrimination and have really not proved themselves to be very useful in seeking broader redress over the deeply rooted and pervasive factors in society which cause women's inequality.

In 1982, of course, on the proclamation of the Constitution, we entered our third phase, which is the struggle for substantive constitutional equality rights. Given the enhanced role of the courts in this third phase, women prepared for constitutional litigation and our organization was founded. It is our hope that the equality guarantees of the Charter of Rights and Freedoms, specifically sections 15 and 28, will provide the foundation for achieving substantive equality for women as a group through tackling systemic discrimination. We are at a crossroads in this most recent and, hopefully, final phase of the development of women's equality.

Section 15, as you all know, is only three years old. What is perhaps less known is that the very first section 15 case has only been heard by the Supreme Court of Canada as recently as October of last year. There are a number of cases in lower courts. However, the vast majority of cases in the



lower courts do not involve equality cases; they involve other charter areas. Of those which are using section 15, the majority are not focusing on women or other disadvantaged groups and the interests of those groups. In fact, a number of these cases threaten the very few gains women have made through our earlier phases of reform, such as maternity benefits and rape shield legislation.

The Supreme Court of Canada will be deciding on a number of issues of critical importance to women in the next two or three years, including not only the meaning of "equality" and more specifically "sex equality," but also whether legislation promoting rights, of for example female victims of violence, will be upheld in the face of challenges under other sections of the charter; whether the foetus has rights and, if so, how those balance against the rights that women have under the charter.

Our courts will be weighing rights such as freedom of expression or aboriginal rights against sex equality rights. These judges will do so in the context not only of precedents but also with an eye to the views of legislators on the priorities in terms of Canadian values, what they should be weighing against what.

The consequences of legislatures seeming to or actually elevating one set of rights in our Constitution over others, any other set of rights over equality rights, at this historic moment, when courts are interpreting the meaning, nature, scope and weight of these rights, is foolhardy and playing with the future of women in this country.

Whatever the outcome of the political debate about the accord, if it becomes law it will be interpreted by the courts of Canada. Equality litigation has some features which must be understood and addressed in political consideration of the accord. Much effort has been expended by the minister responsible for federal-provincial relations, the honourable Senator Lowell Murray, senior officials of the Department of Justice and the joint committee to convince women that the accord does not override or supersede the charter.

The very same Department of Justice has argued the opposite in court recently. In a case taken by the Yukon territorial government, arguing that the rights of persons in the Yukon territory would be adversely affected by certain amendments in the accord, it was argued on behalf of the government of Canada that the charter could not be invoked to invalidate another part of the Constitution.

While we appreciate the assurance and most certainly keep the record in case we need it for future reference, our experience tells us that the governments of Canada, for whatever reason, are answering the wrong question. The right question is, "What direction will the Constitution, as amended by the accord, give to the courts in deciding equality rights cases where at least one of the parties relies on section 2 of the Constitution Act?" The only possible answer is, "No one knows." We may all speculate on the matter, but we cannot avoid the reality that no one knows.

This concern is increased by the following factors in addition to the ones already mentioned.

First, the generality of the concepts in section 2 promises that it will be invoked often in cases inside and outside of Quebec.

Second, the party initiating the charter action plays the primary role in framing the issues of the case and the remedies sought. The respondents or interveners then must operate within that framework. In short, government's view about how section 2 will be argued will not be determinative.

Third, courts must determine cases on the basis of evidence placed before them. Important decisions may be based on badly argued cases.

Fourth, even if an issue is under review politically it can be forced into the courts, thereby pre-empting a political solution.

Fifth, saying, "Let the courts decide," a very tempting option I do realize, is a denial of the considerable monetary and personal cost borne by the individuals and groups who must go to court either to advance their rights or protect their rights. In fact, section 15 of the charter came into effect in 1985. Women have more often been forced to act in defending their existing rights, as I mentioned a moment ago, as opposed to advancing their rights.

Now I will turn it over to Beth Atcheson.

**Ms. Atcheson:** I am sure you have heard many discussions of section 1 of the charter, which is, of course, the limitations clause, a very important clause in terms of charter analysis. In assessing whether a limit on a charter right is none the less acceptable under section 1, courts will examine a number of factors, including the nature of the right at issue. In determining the nature of the right, and thus the degree of weight it will bear in the analysis, the courts can look at the history of the right, whether it was protected at common law, and the total constellation of references to the right which may appear in the Constitution, including the charter. Thus, no one

provision of the charter stands alone. It is always considered in its constitutional environment. Any alteration in that environment is bound to affect the way courts interpret the right and the balance they strike between it and other constitutionally protected values.

Because the Meech Lake accord will alter the constitutional environment in which equality rights have been interpreted and in which they would continue to be interpreted in the absence of the accord, LEAF's concern is that women's equality rights will inevitably be affected by it. This basic concern, arising from the very structure of the Constitution and the methodology of constitutional adjudication, is reinforced by the language of the accord itself. There is nothing in the accord to assure women that its recognition of some rights and interests will not diminish women's rights. In fact, the language of the accord goes in the opposite direction.

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To speak briefly about the Bill 30 case, which I suspect has also been discussed before you, the important holding in that case is that provincial legislation enacted under section 93 of the Constitution Act of 1867 for the purpose of enhancing the rights and privileges of minority denominational schools cannot be attacked under the charter.

According to Justice Wilson, who wrote for four members of the Supreme Court, this holding was compelled by a need to protect "a fundamental part of the Confederation compromise." According to Justice Estey, who wrote for the other two members of the court who took part in the judgement, the charter could not be interpreted "as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867."

There is no indication in either judgement that the immunity from the charter review is confined to legislative powers granted in the 1867 act itself as opposed to those added later to the 1867 act or granted in any later Constitution Act, including those admitting other provinces to the union.

If then the words of the Bill 30 judgement are not confined to the 1867 act proper, it becomes important to consider what a court would identify as a fundamental constitutional compromise. Critics of the Bill 30 judgement point out that this phrase could conceivably cover all sections granting legislative power to one level of government or another, because they all constitute part of the compromise that permitted Confederation.

We agree that such a wide reading would be absurd. However, we do think the Meech Lake accord would clearly be considered part of the fundamental compromise of Confederation, given the history of patriation from 1980 to 1987 and the significance of the accord in bringing Quebec fully into Confederation.

The Bill 30 case is disturbing for another reason. Section 32 of the Constitution Act provides that the charter applies to Parliament, provincial legislatures and governments with respect to all matters within their legislative authority. These words seem to apply the charter to the exercise of all legislative power distributed by the Constitution acts. The Bill 30 case seems, on the other hand, to create a sort of judicial exemption to section 32 in the case of some kinds of legislative powers.

The danger in creating any exemption is underlined by looking at the decision of the Supreme Court of Canada in *Caldwell versus Stuart*, which is a 1984 decision. There, the protection for denominational schools in the Constitution was held to support the exclusion from provincial human rights law of the Vancouver school board's decision to fire a teacher because of her marriage in a civil ceremony to a divorced person. This case shows clearly that women can suffer when other group rights are furthered.

The point is also illustrated, and I know this point has been made to you in other testimony, in the case of the Attorney General of Canada versus Lavell, Isaac and Bédard, which are the cases under section 12(1)(b) of the Indian Act.

It has been argued that the proposed new section 2 does not actually grant legislative power; it is merely a principle of interpretation. Of course, this ignores the possible interpretation of subsections 2 and 3, which relate to the responsibility to either protect, in the case of Canada, our linguistic duality or to protect and promote, in the case of Quebec, the distinct society.

We point out that there is no provision in the section 2 equivalent to section 31 of the charter. This provision states, "Nothing in this charter extends the legislative powers of any body or authority." Such a cap on the extension of legislative authority does not appear at all in section 2. Subsection 2(4) merely stipulates that nothing in this section derogates from the powers of Parliament, legislatures or governments. In fact, we have heard political comments to the effect that it is hoped section 2 will add to legislative authority.



Even if it is merely a principle of interpretation, we think that the impact of section 2 could be substantial. It will be used as an extra justification for legislation passed under other federal or provincial heads of power. It can provide yet another rationale for these laws and thus serve to insulate them, or to help insulate them, wholly or partially, from charter review. All that is necessary is for a government to invoke section 2 and to argue that it is somehow related to language in any jurisdiction or to the elements of the distinct society in Quebec.

Moreover, because of the nature of our national legal system, decisions made about section 2 in one province will be considered by courts in other provinces when interpreting the provision.

Part of our argument, of course, is that it is difficult to predict how the Bill 30 case will be applied in future cases. We have already seen it argued just as we set out. We anticipate that it will be argued that way. Any of you who are involved in litigation know that legal arguments are structured from whatever materials are available at the time. Even if this interpretation or these possible interpretations are ultimately defeated, they will have to be fought through all the levels of court with very limited resources available to the groups that will be involved.

Now to the charter analysis and the accord, that is the question of balance within the charter. The nature of charter jurisprudence is complex. It does not consist of mechanical application of rules and principles. Similarly, the charter itself is complex. It is in the interrelationship between various of its sections, inevitably including section 1, that the answer to a particular question will be found. Thus, as a basic proposition, we say that to add new elements to the Constitution by the accord will inevitably affect and change what is there now.

We argue that the proper standard to be used is effect. It should be sufficient to show that equality rights are affected by Meech Lake because effect is the standard that already appears in the accord, in particular in section 16 of the accord. It would be invidious to require a showing that other rights would be more affected before they could be included in section 16 or otherwise preserved in the accord.

The main problem with section 16 is that it preserves from being affected only certain of the provisions of the charter dealing with some minority rights. By specifically mentioning provisions dealing with aboriginal and multicultural rights, the section by implication excludes

rights dealing with equality, which are spelled out in sections 15 and 28. Importantly, these equality rights do not receive protection in common law like some of the other interests guaranteed as well in the charter. They are solely dependent on the charter for substantial protection.

This charter protection was achieved only a short while ago. Thus, women see the refusal to protect these rights from being affected by the accord as an unjustified step backward from a hard-won status quo. While other rights receive additional constitutional recognition, equality rights are being diminished in importance.

In effect, saying that aboriginal and multicultural provisions will not be affected by section 2 implies the courts are free to find that and allow equality rights to be affected. This ranking may likely weigh these preferred rights over sex equality rights in cases of conflict, may restrict the progressive use of analogies between adjudications on these issues and sex equality issues and may affect the comparative attitude of gravity towards sex equality cases across the board.

Many witnesses before the committee have pointed out that the proposed new section 2 added to the 1867 act by the accord will figure in analysis under section 1 of the accord in determining whether a particular limit on a charter right is a reasonable one and justifiable in a free and democratic society. We suggest that the fundamental principles of section 2 might indeed be read into section 1, so that the charter section reads, "in a free and democratic society, where linguistic duality and the distinct society are accepted as fundamental principles."

If the concepts in section 2 are thus taken into section 1 of the charter, then it is reasonable to predict that the qualifier on these concepts which is found in section 16 will also be incorporated. The special reservation of rights for these groups arguably informs section 1, charter analysis under the charter, to the detriment of all of those whose rights do not have such pride of place.

### 1630

To accept the accord in its current form is to condone the process by which it is developed and to launch Canadians on a constitutional pattern that threatens the integrity of equality rights in unpredictable ways. A round for one set of interests and then a round for another set of interests and so on will simply ensure that equality-seeking groups will spend their energies addressing shifting political agendas set by

others. In reality, protection of equality rights is not divisible into rounds.

If our commitment to equality rights in this country is genuine, then let us reflect that in the accord by amending it to provide that nothing in the accord will abrogate or derogate from the equality rights provisions of the charter. With respect to this recommendation, we point out that we said to the joint committee, and we certainly say to this committee, that we are open to consider a number of other types of amendments. Some of them have been put before you. There are some, of course, that we do not accept and will not accept under any circumstances, but we are open to further discussion on this difficult question of the selection of the amendment that should be made.

Now we welcome your questions.

**Mr. Chairman:** Thank you very much. We probably have enough material to spend not only the rest of the afternoon but most of the evening in exploring some of these avenues. Even though we have been down the road on most of these issues, it always seems to me that every time we address them, there are certain perspectives or some new combinations of ideas that come together that make it still quite fresh in wrestling with.

I wonder if I could begin. I do not know whether you have had a chance to read the testimony that the chief commissioner of the Ontario Human Rights Commission, Raj Anand, gave to us, where he was discussing primarily the question of the charter. A number of witnesses raised this question. If we were putting forward an amendment, would we want to make that an amendment which is covering the charter globally or sections 15 and 28? Do you just try to withdraw section 16? I suggest that is probably a nonstarter in the sense that I think it is awfully hard to put something forward and then take it away. None the less, that is an option.

One of the interesting points in that discussion has been that the courts are defining what sections 15 and 28 in fact mean, and even five years from now there might still be questions depending on the nature of the cases. What is your judgement? It is eight o'clock in the morning, the first ministers have walked out and they have not signed anything. They are going to go and have breakfast and they hand it to you and say, "Any suggestions?" Assuming you had free reign, what would you prefer to do and why? Anyone? All three? Just if you could wrestle through that option.

**Ms. Atcheson:** I think it is fair to say that for all the organizations that have studied the accord, grappling with the question of amendment is one of the most difficult things. For those organizations that operate in Quebec, as we do, the question that comes up for us is that normally you do not draft in a vacuum. Normally, you do not pull very broad concepts out of the air and put them down on paper. We have said "equality rights," because that is the reason for our existence. We are now considering the question of the accord generally, and that will be put to our organization and subject to an open discussion within our own organization.

It is a very attractive one for precisely the reason you have given, and was proved very clearly to all of us by the Morgentaler decision, which is that we know the courts have before them this range of factors within the charter and they can select them, mould them, push and pull them, which is obviously the basis of our concern about the accord. So we are starting to see some things that no one would have predicted and that to some degree go against earlier case law.

We are open to considering the question of nothing in the accord derogating from the charter as a whole. We will consider that and we would be pleased to talk about it further. For the moment, though, our particular concerns are the equality rights provisions, one of the reasons for that being that most of the cases we take involve people with multiple disadvantages. It is not just gender discrimination; it is gender discrimination and race, religion, marital status or whatever. They are almost never single-issue, so we are open to considering it.

**Mr. Chairman:** I think this came up actually at the conference that the Commonwealth Parliamentary Association had in Ottawa, where I believe there was a professor from the University of Calgary who is putting all the cases on computer. It reminds me of those old Shakespearean word analyses that they do at Texas universities. They get millions of words and then they figure out what it means.

I will be careful here, I do not mean to misquote, but it struck me that one of the things they were observing was that a number of the cases that have come forward, and you drew attention to this, are not in fact women's cases, but in many instances are men's where there is a particular issue, using the wording—I will just check this here because I would be interested in your comments—"Notwithstanding anything in this charter, the rights and freedoms referred to in



it are guaranteed equally to male and female persons."

In a few years' time, we may find somehow the guarantee "equally to male...persons" has been used in a much larger percentage in effect to deal with issues that I think clearly it was not originally intended to do, if you go back to the testimony before the House of Commons at the time of the development of the charter. It seems to me the wording of that and so on was done in the hopes it was going to bring female rights up to where male rights were.

I suppose as part of the argument around whether it should be the whole charter or certain sections of it, one of the arguments that has been put before us is that because we really do not know about all the elements of the charter and how they interrelate, if you were protecting the whole charter, while that would maintain the anomalies, at least as they got worked out there would be similar relationships in terms of different rights.

But I see that what you are saying is, "Look, with sections 15 and 28, we at least have a sense of what we hope they will do and section 15 does include affirmative action. So there is both, if you like, a right and also a limitation on a right, but for a specific purpose. In that sense, had that been put into section 16 along with the others, at least the message of that would have been clear, whether or not courts dealt with it in some other way." That is really that point. I take it there is still the sense that by having left it out, one cannot prove, definitively beyond a shadow of a doubt, that will automatically mean certain things, but it adds another element of real insecurity and uncertainty.

**Ms. Atcheson:** In fact, while we take the decision to leave out the equality rights provisions as a decision made in good faith, we cannot help but consider that in fact they were left out for specific reasons which have not been disclosed to the Canadian public. In fact, the onus has been put on us to respond rather than for governments to set out the policies they are actually trying to achieve.

**Mr. Chairman:** I think one of the things we have wrestled with at times is trying to determine—you know, you start off saying, "Look, it was an oversight, a mistake, whatever." I have tried to think why Quebec would not want that in, or are there other provinces that did not want that in for certain reasons? At the time of the discussions back in 1981-82, when you had to work hard to get that included, were there arguments made then that, as you think back,

appear to relate to this in terms of why it was not there, or are you just not sure why that happened?

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**Ms. Atcheson:** I think what we can do is go to the testimony around the Meech Lake accord. I do not think this issue came up in 1980-81. What we have to do is look at what is being said about the concept of linguistic duality—there is not much being said about it at all, in fact—and the concept of "distinct society," which is being very broadly interpreted. I think most references are to Claude Ryan's beige paper—I have the definition of "distinct society" here—which covers every major aspect of the governmental and quasi-governmental structure in Quebec. I am just leaving that thought there.

Of course, then we have section 32 of the charter which says that this applies to essentially any action taken by government. It is very dangerous to look at the concept of "distinct society" narrowly. In fact, it is not being put to us in that way.

Back from that, what that suggests is that around the more limited areas of perhaps culture or language or religion in Quebec, there are some specific concerns relating to equality rights. But that has not been put on the table; it is simply not clear. If there are specific areas where a government would wish to legislate that might come into conflict with broadly based equality rights, that should be made clear. If that is not the case, then there should not be an objection to extending the equality rights protections we have had.

**Mr. Chairman:** I apologize. The chair should not be doing this. I just want to follow up on this point.

Let us suppose that was being discussed. Here, I am interested in the collective right versus the individual right. In terms of Quebec, I am trying to think of a situation where for some reason, for that government, which is the only one that has a francophone majority, there might be something whereby it is concerned that if a certain policy goes through, it is going to have an impact on the collectivity.

Would there be situations where you feel there could be a legitimate conflict between a collective right and an individual right, where there would have to be, I guess, a perpetual tension between the collective right and the individual right, or do you think that no matter what that collective sense is, the individual right—I realize it is hard because we are not talking about specific cases and I cannot really give you one.

I have wondered if part of the problem Quebec might have had with some of the charter rights, if not the charter per se, might have been a feeling that there may be a time where there will be a need for certain action to protect the collectivity that may run into conflict with certain individual rights. How do we measure that one? I wonder if perhaps in discussion with some of the Quebec women as well, that may have come up—

**Ms. Jefferson:** I certainly think the hesitancy on the part of a number of women and groups in Quebec to even entertain the notion of amendment is the need to say, "The paramount thing we want out of this is rights as Quebeckers and the "distinct society." Forget anything that could be seen to compete with that or undermine it in any way—this is, of course, why getting even as far, as a national organization, as including sections 15 and 28 is some movement in that discussion.

There is a whole other sort of counter-possibility, and it is one that has certainly occurred to me, that in fact it was not planned, that in fact it was at the very last minute and was thrown in by one particular provincial government, that it was a last-minute thing and was not thought out and nobody is prepared to admit that.

**Mr. Chairman:** This is section 16?

**Ms. Jefferson:** Yes.

And that in fact no one thought it through. Certainly, the haste with which the accord was struck in the first place and the fact that this surfaced, not in the first round but somewhat in the latter hours of the second round of discussions, suggests that perhaps—this is a question I do not know—political egos were involved or whatever. How do you admit to half the Canadian population that you have kind of accidentally left them out?

**Mr. Chairman:** A staggering thought to people with political egos.

**Ms. Jefferson:** It is a very interesting thought; I do not know.

The trouble is that it would seem, of those who were sitting around the table at the time, no one is prepared to concede the possibility that either intentionally or by accident, women's rights are going to be affected, which leaves us in this rather difficult situation at this time.

**Ms. Atcheson:** Supplementary to that, to use your language: Our experience is that governments do many things and policies have many effects, some of them anticipated, many of them unanticipated, and that until you actually get into the working of a particular law, you do not know what effect it is going to have, you do not know

where the problems are going to be and where the successes are going to be.

What an organization like LEAF does all the time is essentially to work with laws that are neutral on their face, that were set up for policy reasons that do not necessarily have anything to do with equality, but in fact have a substantial effect on equality.

When it comes time to challenge those laws, governments rarely back off. They rarely agree that there is some sort of invidious or unacceptable effect. In many cases, they will defend those laws. They will do it on the same basis we have trouble with on the Meech Lake accord, which is that they are very nervous about the effect on future cases. They know that out of cases can come decisions, doctrines, precedents that are a bit like releasing bubbles into the environment. So they fight them.

Part of what we are saying is that even if there is no intent, and we have said that we feel that in good faith there was not, what will happen is that these possibilities for argument will be sitting there and they will be used. There is certainly no question in our minds, having spent two years watching how respondents structure their cases, that they will be used.

**Mr. Offer:** I know you had a supplementary in answer to the chairman. I am going to have a supplementary to the answer to the chairman. It has to do with the concerns you have raised surrounding section 16 and whether it was an oversight or whether it was not appreciated. There is also the argument that could be made that the ramifications of section 16 were well thought out, that section 16 was specifically put there, that there are reasons why section 16 is there and that there is a difference between section 28 and section 15 as being rights-giving, substantive sections as opposed to section 25 and section 27 as, if not fully interpretative, very much a collectivity of thoughts, which are in section 16.

There is also the side I did not think was brought forward, that those who were there and made the decision with respect to section 16 made that decision not due to lack of appreciation of its ramifications or with respect to oversight, but rather that they did, and that everyone there did, direct their minds to it and made the decision that section 2—because that is what we are talking about, the interplay between section 2 of the accord and section 15 of the charter, when all is said and done—is an interpretative section and does not convey rights by itself vis-à-vis section 15, which is a substantive rights sections. I guess



this is my question to you is—because your response just did not mention that particular aspect of the question—

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**Ms. Jefferson:** I guess we are trying to give you the benefit of the doubt, that as government, you would not have been so foolhardy as to have consciously done such a thing.

**Mr. Offer:** That is exactly the question. Surely the concern that you have raised, that it was an oversight or was too quickly thought out, your comment really saying, "Certainly they have made that decision based on certain reasons." You may not agree with the reasons.

**Ms. Jefferson:** Right, and quite clearly we do not. In fact, it is an erroneous distinction to consider section 28—the notion of interpretation, an interpretative section. What we have tried to do, if nothing else, in the presentation is to emphasize the complexity and the interrelationship of the different sections of the charter and that the accord and the decision to only include two rights out of all the charter rights to be used when interpreting section 15.

In other words, it is fodder for the kind of fire going in the wrong direction, in our minds. In fact, we feel it was an erroneous decision if it was a conscious decision. An understandable one, but on reflection, we hope this Legislature will see its way clear to saying, "On further reflection, we do see that it is far too complex to leave to the present wording of section 16 and it was must be revised."

**Ms. Atcheson:** It is interesting, the question of whether or not there was a common interpretation and a common view of section 16, because in fact, last summer, we sent a telegram to all the first ministers and received a number of responses and a number of explanations as to the reason for section 16. The testimony to the joint committee bears the same thing out: a number of reasons, a number of responses, no clarity whatsoever. If the first ministers were going to stand and fight on the appropriateness of section 16 as drafted, one might have expected a better case to be put to the public. We certainly have not seen any opinions to support the interpretation that the first ministers might have had. When you look at this patchwork across the country of attempts to justify, explain and interpret section 16, there in fact is no pattern, which I think undermines the notion that there was, in fact, one agreed interpretation.

**Mr. Offer:** Which leads again, I think, to what came throughout the whole presentation,

the whole question of uncertainty. Whereas you have got these section 15 cases before the court, you do not know how the court is going to deal with them. You do not know how the courts are going to decide, based on a particular fact situation, which is, as you all know, variable, to say the least, and now we have put a second layer on top of those which will really take you right to the beginning again once you go through the section 15 cases. It leads to a question we have grappled with, probably since day one, and that is with respect to process.

You have been involved as this organization since 1982—

**Ms. Jefferson:** Since 1985.

**Mr. Offer:** —when section 15 came into effect.

Have you directed your mind to the whole question, not only of the constitutional reform process, which is what you have spoken to so far, if there are changes and if there are discussions surrounding the Constitution, how your input ought to be heard; the framework for such a process?

**Ms. Atcheson:** We obviously focus on an amendment because that is the critical thing at this juncture. Certainly the experience we have had with the accord will lead us to focus, as it will a number of organizations, on the whole executive federalism at the federal-provincial level of government that we now appear to be developing. I think, however, it is fair to say that governments already have established mechanisms for consultation. They do it all the time.

You will see in our litigation report that we list the occasions on which we are approached by government to discuss very detailed proposals. There is no question but that the buildup to the Meech Lake accord occurred over a fairly lengthy period of time at a very secretive level, and you can understand part of that. In fact, governments reach out all the time. They could reach out in this situation. They reached out in 1981 when the charter was released in draft form and we were consulted.

It is not foreign to what governments do. It was foreign in this case, and one can only think that is for a particular set of reasons.

**Ms. Jefferson:** Indeed one of the things we want to emphasize today is that should the possibility of amendment be a real one, we would be more than happy to consult with this Legislature and indeed any legislature as to the wording—it is one thing to say you are going to amend it; it is a whole other thing to know what that amendment would look like. We are very

committed to bringing our resources to bear on the issue. We do have quite a national network of constitutional lawyers, which could be quite helpful.

**Mr. Offer:** I wonder if I could have one short, sharp question.

**Mr. Chairman:** Certainly, a supplementary.

**Mr. Offer:** Yes. One thing which has been promoted by some groups is the whole question of a court reference. You have been involved in cases and you have cases pending and will have cases, I would imagine, in the future. The reason the groups promoted a court reference was to acquire a certainty. There are others who have said that certainty is in fact not going to be achieved through a court reference of sorts because of the whole question of the variable issues that will come before the courts in time. I am wondering if you could give us your thoughts on that.

**Ms. Atcheson:** The idea of the court reference has, in fact, been discussed by our national LEAF committee. It is something we are certainly prepared to consider. There are obviously two major points. The first is that the government that makes the reference controls the questions. If a reference is to be acceptable at all, there would have to be a meaningful consultation process around the questions. We are not going to find it any more acceptable to have the questions approached in the way that the accord has been approached, should that be any government's choice. That is number one.

Number two is that we, probably more than any other organization, know the cost of litigating and know the cost of becoming involved in a case at the appellate level, as a reference would be, and then probably on to the Supreme Court of Canada. It may sound trite, but we have to ask why, if this is a political problem, we should have to bear that cost. It takes resources away from the kinds of cases that address the problems that women have and other equality seekers have in their day-to-day lives, and we have some problems with that. One answer to that is if you are going to go into a reference, then make some of the comparatively extensive resources of government available to the equality-seeking groups, a number of whom have already received recognition by the Supreme Court of Canada as being qualified and representative to be involved in that process in a meaningful way.

1700

**Mr. Allen:** Thank you. I apologize to you for not being present for your brief. I can only say that a constituent of mine was receiving an outstanding achievement award and I had to be there. If this question has been answered in the course of your brief, please say so and I will look up the record and check it for myself.

We have, of course, gone back and forth with respect to various ways that we might approach the accord and what we might do with it, how we might have some political clout if not immediate impact on the premiers in forcing them to renegotiate or whatever.

In the course of doing that we heard testimony on both sides with respect to section 16 as to the best remedy. There are some three options I understand. One is just simply get rid of 16 and let everything else stand. Secondly, add 28, which, of course, has the problem that you really capitulate in some sense at least to the hierarchy of rights because while you add one more to 16, you also in terms of section 15 of the Charter of Rights and Freedoms tend to reduce the handicapped and the aged and the other categories that are in there to being also-rans that did not quite get there.

We have heard the third alternative very persuasively presented to us by the chairman of the Ontario Human Rights Commission, Raj Anand—that in order to balance things up probably the best thing that could be done would be simply to take out 16 and put the charter in a language that you would recognize as appropriate.

Do you have in any sense some preference? I checked with our research person and he said that nationally as an organization you do not because you do not have that quite resolved. I wonder if you have any advice to us as to how you might tend to lean with regard to one or another of the options?

**Ms. Jefferson:** We certainly have a minimum which is actually a fourth option which you did not outline, which is 15 and 28 for exactly the reasons that you mentioned.

First of all, just in terms of our own specific interest of women's equality, most of the issues women face are very complex and involve multiple disadvantages; women who are handicapped, Indian women, immigrant women, visible minority women, that kind of thing.

**Mr. Allen:** You said 15 and 28?

**Ms. Jefferson:** Fifteen and 28 would be our minimum.

**Mr. Allen:** Was that not my second option?



**Ms. Jefferson:** You just mentioned 28. You said get rid of 16.

**Mr. Allen:** I meant to add that to 16.

**Ms. Jefferson:** Fine.

**Mr. Allen:** That is the third option.

**Ms. Jefferson:** Right. That is where we are at this point as an organization. However, the notion of including the entire charter has some attractions and it is one that we are committed to working through at our earliest opportunity.

I think it would be fair to say that we are open to any amendment that would meet our basic criteria of at least 15 and 28 and are not adamant and rigid, saying, "It must be only this way." But certainly at this point our bottom line is 15 and 28.

**Mr. Allen:** OK. Thank you.

**Mr. Chairman:** Thank you very much for sharing your thoughts with us on a number of issues. The fact that we have gone over some of this ground before I think really helps to solidify certain perspectives and approaches. I think you have done that very specifically in terms of equality rights. We thank you very much and we also thank you for your offer of help.

**Ms. Jefferson:** Thank you.

**Mr. Chairman:** I call upon our next witnesses. The representatives of the Toronto Area Caucus of Women and the Law, Nicole Tellier, Susan Vella and Melissa Rosen. Welcome. We have a copy of your submission. If you would like to speak to that we will follow up with questions as we did with the previous witness.

#### TORONTO AREA CAUCUS OF WOMEN AND THE LAW

**Ms. Tellier:** We are speaking on behalf of the Toronto Area Caucus of Women and the Law which is a member of the Caucus of the National Association of Women and the Law. Both the national and the local caucuses are comprised of feminists, lawyers, academics, students and people outside the legal profession.

Our goal is to improve the social and material conditions of women. We try to do that through both public legal education and law reform. We have lobbied on a number of issues, both in the federal and provincial arena, specifically child care, pornography, midwifery, family law and various aspects of criminal law.

I would like to start by saying that we are very pleased to have this opportunity to express our concerns with the accord and its proposed constitutional amendments, and to say that we hope we are coming to a committee with an open

mind. When the national association appeared before the special joint committee of the House of Commons last summer, we had the sense that much of what we were saying fell on deaf ears, and that was due to very specific quoted comments in the press of the Prime Minister and others.

The lack of public consultation, before the accord was signed and immediately following it, led to some pretty widespread public criticism about process, which—as I was listening earlier—has been recognized by at least one member of this committee. That mobilized the women in this province to secure provincial public hearings.

We are here today hopeful that this committee will give very careful consideration to our concerns. We have drafted specific amendments for pretty well every issue in the accord, so you have some draft legislation to work with. Just for the sake of clarity, we refer to "clause" in the accord and "section" in the charter, rather than using section for both documents, so we call it "clause 16."

We hope we will be able to persuade you that the accord must be amended, and that doing so does not necessarily have to alienate Quebec or jeopardize the accord at all.

Our brief sets out a fundamental principle and, as it is short, I will read it to you: "With full awareness of the lack of accord in the Constitution existing since its repatriation, and recognizing that Quebec had to reintegrate into its position within Canada with dignity, the Toronto Area Caucus of Women and the Law is satisfied that provincial and federal governments achieved an agreement which respects Quebec's requests, especially with the attribution of a particular status. The Toronto Area Caucus of Women and the Law is hereby resolved to recognize and is recognizing that Quebec is, within Canada, a distinct society."

I would like to point out that as a local caucus of the national organization, our policies are consistent with that. At the national level, there was broad consultation with our Quebec members, which forms the basis of our position. Although we speak as Ontario women and as anglophone women, despite my name, we are sensitive to the position of Quebec and to Quebec women and francophones outside of that province.

Susan Vella will be elaborating our position on equality issues and Melissa Rosen will respond to any questions you have on federal spending powers, but before they do that, I would like to

briefly set out our position on a number of other issues.

I will start by pointing out that if you have time to read the brief, or a précis of the brief prepared by your research officer or whomever, you will see that a major theme throughout the brief is participatory democracy. We are calling for greater representation of women, of other disadvantaged groups, of aboriginal peoples of this country, of the territories; and we are recommending a more open and public process around federal and provincial immigration agreements, the amending formula, and first ministers' conferences. We would like to see those groups I have just mentioned all be given a stronger political voice, and a voice that is constitutionally entrenched.

On that note, I will begin my comments on our recommendations on the Supreme Court of Canada. The accord proposes an amendment which would give the provinces a voice in appointments to the Supreme Court of Canada. We see the rationale for that as being recognition of the Supreme Court of Canada as the final arbiter of division of powers issues.

Increasingly, the Supreme Court of Canada is being called upon to deal with charter issues, and a large number of those are equality issues which affect women and other equality-seeking groups. As the proposed amendment stands now, it does not recognize this major role of the Supreme Court of Canada, and so we are recommending that, in addition to the provinces, the territories also have a voice in those appointments and that public interest groups be given a formal opportunity to make recommendations to the provincial and territorial governments which would then form the basis of the final list that is presented at the federal level.

#### 1710

We not only would like a voice in the appointment process but would also like to ensure that the representation goes beyond our suggesting various people and other public interest groups to that body, and that there are actually more women and other groups represented in that body. To that end we have some very specific recommendations which you will find on pages 10 and 11 of the brief. We are recommending that this list I have spoken to be made public so that there is some accountability for the final appointments and what has been made of the recommended names on the list.

One of the things that the proposed amendments also do is entrench the convention that three members of the Supreme Court come from

Quebec. We are suggesting that there be a constitutional commitment to redressing the gender disparity on the Supreme Court bench. You will find in the Constitution Act, 1982, a similar provision dealing with regional disparity. It does not address it, but it entrenches a commitment to redress it. We are suggesting an amendment that would have a similar effect and symbolize a constitutional commitment to increasing the number of women on the Supreme Court bench so that it reflects the population more at large.

We have very similar concerns and recommendations with respect to Senate appointments. Again, the territories have been ignored in the appointment process, and although the whole issue of Senate reform is slated on the agenda for the next first ministers' conference and these proposed amendments in the accord purport to be temporary, they have none the less modified the appointment process.

In doing so, again we would hope and we ask that you consider our recommendations—they only require inserting three words in the clause—to ensure that women's organizations also have a say in those appointments. To date, out of 104 senators, only 11 are women, and that is some 60 years after we won the case that recognized us as persons eligible to be appointed. I think that is very telling evidence of the fact that the current appointment process is seriously flawed.

We have some recommendations on spending powers. Very briefly, we would like to see the language made clearer and we have some suggestions on that. We think that "national objectives" needs to be defined, and we suggest that, at minimum, the definition include six basic elements, which are outlined on page 15 of the brief. These are similar to the criteria that appear now in the Canada Health Act. If there is any redefinition of national objectives, we hope that there would be broader consultation, because there are many groups which will be affected and which are beneficiaries of these cost-shared programs.

We would also like to see a minimum standard developed. One of our concerns with the current section 7 is that there may be very different standards of programs available, depending on your province. So as a major principle, we would like to see a minimum standard while recognizing that certain regions and provinces have particular needs.

With respect to immigration, we are concerned that any federal and provincial agreements that might be made as a result of the



proposed amendments would not be subject, again, to the public consultation process. As it stands now, immigrant women already have unequal access to certain benefits, such as language classes. I believe the Women's Legal Education and Action Fund is involved in a case on that very issue and may have spoken to you about it; I missed the beginning of its presentation. We are concerned that there will be a further erosion of the very limited rights that female immigrants have if provinces and the federal government enter into agreements without public consultation and public scrutiny.

We have some concerns about the amending formula. There are two main issues. One, again, is the lack of recognition the territories have been given specifically on issues that directly affect them, such as the creation of new provinces or extending provinces into the territories. Similarly, the aboriginal people have not been given a formal voice, and we would suggest that they be invited to any first ministers' conference or any such forum where the issues set out in section 41 will be discussed.

We do not have a specific recommendation, and we hope your creative minds might be able to come up with one, but we would like to see some mechanism for resolving stalemates. I think we are going to get into very deep trouble if certain kinds of constitutional amendments require unanimity. If there can be some kind of fallback compromise to avoid stalemate, I think that is the recommendation we are making.

Finally, a note on the first ministers' conference. We propose that these conferences be made more open to the public and that information about, and meaningful opportunities for input into, the process be provided for. I think the Meech Lake accord stands as a very good example of lack of process around constitutional amendments, and we would hope that something similar to that would not be repeated.

We are concerned also, and it is worthy of note, that their first ministers' conference consists of 11 leaders, all of whom are men at this time, and yet their decisions have very wide—

Should I ignore that bell?

**Mr. Chairman:** You will be able to ignore it. It is a quorum call. We are going to have to adjourn and go up for a quorum call.

**Mr. Offer:** I understand the rules now are that once the quorum is reached, the bells will go off. They started at 5:18, so since we are only a couple of minutes away we can continue and maybe the bells will stop.

**Mr. Chairman:** All is well. You can sense that there are some experienced old hands and there are some newer members here. We are glad, Mr. Offer, that you could get the bell to stop so that we can continue. It is a bit like coming back to school here with bells.

I apologize. Would you please go on?

**Ms. Tellier:** That is all right. I have given you a very brief summary of some of the issues which you may not have heard from other groups. Certainly on the Senate and the Supreme Court Canada, I would suspect we are one of the few that have made such explicit recommendations. I think at this point I will turn the table over to Susan Vella, who can speak to our concerns with respect to equality rights.

**Ms. Vella:** Good afternoon. We find it ironic that a document which purports to deal with perceived inequality of provinces may in fact infringe on the equality goals of other groups. We feel that this must not have been the intention of the first ministers, and in fact Prime Minister Mulroney was quoted as stating that section 2 of the Constitution Act could not be used to discriminate on the basis of sex. Certainly there seems to be an intention that sex equality rights were not to be infringed by the accord.

However, as you likely know from court decisions, the intention of drafters of legislation, including the Constitution and the charter, will not be determinative when an issue of interpretation of a section comes before the courts. For that reason, we would recommend that this committee take steps to remove any potential misconceptions or ambiguities by amending the constitutional accord before it is ratified by the Premier of Ontario (Mr. Peterson).

1720

We specifically have two recommendations. The first involves an amendment to the preamble. The fourth paragraph of the preamble in fact refers to the concept of equality, specifically equality among the provinces. We would suggest that you include three more words in that preamble so that it will read: "and whereas the amendment proposed in the schedule hereto... recognizes the principle of the equality of all provinces and their people." We would suggest that you include those latter three words. The reason for it is that should this document be challenged before a court, the court will look to the preamble as a statement of the policy which is intended to be reflected in the subsequent legislation. In fact, we have a Supreme Court of Canada decision which deals with our own Ontario Human Rights Code, called Ontario

Human Rights Commission and O'Malley versus Simpson-Sears, which used the preamble of the Human Rights Code as fundamental to interpreting and applying the human rights provision to the case at bar.

The second recommendation that we make is to section 16. Specifically, we would like to see the inclusion of the applicability of sections 15 and 28 of the Charter of Rights to section 16 by adding a subsection 2 similar in wording to subsection 1, which refers to sections 25 and 27 of the charter pertaining to aboriginal groups and to multicultural groups.

We think this is a logical amendment in view of the fact that sex equality provisions of the charter hold a special place within the charter, much like aboriginal peoples and multicultural groups as reflected and recognized in sections 25 and 27 of the charter. In fact, it is arguable that sex equality rights are the only other group which holds what we might call this special position in the charter, and therefore it would be logical to include this section in section 16 as subsection 2. You will find our recommendation specifically on page 6 of our brief.

We would like to suggest that the inclusion of section 28 alone would be insufficient, for the reason that section 28 pertains to an interpretation of the charter, and if the charter is excluded from the accord, as it would appear to be now, then section 28 obviously will not have any power or effect with respect to an interpretation of the accord. The reason we say the Charter of Rights has effectively been immune or isolated from the accord is from a principle of statutory interpretation which is called *expressio unius est exclusio alterius*, and you can bet that litigators will have fun with that one. Specifically, because there has been mentioned the application of sections 25 and 27 of the charter to the accord, there will be by implication an exclusion of all of the other charter provisions. This means that should a case come before the courts, the courts will be invited to interpret that any other charter right will be excluded from a consideration of the rights that are allegedly being infringed.

The second reason we say the charter does not apply but for sections 25 and 27 is the Bill 30 case, which I am sure has been spoken to today probably several times. Briefly, that case stated that as the legislation was taken pursuant to the Constitution Act and was part of the fundamental compromise of the federal system, the Charter of Rights and Freedoms had no application to Bill 30, and thus the individuals lost their rights to

equality because of the wording of the Constitution Act that was in question.

Our concern as to why the exclusion of the charter's sex equality provisions is so important is that we can perceive examples where government action can be taken which will effectively infringe on existing rights which women now have in the name of promoting or preserving a distinct society.

We would like to point out that government action can be taken from any province in the name of promoting a distinct society under the current wording of the accord. One potential action would be, for example, a government program which currently promotes the rights of women—and it could be any program—being axed in favour of a program which is designed to promote bilingualism. As it stands pre-accord, that legislation could be attacked, by recourse to section 15 of the charter, by a women's group which is being specifically disadvantaged. Should the accord be passed without our suggested amendments, this recourse would be taken away.

I think it would be very sad if the rights of individuals were to be sacrificed, without thought, for the right of some broad government policy. We suggest simply that the inclusion of section 15, the sex equality provisions of it, and section 28, in the manner we have suggested, would maintain the status quo, at least, and give the individual or a disadvantaged women's group the option of challenging such government action before the courts.

I refer to a case also on page 7, Regina versus Morgentaler, which I am sure everyone is familiar with. You will note Madam Justice Wilson's comments. She said:

"It is probably impossible for a man to respond, even imaginatively, to such a dilemma"—that is, abortion—"not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche, which are at the heart of the dilemma." And I want you to take note of the next section.

"The history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as



men... It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the sexes. Thus, women's needs and aspirations are only now being translated into protected rights."

I believe the rights she was referring to would be the rights enclosed in sections 15 and 28. I think we have it from the top court of the land that women's rights are ones which need to be given priority, and only now are they being given priority. I suggest to this committee that two amendments to the accord would reaffirm the court's statement and give back to women the rights that they have fought for in the charter.

That is the end of my presentation. Thank you.

1730

**Mr. Chairman:** Thank you very much. Clearly, I want to underline that you have put a lot of work into this. I guess, like people coming through a desert to an oasis, to see some specific recommendations is very helpful for the committee. I really want to underline that we appreciate the time and effort you have clearly put into a variety of parts of the accord, not only criticizing them, but then trying to come up with some amendments that perhaps could be put forward.

We will, most assuredly, individually read through these carefully, no matter what our esteemed research director, Mr. Bedford, does. I think this does put a lot of things in perspective and then provides the amendment.

If we could then move to questions. Mr. Offer?

**Mr. Offer:** Thank you, Mr. Chairman. Thank you very much for your presentation. I would basically like to get into the whole question of the cost-sharing aspect. The reason I do that is because you state, on page 16, "...some problems facing women are national in scope and that not every province has the resources to provide for comprehensive social programs...."

My question is, keeping in mind what section 106 of the accord has to say, that these are areas of exclusive provincial jurisdiction, do you not feel that this, in many ways, would provide a mechanism for provinces to either adopt the national program or, if not, to opt out and adopt a program which very compassionately and sensitively meets the needs within their province?

I guess I am taking issue with the paragraph, because it somewhat assumes that everything is equal across the province and the conditions are sort of the same across the province, and we have heard, throughout our testimony, that they are not even sort of the same within this province.

In my opinion, this particular section has always been a vehicle which provinces can use if they want, with compensation, to address, maybe in a better way, the particular needs which you have outlined. I wonder if I could get your comment on that.

**Ms. Rosen:** While recognizing that provinces should be free—and they have been, to an extent—to respond to regional or provincial concerns, we are very concerned with the way the accord is worded now.

First, there are no guidelines or minimum criteria which each province should adhere to. Along that line, we have concerns with three specific phrases, which are set out at pages 15 and 16. Just to outline those, there are problems in that the phrases are vague, but there are also problems in that the phrases are different within different clauses of the accord. If you apply the principle of statutory interpretation which Ms. Vella referred to earlier, namely—well, I will not requote the Latin. Basically, if you say it one way somewhere and say it differently somewhere else, it will be assumed that you intended something differently.

For example, referring to the phrase, "national shared-cost program," we do not know exactly what it means, because it has been referred to different types of programs with different standards. But we also do not know how different provinces will apply that. To give an example, if a province wanted to apply federal child care funds to a provincial program, the only criteria in clause 7 which they have to meet are that it be a national shared-cost program, that it meet national objectives and that it be compatible. In terms of compatibility, they may say that child care is compatible with a kindergarten program and use federal funds to fund a provincial kindergarten program and, for example, divert provincial kindergarten funds to some other use. There we have a province implementing a program that is not really new or needing the specific new child care concerns in that province.

**Mr. Offer:** I understand what you are saying. In fact, that particular example has been brought up before and it is an extremely important example because it gives us something to really think about when we are talking about this section. I guess my thought is that it allows you, through this section, where it did not allow you before, to say to a particular province singly, "Listen. This is the national program. These are what the objectives are." You are in fact lobbying, saying, "We want you to comply with that, to opt into that particular program. We

understand that it is under exclusive provincial jurisdiction."

In the alternative—and I think this is what I always find is the real strength of this one section—groups across this province and groups across every province can go to their province and say, "That is the national program, but it does not meet the specific situation and conditions of this province. Now, under the Constitution we want you to opt out and we want you to opt out for this reason, so you can better meet the needs in a provincial area or sphere, maybe what the federal government was hoping to do in the national area."

This is one problem. I have always had a problem as to why groups, instead of condemning this section, would not actually embrace the section and say, "This is really going to ensure through the Constitution that we are going to be able to take our concerns in a very meaningful way to the province, even if the federal government has entered into a national cost-shared program."

**Ms. Rosen:** To implement any kind of—to use your phrase—meaningful program that can actually benefit the people in a province, we agree that the federal-provincial cost-sharing program idea is fantastic, but it will be entrenched in the Constitution. Our specific concerns are that, first of all, there are no minimum criteria. As a suggestion or recommendation, you could, for example, adopt the six criteria that are set out in the Canada Health Act and those are listed on page 15 of our brief.

First, there are no minimum criteria. Even if there were minimum criteria, there is really no mechanism for monitoring compliance or, after it is found that a province's program did not comply with these national objectives that, hopefully, are now defined at a very minimal level, method of redress.

**Ms. Tellier:** Can I just add a comment? I am curious a bit about your question because I am not sure that I hear you saying you have concerns with these elements that we have, in fact, listed. I would suggest to you that none of those six elements would necessarily constrain a province or territory from providing programs that meet the regional needs. All we are saying is that there has to be a minimum standard to get the money. I think those are two very different issues.

Yes, you definitely need to have enough freedom with your spending power in order to discharge your jurisdictional power to provide programs in a certain area, but we are also saying that Canadians in Prince Edward Island should

not be any better or worse off than Canadians in British Columbia in the context of their specific needs. Then I would submit that defining national objectives in this way does not constrain a province from meeting its particular needs. It just ensures that there are minimum standards.

1740

**Mr. Chairman:** Thank you. I regret that it is now close to 5:45 and we have another witness to hear from this afternoon, so I am afraid I am going to have to close off our exchange at this point. I do reiterate that we are very grateful for the brief number of points you have touched on and the recommendations. I can assure you we will look at those very carefully and closely. We thank you for coming this afternoon.

I call the representatives from the Young Women's Christian Association of Metropolitan Toronto: Luanne Karn, the social action co-ordinator, and I know there are a number of others. Perhaps I could ask Miss Karn to introduce all the members of the group.

#### YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN TORONTO

**Miss Karn:** My name is Luanne Karn. I am a social action co-ordinator at the YWCA. I would like to introduce Micheline McKay-Comperey, one of the members of our social action committee, who will be presenting today's brief, and Ellen Campbell, who is the executive director of the YWCA of Metropolitan Toronto.

**Mr. Chairman:** Welcome. We appreciate your coming. I am sorry we are a bit behind but we will certainly go through the presentation and ask questions afterwards. Please go ahead.

**Ms. McKay-Comperey:** Thank you very much. The YWCA of Metropolitan Toronto, established in 1873, has a long history of providing service to women and girls and advocating social change, particularly change that relates to the equality of women. Our services range from short-term crisis and long-term housing services for women to educational services, community services and recreation. In 1987, we served 18,000 people, most of them women.

Integral to our mandate is our work for social change in areas which affect women's lives. The YWCA has made numerous presentations to many communities and commissions on subjects of interest to women, such as pay equity, equality rights for women and the Social Assistance Review which was recently held in Ontario.



The YWCA's policy statement on the status of women provides the fundamental basis on which most of our policies and positions are premised. It states:

"The YWCA of Metropolitan Toronto: (1) reaffirms its support of women's right to equal status; (2) supports the individual woman's rights to self-determination in all spheres of her life; (3) continues to assist women individually and collectively in their efforts to develop skills and strengths in order to facilitate their attaining equal status; (4) acknowledges the need for institutional change and urges all institutions to offer women parity with men in all spheres of civil, social and political life; (5) supports women's rights to freedom from psychological and physical abuse resulting from unequal status; (6) continues to co-operate with other groups and organizations that are working towards the same goals."

This policy statement was adopted in 1980, and I believe it still stands now as strongly as it did then. A copy of the complete statement is also appended to our brief. It is on this solid foundation that the YWCA of Metropolitan Toronto welcomes the opportunity to make this presentation to the Ontario select committee on constitutional reform.

Like other groups who have preceded us, including those today, we applaud the efforts of Prime Minister Mulroney, Premier Peterson and the other provincial premiers to bring about Quebec's full participation in the Canadian Constitution. We feel that Canada will be a stronger country with the full participation of all provinces, especially Quebec. We do, however, have specific concerns about the provisions of the Meech Lake accord.

Today, we will specifically address the issues of women's equality rights, section 16 and national cost-shared programs. We want to reiterate that Quebec's participation cannot be brought about at the expense of these concerns to women.

Perhaps I will please you or displease you—I am not sure—but we have left the more rigorous legal analysis to groups such as the Women's Legal Education and Action Fund and the National Association of Women and the Law, who are much more qualified to address the constitutional provisions than we are. We are however, very concerned about the two concepts of women's equality and national cost-shared programs, two areas that affect us as a service deliverer to women in this community. As you know, the Y is a national organization. We are,

however, speaking for the Metropolitan Toronto Y. Having said this, we do support the statements made by such women's groups as LEAF, the Ad Hoc Committee on Women in the Constitution, and other groups like that.

With regard to women's equality rights, section 16 of the accord specifically protects sections 25 and 27 of the Charter of Rights and Freedoms, those clauses guaranteeing aboriginal and multicultural rights. Put another way, this section exempts multicultural and aboriginal rights from being affected by the accord's guarantee of linguistic duality and distinct society. By inference, this clause opens the possibility that those rights not specified, including women's equality rights as provided in section 28, may not be protected. In our view, this creates a hierarchy of rights.

Future decisions of Canadian courts cannot be foreseen at this time. Consequently, women's rights and our quest for equality may be jeopardized by the accord as it is presently written.

The YWCA sees sections 15 and 28 of the Canadian Charter of Rights and Freedoms as providing the critical impetus for women to achieve equal status with men in all aspects of society. If this accord is entrenched in the Canadian Constitution as it is proposed, it is possible that future governments may use the accord's provisions to override the charter's guarantees of equality for women. For instance, language-oriented affirmative action programs may override affirmative action programs for women.

There is no question that women and other minorities do not enjoy equal status in society. As recently as October 1984, the Commission of Inquiry on Equality in Employment stated that what is happening in Canada to women, native people, disabled persons and visible minorities is not fair. Many people in these groups have restricted employment opportunities, limited access to decision-making processes that critically affect them, little public visibility as contributing Canadians and a generally circumscribed range of options.

Since 1874, the YWCA of Metropolitan Toronto has provided services to women and advocated for changes in legislation, regulations and employment policies, all of which would enable women to participate more fully in the economy on an equal basis with men. The accord, as it is presently written, may jeopardize the achievement of women's equality in society. Consequently, the YWCA of Metropolitan To-

ronto recommends that either section 16 of the accord be amended to include section 28 of the Canadian Charter of Rights and Freedoms—a minimum position—or section 16 be deleted and provisions stating that all charter rights prevail over the accord should be added.

The second concern is national shared-cost programs. Section 7 of the accord allows provinces to opt out of national shared-cost programs if the province carries on a program or initiative that is compatible with national objectives. This provision raises two areas of concerns for the YWCA, first, the limiting of federal spending powers and, second, the potential diversion of funds intended for social, educational and health care programs. Women and their children are major users of these programs. Any erosion of these programs will have strong adverse effects for women.

We have concerns that the renewal of the existing fiscal arrangements legislation, which includes the provisions for Canada's health care system and post-secondary education and other shared-cost programs, such as the Canada assistance plan, may result in inequitable access and quality of services for women from province to province. We are also concerned that no new national shared-cost programs may ever again be established.

The YWCA believes in universal, accessible, portable and comprehensive national social programs. Without definitions of "national objectives" and "compatible" and without national standards, the opting-out clause endangers equal access to social programs for all Canadians. The standards for existing programs may be in jeopardy and future national programs may never again be possible. Consequently, the YWCA recommends that section 7 of the accord should be deleted.

These two focuses are major concerns that we have with the accord. There are many others that other groups have. Obviously, those are things that we have talked about. However, we think these are the two critical elements of the accord that affect women and affect our ability to work towards achieving equality for women in Toronto and across the country. Thank you very much.

1750

**Mr. Chairman:** Thank you very much. I think your concerns are set out very clearly and specifically, and certainly the YWCA's long involvement with women and women's programs is well known and we appreciate the fact that you have come before us today.

Could I just ask one thing? Has the national body set out a position on Meech Lake, or have you had national discussions, and is it basically similar to what you have done?

**Ms. Campbell:** I do not think the national body has prepared a specific response to Meech Lake, but it has the same general status of women basis as Toronto does and the same commitment to women's equal participation in society.

**Miss Karn:** I could add that, as well, they are very committed to the process of consultation among different YWCAs in terms of finding a solution and amending the accord. They are quite open to listening to what other provinces have to say about the issue.

**Mr. Allen:** I must say I certainly subscribe to your central premise, which is that nothing with respect to women's rights should be taken for granted. There is very little in history that would justify anybody resting on his or her oars on that particular proposition.

Just as a clarification with regard to your statement on page 2, "For instance, language-oriented affirmative action programs may override affirmative action programs for women," I am not quite sure just what specifically you have in mind. The previous group did refer to the possibility of a program that was in place, let us say in Quebec, being cancelled to free up funds in order to provide a language-based program of some kind, and I can understand that with respect to an existing program.

Are you also suggesting that the implication is that in future, if a government were to propose a language-oriented affirmative action program and women's organizations had any program whatsoever outstanding at the time that they wanted, they would consider it inadmissible for the government in question to embark on the language-oriented affirmative action program. Do you see the point I am making?

I am not sure whether you are concerned about some retroactive problem or whether you are really trying to absolutely tie a government's hands. I think some of the possibilities in the language of some amendment to that effect might really have a very heavy impact upon a government's general sense of deciding what, at any moment in time, is a preferable course of action, given what has been done in the past, etc. Can you respond to that?

**Ms. McKay-Comperey:** I guess the concern is one based on retroactivity. It is awfully hard to foretell the future. We would not want to be in a position where our programs would be second to one of a linguistic nature.



It is difficult to say that with a constitutional sense, because so much of what drives us is spending powers, be it spending powers of provincial governments or our federal government. That is an entirely different set of priorities that must be addressed, and that is fair. It is government's job to address what money gets spent on.

We do not want to be in a position of finding that constitutional reasons give government the reason or the precedent to establish a linguistic affirmative action program over a women's affirmative action program.

Luanne, do you have anything to add?

**Miss Karn:** We are worried about a hierarchy of rights being established, not that a right to establish a language-oriented affirmative action program be taken away from Quebec but that a hierarchy of rights is established and women's affirmative action programs can be seen as given lower priority on the basis of this document.

**Mr. Allen:** Any language-oriented affirmative program, of course, would normally, applied to any group, equally benefit men and women, so that is not in question, presumably.

**Miss Karn:** No, just that one would have priority or there would be a hierarchy of rights for the—

**Mr. Allen:** With respect to the spending powers and the shared cost programs—of course, you realize this point has been made to us many times and we are trying to get our heads around it—I do not know whether it helps you in your reflection about it to know that the Canadian Council on Social Development, which came before us in Ottawa and is a body which is concerned and expects that there should be many new national shared-cost programs in a whole broad range of subject areas, did think it was possible to interpret “national objectives” in an appropriate way that would be quite inclusive, and probably every bit as inclusive as the language “national standards.” If you were satisfied that that was indeed the case, would you still have a problem?

**Ms. McKay-Comperey:** The status now is that we are not satisfied with the wording “national objectives.” That is something that obviously appears to have been left up to the courts. We would have to be very happy with the definition of “national objectives” to consider that option. I might add that when “national objectives” is being defined outside of the constitutional arena of the Meech Lake accord, it

obviously becomes much more open to future change and things like that.

One of the great strengths of national shared-cost programs and the federal spending power has been that it has been a very open spending power, which has been able to achieve wonderful national objectives for this country. By tying it down to a definition of “national objectives,” we are tying it down and perhaps limiting it.

I think such things as the Canadian health system, the Canada assistance plan, post-secondary education and the host of other national cost-shared programs have been developed in large part because of the openness of the federal spending power. Limiting that in any way, shape or form has potential for limiting national programs.

I might add that by saying we must maintain the mechanism for national shared-cost programs does not mean we are in any way limiting the right of a province to add on to that, to make it more specific to provincial needs and goals or to supplement it in some way. It is simply that we must have a minimum set of national standards, be it in health care, child care or any social or other program.

**Mr. Allen:** You realize that in order to do that you are going to have to set up a whole range of definitions that would pertain to social programs, economic development programs, etc., whenever a shared-cost program could come into existence across the whole range of powers of the federal-provincial administrations. That would be a remarkable intrusion into the Constitution of something to which there is nothing comparable at the present.

Is it not true that although what you say is the case, that because there is no definition around spending power or shared-cost programs in the Constitution, there has been remarkable openness, none the less what has happened in the process of negotiation is that normally Quebec has opted out in some form or other and designed its own program, and that has really had the essential effect of what we now have in Meech Lake, and nothing particularly disastrous has happened to the nation in terms of unequal access to unequal programs in the course of that. There are good precedents now in those programs which would suggest how “national objectives” would be defined, surely.

**Miss Karn:** We are concerned about the erosion of any established national programs and any new programs which are set up. We feel that is very important for women in terms of accessibility and quality of service across Cana-

da. Certainly, you can pull out examples of provinces that have created good quality programs on their own, but you can also imagine other situations where social programs for women may not be equal. There may not be the same quality, the same level of accessibility. I think reproductive rights is a good example and one we are concerned about.

**Ms. McKay-Compary:** To add to that, a case in point is the Canada Health Act and the Canadian health care system. I do not think anybody would say that health care across this country is equal on a province-by-province basis, but the Canada Health Act has established certain minimum criteria that must be met. There are the five of them: accessibility, portability, universality, public administration—the fifth one escapes my mind. But that has achieved the objective of a minimum high standard of health care across this country. I think there is something to be said for that.

**Mr. Allen:** Yes. That just takes us back in a circle, because I think the statement that I referred to by the Canadian Council on Social Development really suggests that those criteria are quite developable under the language of “national objectives” and “compatibility” and so on. But I gather that your principal concern about accessibility and equal applicability for women in particular would be met by your proposal that the whole of the accord be subject to the charter. The principle would be there.

**Miss Karn:** Certainly, the minimum we recommend is the inclusion of section 28; that is another possibility that has been recommended. We have recommended the inclusion of the whole charter. I think that what other groups have reiterated in terms of a process of these amendments is important, because there are so many different factors to weigh that there needs to be a consultative process in terms of figuring out what amendments would be appropriate for ratifying the accord.

**Mrs. Fawcett:** Again on the shared-cost programs, it was suggested to us by Mr. Pickersgill that a new shared-cost program under

Meech Lake would not get started unless nearly all the provincial governments agreed to participate. If one or two opted out, the conditions for compensation would have to be approved by Parliament. There would not be any automatic or unconditional payment. Parliament would have the final word on all the terms of any shared-cost program and any compensation. Just what would be your feeling on that, if that is the interpretation of it? There are those who think that is one of the big gains of Meech Lake.

**Ms. McKay-Compary:** Perhaps I could respond with a question and then answer. What if a province chooses not to opt into the program or to develop a program with compatible national objectives? They do not get the money, but that service is not offered in that province.

**Mrs. Fawcett:** Yes.

**Ms. McKay-Compary:** In that situation, you do not have universally accessible programs, whatever they be. They would not be health care. It would be child care or something like that. I think there are programs that may not be under specifically federal jurisdiction, but which certainly have a national perspective to them, and that might eliminate that.

**Mr. Chairman:** I regret that the time has come to five after six. As so often happens in our days as we look at Meech Lake, we have many questions. There are many issues. Today it happens that we had a number of groups looking particularly at this issue of the charter rights. I think a number of your concerns have been reflected in the weeks before but also in terms of specific points that have come up today. We appreciate your expressing those and sort of singling out the two key areas, which indeed have been singled out by many.

We apologize that we were late in getting to you, but thank you very much for both your presentation and the answers to our questions.

We will reconvene here a week today at 9:30 a.m.

The committee adjourned at 6:05 p.m.



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No. C-24

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Wednesday, April 13, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 13, 1988

The committee met at 9:36 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

(continued)

**Mr. Chairman:** If we can begin our session, I would like to call upon the representatives of the Ontario Committee on the Status of Women, Lee Grills and Susan Hutchinson. Please be good enough to come forward and take a seat. We have a copy of your brief, which is brief. I am sure you will elaborate as you go on, but perhaps I could turn the microphone over to you. We will follow up with questions.

### ONTARIO COMMITTEE ON THE STATUS OF WOMEN

**Ms. Hutchinson:** My name is Susan Hutchinson and my colleague here is Lee Grills. We are here to represent the Ontario Committee on the Status of Women. The OCSW is a nonpartisan, nonprofit group formed in 1971. We have about 500 members and have worked since that time on a variety of issues of particular concern to women.

Before we explain our rather brief brief, we would like to express our public thanks to your committee and staff. They have been courteous, kind and zealous in their desire to find a mutually convenient time in which we might meet with you. We appreciate that.

We will not be doing a clause-by-clause criticism of the Meech Lake accord, as so many others have already done so. We urge that you reread the transcript of the presentation by the Women of Halton Action Movement on March 30. We agree completely with them in terms of their discussion on process and analysis of the accord.

Now, our brief.

You will see in front of you an H for haphazard, which characterizes the process which we believe has been used to arrive at the document under discussion.

The E is for erasure, the erasure of equality, which we feel is the result of the document.

The L is for a lapse in memory for the architects of the Meech Lake accord, who forgot the charter. They forgot women and minority groups again.

The P is for the passion which we feel about the issue and with which we hope you will persuade our government to pursue amendments which we must have so that all of our work will not disappear.

I will turn it over to my colleague.

**Ms. Grills:** I am going to tell you a small story just to try to help you understand exactly how we feel. We have had a lot of discussion in our group. I think the bottom line for all us is abject terror at what is happening.

My story is quite personal. When my grandmother was born, women were chattels. They went from the homes of their fathers to the homes of their husbands. When my mom was born, not a whole lot had changed except that there were a few women working out in the labour force for wages which gave them a degree of independence. By the time I was born, women in Canada could vote. We could hold public office and we had already been declared to be persons, which was quite a landmark decision in this country.

When my daughter was born, women were entitled to equal pay and married women could be employed by the civil service. That was a great battle of the past. About 18 months ago, a really wonderful thing happened; my granddaughter was born.

Kathleen Michelle is named for the so-called two solitudes of our country. I will tell you what was a very moving experience and I think it was because of what my daughter said to me. My granddaughter was not even 10 minutes old. She was not washed yet. She was so new to this world. Karen, my daughter, had obviously been busy rehearsing something.

We did not know the gender of this child, but she thought, I think, a lot about what she was going to say when she presented me with this new life. She said: "Mom, this is the first female in our family who is an equal partner in our country. Just imagine what a life she will have. It is wonderful that so many people worked so hard to make this happen."

I thought that was a very heartfelt comment on her part. She has followed developments over the course of her rather short life and she knew I had been involved in issues of this sort, that my mother had and that my grandmother had, and she was trying to thank us for the past.

Before I came back to Toronto, Karen and I sat around for two weeks bouncing this little baby, which was really quite special. We spent a lot of time talking about what kind of life Kathleen Michelle could potentially face. She would be free from discrimination and from a lot of the roadblocks that had been placed in the way of other women, just roadblocks to their potential achievements. We concluded that expectation is quite often half the battle that we have to win in our lives.

I do not know what it is that we can tell all of you that will convince you to really convince our government to amend the Meech Lake agreement. It must be done or we will see all the work that has gone on just disappear. This was such a rich promise for us, and we have not even had a chance to get into court yet to really use the charter. Now we are going to have to go to court to work on Meech to find out what it really means.

We have heard a lot of discussion and rhetoric about it is not going to affect anything. We simply do not believe that. Our experience in the past tells us that if we do not do what we must do prior to the legislation being passed, then we will spend years in court fixing things. We think it is a waste of taxpayers' money to tie up the court system when we know the intention was not to leave us out. We think instead of telling us, "We did not leave you out," it should say so.

I was wondering if any of you had really sat down and thought about the millions of people in this country who have now been counted out. It is not solely the women, and we are more than half the population. It is also physical minorities, the people in the far north and people with disabilities. That is far in excess of half of the population. So who does that leave? I think it leaves the same old gang in charge, and we are not the least bit content with that.

Someone during these hearings, and I wish I could remember who, said that no premier in his right mind would stand up and publicly say that women were not entitled to equality. I firmly believe, and many other people have said this to me, that this is precisely what they did. They forgot us again, and we are not the least bit happy with that.

Equality is definitely threatened. If Meech does not say what it means to say, then please talk this government into amending the accord.

Are there any questions?

**Mr. Chairman:** When I said hello coming in you said your presentation was going to be somewhat different, and it has been, but no less

effective. So often we forget with constitutions and constitution-making that it really does touch us. I think your story about your granddaughter is real and very meaningful. Perhaps you wondered how that story might impact on others. This has come up at different times but particularly during these hearings which have been going on for a while now.

I have a daughter who is 18, finishing grade 13 and about to head off to university and so on. We talk about this. I sort of say to myself, here is somebody who is bright, full of vigour, looking forward to who knows what. Then I say, is there going to be something that will stand in her way of achieving her goals and objectives, whatever it is that she wants to do? That may be something that, particularly for fathers, is an interesting way to look at it. You look at your sons and you do not necessarily ask that question because you just assume they will battle through somehow. If they have problems, it is not necessarily because of their gender.

I think the personal route there is, none the less, effective, especially at this point in our hearings when we have, understandably, heard some fairly detailed clausal analysis. Also, I think for the television audience it was a unique presentation in the way you described the different meanings of the words. We will certainly remember the presentation.

**Ms. Grills:** We scanned the thesaurus, and let me tell you, we came up with many others. Aside from "haphazard," there was "half-baked" and many others.

**Mr. Chairman:** Yes, I am sure there were some that probably could not be on a family show like this.

**Mr. Allen:** Mr. Chairman, like yourself, I want to say a word of appreciation for the very personal story that was recounted. It does take me back to the early years of my own children and our placing of them in among the first French programs that were available for non-French-speaking people in Canada. I guess it was three or four years after they had been involved that I began hearing the story of the tidal wave of more and more anglophones who were putting their children in such programs, but I was disturbed about one thing. The reason that began to come forward was: "Our kids will not get jobs. We want them to have work when they grow up and, obviously, this will help them get jobs." It was the last thing that was in our minds.

We felt very deeply, as your daughter did, that there was something very important about seeing that our children were able to function in all parts



of our country with, in particular, a capacity for French and English, and then since my wife is Ukrainian, to be able to relate to some other cultural groups that were around in the neighbourhood. That was the motivation.

One of the things that has really impressed me about the hearings we have had is that so many people like you who have come forward to raise questions about the Meech Lake agreement do not do so with any doubts or equivocations about the importance of our being French and English in Canada and being comfortable about that. That is what I appreciate so strongly about your brief.

Like other members of the committee, I have listened very carefully. I have been very involved in the course of my own lifetime in helping promote the cause of women and equality, as has our party. I find there is a great difficulty that I have, and I think presenters have, with the Meech Lake accord and the exercise we are in. There is a kind of constitutional code that you have to break in order to get some sense as to whether things are going all wrong or all right or somewhere in between and how you read all that. That is why I sometimes wonder why we are so unwilling to give any credence to assurances that since this is the Quebec round and we want to concentrate on that, and that though there may be some problems along the way those are fixable. Can you respond to that question?

I think that is what some people would say: "We are well-intentioned. There were perhaps some oversights but also some reasons why section 16 got in the way it was. They were interpretative clauses, they were not substantive clauses, and so the substantive clauses remain, the charter remains and always will be read over against Meech Lake. The balancing is there and so on, but that is fixable." They say that but you do not believe that. You just simply said you do not believe it. I wonder if you could tell us a little bit more why not.

0950

**Ms. Hutchinson:** I have a deep mistrust of any kind of amendment that is made and agreement that is come to at three o'clock in the morning after a long evening of negotiation, a lot of cups of coffee and probably some frayed tempers. It leads to things being left out, misunderstood and not quite figured upon, the drafting language being not quite perfect and that sort of thing.

That happened the last time out, and we had to change it. We headed off to Parliament Hill. Thousands of us across the country dropped out jobs, dropped our family obligations and ran off to fix a mistake that was made in the kitchen at

two in the morning. It is not the first mistake from a kitchen that women have had to fix.

This time out, some groups were included in a so-called interpretative clause. One wonders why those particular groups required an interpretative clause and others did not. If there was no real need for an interpretative clause for women and other groups, why bother with an interpretative clause at all?

The process, we feel, has not been one that includes large numbers of Canadians. Obviously, large numbers of Canadians are interested. We are in the midst of building our country through that Constitution, and it is being done, as we said, in a haphazard and sometimes half-baked way. It is unfortunate that we cannot expand the process. This committee is one way of doing it, but do we have to go back and fix things all the time? We do not want to have to do that by fighting through the Supreme Court.

**Ms. Grills:** In addressing fixing, I would also like to ask, why should we have to go back and fix it? Why do we not simply take a moment and fix it prior to everyone signing? If, as we have been told, we were not meant to be left out, then put us in. I really do not understand and do not believe that those 11 people—now only nine—cannot agree. If they all agree publicly that they are in favour of women's rights, then I see no problem with fixing it.

**Mr. Allen:** If you had one shot at fixing the accord what would it be? Would you simply eliminate section 16 to put everybody back to square one? Would you eliminate it and then replace it with a reaffirmation of the charter or would you want specifically to have all the rights in the charter written in a separate section and replace section 16; in other words, not the charter going in but just the rights, equality section 28 and so on? What is your one-shot fix that you think would be most important for you?

**Ms. Grills:** We have had a long discussion, and the one that everyone seems to have more consensus towards in our organization is the one put forward by the ad hoc committee, "does not derogate or abrogate from." We worked very hard to acquire that list in the original charter and it was not solely for women that we spoke when we went on the Hill. There were other people we had wanted to add who did not get added. It is still a concern that an identifiable group is not protected from discrimination. We had hoped, in the course of time, those people might be added as new identifiable groups emerge and convince the majority that they are entitled to nondiscrimination.

At this juncture, we really seem to favour such a clause and not to have it appear, as section 16 currently does, that there is a tier, that this group is more important.

If we are speaking of equality, then I think we mean equality for all, because if that had been a boy child we would have had the same conversation in my family about his opportunities; he might want to be a full-time parent or a househusband. Perhaps in 20 years' time, because of the equality provisions, we could in fact examine our own lives and make different decisions from the ones we currently make. It seems to me "equality" means solely that—that we are, in fact, all equal in this country.

**Mr. Faubert:** I am new to this process. I am actually subbing today—the members of the committee might understand this—but I think I am as interested as any member of this Legislature in the exchange here, and I welcome you.

This is one of the issues that I have had to grapple with. I do not want to be cast in the role of the defender of the accord at this point in time, because I too have some questions about how it is to be ratified and how provision is to be made for future amendments, if that is possible.

I am not sure what you are saying specifically about women's rights. Are you saying that because they are not specifically included they are by definition excluded? Surely, if we talk about equality of rights for all, we mean just simply that.

**Ms. Grills:** Do we?

**Ms. Hutchinson:** There is a qualifying clause that gives particular concern to particular groups. In clause 16, it identifies some groups, and by identifying some groups perforce leaves out others. If that clause is required to strengthen the rights and makes sure those rights are there for those particular groups, why is it required for those groups and not for others?

**Mr. Faubert:** One of the dangers of even having such a clause is there is an impression that those who are not included in that list are therefore excluded.

**Ms. Hutchinson:** That is right.

**Mr. Faubert:** But when one talks about equality of rights for all, I assume, perhaps wrongly, that women are included in the term.

**Ms. Hutchinson:** We have made that mistake before.

**Mr. Faubert:** Because we have worked towards this in principle in law and in principle in legislation across Canada, that when one talks

about equality, one is inclusive of women's rights as well.

**Ms. Hutchinson:** That is what we thought in the definition of "persons" under the original British North America Act, but that one had to be fought out. So our trust is not there that "all" includes all of us.

**Mr. Faubert:** OK, but women were not even considered as persons at the time of the writing of the BNA Act.

**Ms. Grills:** That is quite true.

**Mr. Faubert:** Subsequent law has established that indeed they are, and therefore when one talks about "persons," one indicates all genders.

**Ms. Grills:** I think the reason we feel so disquieted by this is, what will a judge do? A judge is not party to any of the discussion that has gone on. A judge is not party to the intent of legislators. The judge will look at the law, and we feel extremely wary. That was one of the reasons we fought so hard the first time around to be included and to have all those other groups included. Not meaning any slur on the judiciary at all, but we cannot afford to take the risk, in our view.

**Mr. Faubert:** I understand what you are saying, but one of the principles, I understand, of constitutional law is that it is written in legislation and then established in the courts. There are schools of thought that indeed the courts are now becoming our legislators. If that is the argument you are making, I think you are on pretty firm ground with some constitutional experts on this.

I appreciate your comments. This has clarified something in my mind as to how you view it, and that is really what I am looking for.

**Ms. Grills:** I think we view it from abject terror. I think I said that once before. Again, we would prefer to be able to go to court using the charter and not have to test out Meech Lake, spend all that time and then after that, if we are in fact equal, hit the courts under the charter.

**Mr. Faubert:** Thank you. I can appreciate that.

1000

**Mr. Chairman:** Thank you very much for coming in this morning.

**Ms. Grills:** May I say one more thing?

**Mr. Chairman:** Yes, please.

**Ms. Grills:** There has been talk of a companion clause and we have discussed that at length. Our feeling is that if, in fact, a companion clause is required, then that is a clear indication there is something wrong with Meech. We are not



companions; we are partners. We would very much not like to see something like that happen. We would like to see Meech amended.

**Mr. Chairman:** Right. Your reference there to a companion clause, companion resolution, that kind of suggestion; in your view, if you need to do that, you would prefer that the accord be directly amended?

**Ms. Grills:** Yes.

**Mr. Chairman:** That has been discussed on a number of occasions.

**Mr. Allen:** Could I ask for a quick answer? If it appeared in the balance of the Legislature and the way things were going that the accord was about to be ratified, would you still not want us to try to get a companion resolution which would at least state the fact that the Legislature, notwithstanding the fact that a majority, whoever that majority is, is supporting it, none the less believes that this issue is so important that the ministers have to immediately address it?

Are you telling us you would not want us to do that at all?

**Ms. Grills:** I think it would cloud the issue in court, frankly. I suppose, in some way, that would be required to go to a court, that intention, but that would only be the intention of the Ontario Legislature.

**Mr. Allen:** There are devices we have and can use to get that before other legislatures.

**Ms. Grills:** We, frankly, would prefer that you spend your time and energy convincing your caucus colleagues that it must be amended.

**Mr. Allen:** Oh yes, and I think those of us on the committee intend to try to do that, but the question remains, "If, at the end of the day..." One always is in that position, or often is, in the Legislature.

**Ms. Grills:** We really cannot see much good in a clause like that. It is a clear admission that there is something wrong with Meech. It is a clear admission, and even if you could get the other 10 legislatures to agree with that, then they are also admitting that they should have done their work prior to appearing.

**Mr. Allen:** I guess what it is also saying is that sometimes there are things which, in the political process, are not immediately fixable but can be fixed at another date. Do you want more or less political pressure around that option as you go through the process?

**Ms. Grills:** There is only one Legislature we can count on as Ontarians, and that is this one. We really do hope you will use all your force and

your passion and any means you can to convince the Legislature to go back and try to amend this. I simply do not see, when all of these nine premiers who are left are saying, "We believe in equality," that this cannot be fixed.

**Mr. Allen:** It is a reasonable last statement.

**Ms. Grills:** Thank you very much for your time.

**Mr. Chairman:** Thank you.

**Ms. Grills:** Go forth and amend.

**Mr. Chairman:** I next call Professor Tony Hall, of the department of native studies of Laurentian University and a member of the Canadian Coalition on the Constitution. If you would be good enough to come forward, we welcome you here this morning, Professor Hall. We have received three documents which you have presented, one to the joint parliamentary committee, one to the Senate task force and an article from *Le Voyageur*.

**Dr. Hall:** No, there are several articles.

**Mr. Chairman:** Several articles; yes, right; sorry.

**Dr. Hall:** Describing our work in Sudbury, primarily.

**Mr. Chairman:** Yes, very good. Thank you. Let me then, without further ado, turn the microphone over to you. Please go ahead and make your presentation and we will follow up with questions.

#### DR. TONY HALL

**Dr. Hall:** Thank you, ladies and gentlemen of the committee and Mr. Chairman. It is a great honour to be here. Thank you for including me in your proceedings.

I have produced a couple of written submissions to the federal level of government, which you have. I thought today I would speak extemporaneously.

These are interesting times. I think what is going on in Saskatchewan has brought into focus some of the issues we are concerned with here, so I will endeavour to look at what has happened today, yesterday, last week, and try to put that in some sort of context with what is going on. Obviously, the real frustration in all of this is to try to include or get a sense of what is at stake here.

We have been a colony until 1982, in a sense. We have not had to deal with these issues. They seem so theoretical and far removed from many people's lives. Something, it seems, has to go wrong before we realize what is at stake here. My endeavour is to try to show how family-

significant these matters are, not only to the people in the committee but to whomever might be reading this transcript or seeing it over the airwaves.

We hear the phrase, "The spirit of Meech Lake." What is the spirit of Meech Lake? Stan Graham, the Progressive Conservative member of Parliament for Kootenay East-Revelstoke, "said that Mr. Devine's legislation is perfectly within the spirit of the Meech Lake accord in that it allows the province to 'accommodate' its linguistic minority as it chooses." I am reading from the *Globe and Mail* of April 7.

Yesterday in the *Toronto Star*, Premier Robert Bourassa expressed the following, having met with Premier Getty of Alberta: "Mr. Getty was expressing an obvious fact, with which I am in agreement. I take care of language questions in Quebec and he takes care of language questions in Alberta. That is a self-evident fact." I think this is the spirit of Meech Lake, the idea that we have 11 sovereign provincial governments that will take care not only of language but everything possible beyond a few things which require a national government, such as defence or currency.

The question I begin with is, if we are to treat language as exclusively a provincial issue, as Mr. Getty, Mr. Devine and Mr. Bourassa seem to want, what is left at the national level? If language itself, the most basic communicative tool that we have as a people, as an emerging self-governing people of Canada, if we cannot consider this to be truly a national issue of concern to all Canadians and of paramount concern for the national government, what is the national government there for?

My argument, my concern, and I guess the word "fear" has been used, is that the spirit of Meech Lake is one which would see a kind of dismantling. In decentralizing authority, it would see the national government increasingly made impotent and people increasingly concerned only with the provincial legislatures as the key focus of decision-making.

In saying this, I witnessed some of your earlier proceedings and I was wondering how I would relate to you. I am full of a sense of indignation, of having been cheated, and here you are, the government. In sort of rehearsing this in my mind, I thought of taking that approach, but in a way, you are as much outside of this process as I am and in a way you are more humiliated by this exercise than some of us others are.

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What does it say of our democratic system of legislative values when the chief executive officer tells you: "Look, go and hear the people. Give them a chance to spout off whatever fury they might have, but I am not changing a thing"? Does that make you sort of glorified flak collectors?

You are elected representatives. You are the legislative essence of what this self-government in Ontario is about. I would suggest to you that it is extremely important what you do in the future on this matter, that you assert that legislative authority of yours and make it clear that government in Canada is not to be understood as simply an exercise in executive authority and that the legislatures are going to be more than simply glorified nominating conventions. Once you get that legislative power, the legislatures become increasingly relevant. I encourage you to live up to the tremendous responsibilities which are before you.

In this town—Professor Allen is gracing us on this committee and the chairman, I understand, is a student of Ramsay Cook—many of you will be familiar with the Canada-first movement. I would describe the increasingly dwindling and embattled proponents of the Meech Lake accord as proponents of the "Canada second" movement: provinces first, Canada second, and to complete this logic people last.

As we speak, Prime Minister Mulroney, Premier Devine, Premier Getty and Premier Bourassa are in the west trying to hold this thing together. I think it is very interesting that these three premiers are the premiers who have already pushed through Meech Lake without any—well, there were some public hearings between Meech Lake and Langevin in Quebec, but the western premiers had no public consultation whatsoever. The western premiers certainly are not in favour of shoving French down people's throats, but the western premiers certainly saw nothing wrong with shoving Meech Lake down the throats of their constituents.

I think the great people of Alberta and the great people of Saskatchewan deserve much better than this, really—and the word "disgraceful" comes to mind. My father is in the audience and he is going to be a good check that I keep myself moderated, but the great people of Alberta and Saskatchewan deserve far better than this sorry display of supposed leadership which their elected executive officers are giving right now.

It is interesting that these three premiers are also the three premiers who are pushing free trade the hardest. Devine is actually, I might say,



Mulroney's hit man on free trade, and bashing Ontario and now bashing Toronto is the level of promotion for this free trade deal. Is it not interesting that the three who have approved Meech Lake in their legislatures are also the three pushing free trade? I would suggest that is not coincidental. In my presentation to the Senate, I made the point that free trade and Meech Lake are obviously connected. They are part of a deregulatory, privatizing thrust, and Mr. Bourassa said as much. Did I put on the record that I developed this in my Senate presentation, the connection between free trade and Meech Lake?

Since that time, on April 1, in the *Globe and Mail*, Premier Bourassa, in responding to former Prime Minister Trudeau, said as much; that in his mind free trade and Meech Lake are connected. He says, "Canada is not the only country where a cultural decentralization is happening to offset the effects of economic integration.

"The free trade agreement underlines a trend towards economic interdependency," he said.

"To create a balance, we see centrifugal forces develop in the social and cultural fields, and for Quebec that is very important.'" So he is declaring that, in his mind, Meech Lake is the other side of the Mulroney-Reagan trade accord.

What is the spirit of Meech Lake? I would suggest to you that the spirit of Meech Lake is one that would see a dismantling and an undermining of our national institutions and a decentralization in order to accommodate a more continentalist approach to our economy, to our politics and to our cultural policy.

I would suggest to you that this is undermining our national institutions. We are seeing this with the disgraceful undermining of that great institution, the CBC. The Honourable John Crosbie, I think in a really slanderous way, slammed the CBC in slamming Torontonians. Since he is setting the tone of the debate, if opponents of the Mulroney-Reagan trade accord are dinosaurs, then I guess politicians of his ilk are dodo birds; I thought they were extinct.

I think that the Meech Lake accord is uprooting; it does not show a continuity with our constitutional traditions. I would argue that our Constitution really is best understood as rooted in the broad facts of history. What happened? How did we get here? It is not to be understood in some wording that some chief executive officers made over an evening or two evenings. This is a kind of instant-fix approach, which is just not satisfactory. I think we are seeing a sense of betrayal; witness after witness is bringing to you the ramifications of doing it this way.

Believe it or not, this is simply the preamble; but I am making the argument that the constitutional facts of the matter are to be understood in our history, not in an overnight bargaining session.

I would like to look a little bit at the Saskatchewan language situation. Here we see a debate about the nature of rights. Are these French language rights pre-existing? Do they pre-exist Saskatchewan; were they always there but denied consistently through all that time? Or can rights be doled out? Can Premier Devine dole these rights out?

I would suggest that the proper way to see rights is that they exist; they are inherent. Governments can present obstacles to those rights or they can help the realization of those rights. I think that is how we are to understand French language rights in Saskatchewan; they were there all along. Premier Devine's legislation is in a sense what we in Indian Affairs call a termination policy; it says: "Let's abolish, let's wipe out that right. Let's wipe the slate clean. But we promise to be good boy scouts. We are good kind of fellows and we will try to get services going."

What are the implications of saying that to a group? The number that is being used is 25,000; it has no electoral force to mention. The reason they are so small in number is because those rights have been denied so long. To hear people using their small numbers as a weapon, to say that it is crazy that their language should be recognized as equal in Saskatchewan when they are so small in numbers—there is a kind of brutality to this, after a historical process that has diminished those numbers for people in the wake of that to take up that kind of argument.

How come there were those French language rights in the foundational documents, in the constitutional foundation of Saskatchewan? How come they got there? They got there because of maybe 200 years of experience of living human affairs, but it really took Louis Riel to assert those French language rights. It took the creation of a provisional government. It took very extreme measures on the part of the Metis and their collaborators in the Roman Catholic church to force that recognition into the founding constitutional infrastructure of the Northwest Territories government, which was the first layer of Canadian jurisdiction after the Hudson's Bay Company was in charge. I think this leads very nicely into consideration of the Northwest Territories and what Meech does to the Northwest Territories. I think you have been very

conscientious in exploring that and my sense is that you understand very well what is at stake here.

**1020**

It is absolutely unacceptable to say that the residents of the Northwest Territories, in the Constitution, have absolutely no say over their constitutional future, over when they become provinces, if they become provinces, how they become provinces and whether other provinces are extended into their territories; that the people in that homeland have no say and that people outside that jurisdiction, politicians whose constituents are overwhelmingly in the south, have exclusive say; that is unacceptable.

It does not matter if you are a federalist or if it is sovereignty-association. If you believe in democracy, you cannot accept that and it has to be changed. The unanimity provisions of this really cannot be accepted. The federal institutions are not a creation of provincial jurisdiction and a higher provincial sovereignty. The federal institutions exist in and of themselves and they must have some recognition of their sovereignty and some ability to adapt and transform themselves through an exercise of their sovereignty, or the federal sovereignty with perhaps reasonable support from some of the provinces.

This was what Louis Riel was all about and what he was saying in 1869: "Look Canada, you may have bought the country from the Hudson's Bay Company. You may have paid £300,000, but we are people. We have human rights. We have some right to say what goes on in our own territory." He made that point and he was the founder. His people made that point of Manitoba. That is why there are those recognitions of the French fact in the founding documents of the Northwest Territories. We are going right back to 1869 if we do that to the Northwest Territories.

If there is anything that should unite us as a people and is at the very cutting edge of how we see ourselves, it is that territory. That should be the celebration of our evolving sense of self-government, of our enlightened sense of democratic principles. There is where we have a clean slate where we can put something ennobling in place. In that betrayal of the people of the Northwest Territories, only 80,000 people are involved. I guess the political calculation is made that you can get away with that. That is the whole spirit of Meech Lake: if you are weak and you are not a big, powerful electoral constituency, you get annihilated in a sense. I saw that all too well at four years of first ministers' conferences on aboriginal rights, which I am coming to.

What happened to Louis Riel? Louis Riel was hung in the district of Saskatchewan in Regina: Queen Victoria, Regina, former Pile O' Bones. He was hung and it appeared to the people of Quebec that Orange, Protestant, English-speaking Ontario was trying to exorcise, to do away with the French, Catholic, aboriginal spirit of the west. A Conservative government hung Louis Riel, assassinated Louis Riel, and the Conservative Party has taken the implications. Along with Louis Riel, there were eight Indians who were hanged at that time.

I know the time is running short, but you have to allow me a few minutes to get to what is my inspirational heart and soul, the aboriginal rights issue. This is foundational. This is not some kind of marginal thing we can put off until another day. We have had it since Columbus.

How do we understand the country when we have gone through this process for four meetings over five years and seen the first ministers say publicly, on television, "We cannot put things, when we do not know what they mean, in the Constitution"? The most outspoken one in this line of reasoning was Grant Devine. We can't go as far as to say that aboriginal communities have the right to determine their own future, to just make a declaration of that in the Constitution? If existing aboriginal and treaty rights do not even include that basic democratic right, which we take for granted for everyone else—self-government is what we are talking about here—what do they include?

Grant Devine is in a province where less than 10 per cent of the population produces more than two thirds of the prisoners in jails. Way more than half the people in jails are native people. If you remove this constitutional negotiation process, as Grant Devine advocates—Grant Devine, who wants to terminate French rights; and we saw him trying to terminate aboriginal rights and deny them and glibly talk about, "Gee, we didn't check it with the town councils and the municipalities, and we have to do all these things"—if you remove constitutional negotiations you are left with a situation where the prison in Saskatchewan is the primary institution of relationships between native people and newcomers.

If we want to speak to the Palestinian question, if we want to speak to South Africa, what strength do we have when such a situation exists; and not only exists but is constitutionalized; even the possibility of more meetings outside the realm of what is in the Constitution.



This is where the sense of something really terribly wrong comes for me, for people I know, for my family. Others have been coming at it from many angles. There is something very wrong.

The last point I want to make is language. Cree is probably as living a part of the life of Saskatchewan as French is. Unfortunately, Ojibway and Cree are not as big a part of the life of Ontario. However, they are living languages, and they are the only distinct languages we have in this country.

Who is speaking for Canada's distinct identity? Who is going to promote these languages? If aboriginal people cannot have governments, which the first ministers have told them, who is going to preserve, let alone promote, those languages?

Preserve—what a terrible word. What a way to put people in the category of museum artefacts. "Let's write down their language, put it in a dictionary, put it in the archives, and we won't let anybody take it out because it might not be preserved." Languages are used. Languages are articulated.

What about aboriginal languages? What are the implications of taking French and English and raising them and saying that is the only fundamental characteristic of the country, the French and English languages? We have marginalized constitutionally yet further the only distinct languages of Canada.

J'ai l'impression que le peuple québécois ne veut pas que son accession à ses droits aille à l'encontre de l'humanité des peuples autochtones. J'ai l'impression que le peuple québécois ne veut pas que son accession à ses droits dans notre constitution canadienne diminue les possibilités des peuples des Territoires-du-Nord-Ouest et du Yukon.

To my way of thinking, the people in Quebec rejected sovereignty-association, but there was a good body of people who voted yes, nevertheless. I am becoming increasingly of the view that the people outside of Quebec are in a position now to also reject that view of Canada, to assert one Canada, to assert a strong Canada; and their referendum—our referendum—will be to reject this Meech Lake accord, or at least to see it as an opening step in a process, not the culmination of a process.

**Mr. Chairman:** Thank you very much for a very interesting and passionate presentation. While we did not have to call upon your father, as you suggested we do—

**Dr. Hall:** Is he still in the room? Has he left in horror?

**Mr. Chairman:** He would feel very proud, I think, of your presentation.

Again, you have underlined a number of the issues, not only the aboriginal issues but also your view, really, of the theme and the intent of the accord. I think that came through loud and clear.

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I wonder if I could just start the questioning with respect to the aboriginal question. When the discussions failed shortly before Meech Lake came about, I think there was a feeling among many people that we were very close to an agreement. This has come up in some of our discussions with other witnesses. You were involved in those discussions. What was your sense of how close we were in 1986 and 1987 to getting agreement on the aboriginal round, and how would you see us getting that started again?

**Dr. Hall:** How close? Not very close in one sense. This is really what is being debated in Saskatchewan: is the French right there one that pre-exists Saskatchewan, that was there all along and that Grant Devine is now terminating with promises that he will be a good boy scout and try hard in the future? That would be a kind of delegated right or a right created by Grant Devine.

To come back to the aboriginal issue, there were only two provincial first ministers who took the position that aboriginal self-government was an inherent aboriginal right, which of course was the position of all the aboriginal groups. They were Premier Pawley of Manitoba and Premier Hatfield of New Brunswick. Beyond that, there were Premier Peterson, Premier Buchanan and the man from Nova Scotia, who would have taken the position that aboriginal self-government could be negotiated and there would be some sort of commitment to do that as some sort of delegated authority.

To ask aboriginal people to agree to that was in a sense to ask them to say, "OK, we agree that you can terminate our aboriginal rights on the promise that you are going to kind of delegate some written specific rights." The extent to which aboriginal groups are willing to do that kind of thing or make those kinds of huge compromises, I guess remains to be seen. However, for Premier Devine, Premier Getty, Premier Vander Zalm and Premier Peckford, this was just way out of the ball park.

I have said this at every presentation, and for some reason it is not picked up on. Premier Getty

said: "What did Albertans get out of Meech Lake? What's in it for us?" He made the point on June 8—and I picked this up out of the *Edmonton Journal*; it was in an editorial there—that before Meech Lake, 50 per cent of the population centred in seven provinces could have forced Albertans to observe aboriginal rights. He made the point, "Gee, we might have had to separate if that was the case, if they actually forced us to observe aboriginal rights." This is what the media picked up on. He said, "After Meech Lake, we don't ever have to observe aboriginal rights."

When you call it the Quebec round or the aboriginal round, that is terminology that misleads. The so-called Quebec round affects Quebecers, it affects women, it affects native people and it affects ethnocultural groups. It is convenient for government to invent these terms. In a sense this is the big lie of the Meech Lake accord: "Just put this in place," we are told, "and all these other issues we can take care of later."

With that unanimity provision, you cannot reform a federal institution without the unanimous consent of all the provincial legislatures. How else is aboriginal self-government going to be implemented, involving not only that but involving some kind of basic reform in federal institutions? That is why Premier Getty, I would imagine, said: "We don't have to observe aboriginal rights because we have got the federal government. The federal government cannot make the kinds of adaptations that would really be required if aboriginal self-government were to become a real, far more powerful fact than it is in Canadian affairs."

I just want to say that at these first ministers' conferences, the aboriginal leadership was most eloquent. There were visions of Canada expressed by Zebedee Nunguk, Georges Erasmus and others that go beyond aboriginal people; it is an all-encompassing vision of the country. We need that vision and we need to have some constitutional basis for visions like that to be part of this great country that we have been blessed to be born in.

**Mr. Harris:** Just a supplementary on that. My understanding is that aboriginal self-government does not require unanimous consent; it requires that it would be subject to the same formula.

**Dr. Hall:** You could put the words "aboriginal self-government" in the Constitution; but now, what is the situation? Who speaks for Indian people or aboriginal people in the federal government? Indians and lands reserved for Indians are a federal matter. Who speaks for that

constituency? The way it is set up now, the Minister of Indian Affairs and Northern Development speaks for that constituency, represents that constituency in the federal Parliament. In the provincial parliament it is a little more informal. Ian Scott theoretically represents that constituency.

The Minister of Indian Affairs and Northern Development is not elected by Indian people. He is in no way accountable to Indian people. In fact, the structure of the Indian Act is that bands and chiefs are accountable to the minister of Indian affairs, not to their own people, and this is obviously unacceptable. This is 19th-century British imperialism at its finest. There is a lot that was good in 19th-century British imperialism. There were treaties; Louis Riel made sure of that. We have to reform those federal institutions in a way that allows aboriginal people some sort of representation that is directly accountable to them.

**Mr. Harris:** That is fine. I am not convinced Meech Lake changes that. I understand your problem and I do not disagree with what you say.

**Dr. Hall:** Aboriginal people are very few in number, just as French people in Saskatchewan are few in number. They cannot make their voices heard very well in the electoral process as it is now set up. They are few in number, they are diffused across the country and there are many nationalities. It seems to me we would have to reform the representation process so that aboriginal people could exercise their franchise in a way to select aboriginal candidates and aboriginal representatives. The one-person-one-vote system basically counts aboriginal people out of the electoral process; so we lose the ability to adapt ourselves in that way and, to my way of thinking, that is extremely significant.

**Mr. Harris:** But no more or any less than before Meech Lake.

**Dr. Hall:** Oh, yes, powerfully worse, because you have to have unanimity—not seven provinces, unanimity—to reform the representation process in the federal Parliament, for instance.

**Mr. Harris:** Oh, I see. OK.

**Mr. Allen:** There are so many points that you have raised that it is almost impossible to begin in the time we have available. I would just like to observe that there is a certain tension in your presentation between, on the one hand, a rootedness in people, which requires significant decentralization—and you, of course, recognize that with regard to native peoples and their right to self-government—and therefore, by extension



also, it is necessary for us to have governments that have some authority over different regions or parts of the country that we call provinces.

Therefore, there is a certain sense in the politics of the nation where at least there is a protocol that Mr. Bourassa and Mr. Getty have to observe when they talk in public that the one does this and the other does that and so on. In a sense, there is a certain game there that one perhaps obviously puts to one side and says, "This is ceremony and it is not particularly substantial, but none the less, it represents a certain important element that is necessary in a democratic system."

1040

We all know about the discussions of whether we have a national identity that is coherent and homogeneous and total or whether it is more generally expressive of limited identities across the country and so on. I suspect you are very sympathetic to expressing those limited identities in a variety of ways, so I will not ask you to comment on that.

**Dr. Hall:** Yes. The supervisor of my thesis was J. M. S. Careless.

**Mr. Allen:** Yes, exactly. But there are real tensions there that we have to wrestle with when it comes to so-called constitutionalizing.

But I still do not get, I guess, a very clear response from the chairman's first question, and that is, how close did we get? It is very easy to define whether there is an inherent right recognized by some premiers or a pragmatic recognition of something that can be said on the other that uses words that make some things possible by others. At the same time, none the less, one still has to have so many votes, whether the philosophy behind the vote is one way or another in terms of an amending principle.

Given that we at least have had some significant assurance in the committee that the unanimity principle does not apply to aboriginal self-government, I come back to the question, how close did we come and what difference would it make for Quebec to be there, since personally I think we seem to be in a way of stepping our way through the constitutional problem instead of resolving everything all at once, which I suspect would be your preferred way of doing it.

**Dr. Hall:** I am going to back up. This is quite a lengthy prelude to the question: states' rights versus federal or Dominion or central rights or responsibilities. Let us look at the United States. States' rights meant, for a time, slavery in some

states. That is what states' rights were about. As late as the 1950s, states' rights meant Jim Crow laws. People in the local areas in the southern United States felt it was quite all right that coloured people should go to the back of the bus. They had legislatures that were willing to assert this detail and a thousand others like it.

I would say that, looking at the Canadian situation, provincial rights, the claims of provincial autonomy, have consistently gone against the claims of aboriginal rights. I have left in the record the St. Catharines milling case, where Ontario tried to fight and successfully did fight the federal government by arguing that aboriginal people had no governments, were primitive and nomadic and thus had no claim to any resources; thus, the treaties were of no meaning.

That is why Premier Lougheed and other premiers wanted aboriginal and treaty rights out of the 1982 constitutional deal and got them out of there. The federal government agreed to it. There has to be, ironically, a strong federal authority ready to assert the rights of aboriginal people in a country such as ours, so provincial governments have no monopoly on claims to regional autonomy and cultural diversity.

For some minorities, and aboriginal people are the classic example, it requires a strong Dominion or federal government to enable people to realize their cultural diversity and their local autonomy. That goes right back into the British Empire, when it was the central authority of the British Empire which asserted the necessity for treaties and which made the royal proclamation of 1763.

In a sense, I even had some trepidation in coming to speak with this body, because this is really a federal matter. Indians and land reserved for Indians are a federal jurisdiction, and the federal government has to assert that jurisdiction. This particular government does not want to upset the provinces on any number of counts, and we are seeing the chaos this is creating nationwide as a result. It is really a matter of a federal authority having the courage to stand up for aboriginal rights, and only a federal authority can do that. Provinces have to be good neighbours.

**Mr. Allen:** But if it is a case of courage, then courage can be asked for anywhere, presumably. If it is a question of courage, then all you are asking is that provincial premiers be courageous too. That is not a constitutional question surely; that is a question of political will. The federal government under the Constitution could just as easily totally abdicate anything responsible with respect to native people.

That could happen under our Constitution. What we are talking about in a federal system is not surely—

**Dr. Hall:** That did happen at Meech Lake. That is exactly what happened. They abdicated Indian rights. That can always be cut out. It was cut out on November 5, 1981, quite literally. Now we know, or the rumour has it, that it was Premier Pawley who insisted that there be some sort of reaffirmation of aboriginal rights in section 16. Rumour has it—and since we have no transcript to go on, it is fair game to report these rumours—that it was Premier Peterson. It was not he who was going to assert aboriginal rights. He was getting the pressure from the Italian community in Toronto and wanted to reaffirm multiculturalism.

The premiers in there apparently said: "We don't want to see the word 'Indian.' We don't want to see the word 'aboriginal' in this document." That is why section 16 has that peculiar wording, which refers only to other acts.

**Mr. Allen:** My question, though, was whether Quebec would make any difference.

**Dr. Hall:** It will certainly make a difference, but I remind you that Robert Bourassa was the Premier who sent the bulldozers and the work crews into the homeland of the Cree without so much as a courtesy letter to say what he was doing.

It was Judge Malouff, a Canadian of Lebanese ancestry, whose judgement kind of forced him into some sort of negotiations. Robert Bourassa, strategically, is forced into a position where he has to make some kind of accommodation with the Cree, and he continues to do so. But that is not to suggest that Robert Bourassa around the table is going to be a great friend of the Inuit in Nunavut. This is one of the duplicitous views or opinions of the Meech Lake accord which usually gets passed off by the responsible people without the appropriate questions being asked.

**Mr. Allen:** So you think you would vote no?

**Dr. Hall:** No for what?

**Mr. Allen:** On the very question that was put in the March meetings at the aboriginal round.

**Dr. Hall:** There was nothing put. There was nothing tabled.

**Mr. Allen:** People were counting heads as to who was going which direction. I am just asking you which way would Mr. Bourassa go in that setting?

**Dr. Hall:** Mr. Bourassa would go in the direction of standing up for provincial autonomy and exclusive provincial jurisdiction in provin-

cial lands, as most every other Premier can be expected to, not because they are nasty people who do not like aboriginal people and do not appreciate them, but because the British North America Act and the way it is written up kind of forces them into that position. It sets aboriginal and treaty rights as the opposite constitutional pole to provincial rights.

The federal government must assert its authority as some sort of mediator and, indeed, advocate and vindicator of aboriginal rights in between.

**Mr. Allen:** Thank you.

**Mr. Chairman:** Professor Hall, I feel we could spend a whole day talking, particularly about the whole issue of aboriginal rights specifically; so I am glad that you brought with you, so that we will have as part of our record and can share with our colleagues, the two presentations, in particular, that you made to the Senate committee and to the joint parliamentary committee.

I think that, as you are aware, in the presentations which have been made by a number of aboriginal groups, many of the points that you have made, needless to say, they have also made. Out of the testimony that has come before this committee, I think the views of aboriginal groups and organizations have been put very clearly and very articulately. In fact, I think some of the most powerful presentations have come from aboriginal groups.

I regret that at this point we have a heavy schedule today and I am going to have to close off the questioning. If there is a closing comment you would like to make—

**Dr. Hall:** Indeed, that should not surprise you, because the aboriginal perspective is surely the deepest Canadian perspective. Aboriginal people have a deeper sense and a greater experience of these constitutional questions. It does not go back only to 1982; it goes back to their negotiation of treaties and it goes back to the days of the American Revolution. I mean, native people have a tremendously important perspective which can enrich us all.

The recognition and affirmation of aboriginal rights is not something which diminishes our strength as a nation. It enormously affirms and promotes our soundness and our integrity as a nation. I do not think you should be surprised at all that aboriginal people have been bringing you such insightful, important presentations.

1050

**Mr. Allen:** Thank you.



**Mr. Chairman:** Perhaps it is not that we were surprised, but we were just underlining that the briefs that were presented and the discussions that we did have covered all of the matters. Your testimony this morning has served to underline and to underscore what they said to us.

**Dr. Hall:** They have done their part and, Mr. Chairman, I expect you and the other committee members will now do your part.

**Mr. Chairman:** Thank you very much for coming and joining us. If your son had still been sitting there, I was going to ask him for the last word.

**Dr. Hall:** That is Sam Hall Nabigon.

**Mr. Chairman:** He was our youngest almost witness.

**Dr. Hall:** Thank you very much. I apologize to the other witnesses.

**Mr. Chairman:** That is all right.

I might now call upon Michael J. McDonald to be good enough to come forward and take a seat at the table. Good morning and welcome, Mr. McDonald. We have circulated a copy of your presentation as well as letters attached to it to Premier Peterson and to Prime Minister Mulroney. If I could ask you to go ahead with your presentation, we will follow up with questions.

#### MICHAEL J. McDONALD

**Mr. McDonald:** Thank you, Mr. Chairman and members of the committee. May I say at the outset that I would like to acknowledge the contribution this committee is making to the democratic process. It is not an easy job to sit and listen successively to a number of submissions. I am appreciative of that fact. I would say the inconvenience of that is offset by the vital role this committee may play in terms of democratic principles.

Second, I would like to say that I submitted an original brief early on, back in January, but for reasons that will become apparent, it is not that original brief that I am speaking to this morning but the brief that has been distributed by the clerk of the committee.

**Mr. Chairman:** We have that as well in our ever-growing files.

**Mr. McDonald:** I would be happy in questions and answers to attempt to answer anything that is in either brief, but I will restrict my remarks this morning to what has been distributed.

In my submission, the Prime Minister of Canada and the Premier (Mr. Peterson) of this

province by their arbitrary action have regrettably brought the integrity of this committee's proceedings into issue.

The Prime Minister of Canada, despite numerous requests for assurances and clarification, has consistently and repeatedly stated that the Meech Lake accord constitutes a homogeneous entity and in these circumstances he is prepared to recommend it in full, as the other prime ministers are committed to do before their own legislative assemblies.

On October 21, 1987, in the House of Commons debate on the accord, he rejected the idea of amending the pact. To quote him, he said, "The government is not prepared to jeopardize this act of national reconciliation by reopening for negotiation virtually every section, as some would have us do."

Regrettably again, the Premier has indicated the same inflexibility. He is quoted in the *Globe and Mail* on January 26, 1988, as saying: "Public hearings on the accord that begin before a legislative committee"—namely, you people—"will not change the government's position that the agreement, despite its flaws, is good for Canada, nor will the government allow a free vote in the Legislature on a resolution endorsing the accord."

I took the trouble of phoning the Premier's press secretary to check the accuracy of that quote, and he assured me that it was substantially correct.

I suppose when you read those sorts of statements you have to look and ask, "Why do leaders of free and democratic governments make those kinds of statements?" In my submission you do not have to look very far. The Deputy Prime Minister, Minister Mazankowski, addressing the House of Commons on June 12, stated:

"In a speech delivered in Sept-Îles in 1984, the Prime Minister (Mr. Mulroney) promised that if his party were elected to office one of his priorities would be to conclude an agreement which would make it possible for Quebec to join the Constitution with honour and enthusiasm. He also stated he would take a different approach to federal-provincial relations, on the basis of national reconciliation."

I certainly am not critical of the Prime Minister of Canada fulfilling what he considers an election promise. I applaud that initiative. However, the people of Canada have every right to scrutinize the legal instrument arrived at and to reject it if they find it wanting in whole or in part. I suggest that the offence being perpetrated by the Prime

Minister of Canada is that by negating a genuine public debate on the accord, he is in breach of this country's most basic democratic principles.

By way of somewhat of an aside, although I do not find fault with the Prime Minister's election motivation, I do however take objection to what I typify as his introduction of a bullying tone into such debate. For example, when the Prime Minister of Canada challenges other elected representatives to stand up and be counted—and I think it is unfair to elected representatives to do that—he is obviously doing so, so that he can shoot such elected representatives down, particularly when he is campaigning in Quebec. These bullying tactics are offensive in any elected representative, but particularly offensive for a Prime Minister of Canada to engage in. More important, they adversely affect the probability of the free and open debate of a national issue.

I note in yesterday's *Globe and Mail* that Mr. Crosbie seems to be following suit on the free trade issue in terms of language and accusations that I find offensive and not helpful in terms of the debate on that important topic as well.

I am aware that by being open to and allowing amendments to the Constitution, this may result in inconvenience and possibly delay its implementation for a period of time. However, those sorts of considerations, legitimate as they may be, can never take precedence over the public's right to be heard and responded to on an amendment to the country's Constitution.

A previous federal administration, when it enacted the entire Constitution Act of 1981, allowed amendments that were presented in connection with women's rights and aboriginal people after the initial constitutional deal was struck. Is Meech Lake more fragile than the original charter itself? I suggest not.

If that is the motivation of the Prime Minister of Canada, what is the motivation of the Premier for his inflexible stance? I suggest that the Premier of this province feels obligated, as do the other provincial premiers, by a commitment made at the time of the accord to recommend the accord in its entirety to their respective legislatures. I am not critical of that commitment as such. The Prime Minister of Canada has also been active in reminding the premiers of their solemn promise, seemingly at every opportunity.

It is my respectful submission that the provincial premiers should, if they did not consider it at the time, consider that the commitment they made to recommend also contained an implicit obligation and responsibility to hear and listen to their citizens, to be open to

amendments if necessary and to request a further meeting of first ministers to agree on such amendments. That implicit responsibility is, in my opinion, also required by law. I will get into the legal aspect in a minute.

### 1100

There are also precedents for the premiers to be guided by in analogous situations. For example, in labour negotiations, as I am sure many members of the committee are aware, the negotiating team is also bound to recommend its proposals. However, membership is always free to reject a proposal in such a situation and send the bargaining team back to the table. In the context of the accord, the membership of the provincial legislatures is being handcuffed by party discipline and therefore the application of this precedent is being frustrated. However, if the premiers took whatever steps are necessary to allow a genuine public debate including, if necessary—and I think it would have to be necessary—a free vote in the Legislature so that the members of the public can be truly represented by their provincial elected member, then this analogous situation could apply.

Having in mind the considerable public debate to date on the accord, with a significant number of learned witnesses critical of the accord, one cannot help but think of Lord Acton's famous remark, "Power tends to corrupt and absolute power corrupts absolutely." I realize those are strong words and I am using them not in a limited sense but in a sense that applies in this narrow situation. I feel that they are very much applicable to the actions of the Prime Minister of Canada and the Premier of Ontario in denying the opportunity for genuine public debate, and I say that with some regret.

Since the integrity of this committee's proceedings has been dealt, in my opinion, a fatal blow by the Premier of the province in stating that its recommendations will not change this government's position, I submit that it is futile for me to speak to the merits of the accord, and I decline to do so, although, as I indicated, I would be happy to answer any questions.

What is the relevant and real issue then? The relevant and real issue to be addressed by this committee, by all members of the Ontario Legislature, by all members of the other provincial legislatures, by all members of the House of Commons and the Senate and indeed by every thinking citizen of Canada is the right to free and open debate. It is urgent to request and, if necessary, to compel the Prime Minister of Canada and the provincial premiers to cease and



desist their arbitrary behaviour on this matter and publicly declare that their respective governments are going to listen to public opinion and make such amendments to the accord as are deemed necessary and reasonable.

In this connection, I have this morning forwarded a public letter to both the Prime Minister of Canada and the Premier of Ontario making such a request and, as you know, those letters are attached to my brief.

I think it is important to place this arbitrary behaviour in a proper context and I draw your attention to the preamble of the Constitution Act itself, which reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

"Rule of law" is to many people a nebulous phrase, and I think it is probably best summarized in a very, very old quote by Bracton, somewhere between 1200 and 1278. It is a quote I am sure you are familiar with. He said, "The king is under no man but under God and the law." I would like to paraphrase that phrase because I think it is applicable here. My paraphrase is that first ministers are under no man but they are under God and they are under the law. The preamble of the charter says that the rule of law applies, and I suggest therefore that the Prime Minister and the first ministers have to pay attention to that.

Section 2 of the Canadian Charter of Rights and Freedoms states: "Everyone has the following freedoms:...(b) freedom of thought, belief, opinion and expression."

I suggest to members of the committee that those words are completely empty if all the freedom I have and indeed all the freedom you have is to listen and to write a report and for that report, despite your considerable efforts on behalf of the people of Ontario, to fall on deaf ears, on a government that has a predetermined agenda and is not willing to listen to anybody no matter what. Implicit in those fundamental freedoms is a government that is prepared to listen to and to respond to thought, belief, opinion and expression. Otherwise, they are not really rights, in my respectful submission.

Section 7 of the charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

As I will demonstrate, one of the fundamental parts of liberty in a society that we think we live in is genuine public debate, and genuine public debate means not only the right as I have

indicated to expression and opinion, but also for elected representatives to listen to those opinions and where appropriate to respond to them.

Section 26 of the charter states: "The guarantee in this charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

That takes us back to all the other constitutional acts, and the one that is most familiar to us is the British North America Act of 1867. I find it ironic, I find it sad, I find it regrettable that I am referring to our relatively new Constitution and our charter for authority in dealing with arbitrary action by the Prime Minister of Canada and regrettably the Premier of this province concerning an amendment to the very same act. The above preamble and sections 2 and 7, in my opinion, guarantee the liberty of genuine public debate. Section 26 as well brings forward all existing law, such as our inheritance of "a Constitution similar in principle to that of the United Kingdom," to quote from the British North America Act.

We have a quote from a former Chief Justice of the Supreme Court of Canada away back in 1938 in the Alberta press bill case, and you would think we have really advanced. Never mind the charter and the Constitution Act, we probably have more rights and a more active, volatile society than in 1938, but it seems to me that Chief Justice Duff at that time certainly stated a position that I adhere to in terms of what it means to be an heir to a British constitution:

"The statute (British North America Act 1867) contemplates a Parliament working under the influence of public opinion and public discussions. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by ministers of the crown of their responsibilities to Parliament, by members of Parliament of their duty to the electors and by the electors themselves of their responsibility in the election of their representatives—but it is axiomatic that the practice of the right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institution."

Obviously, the actions of the Prime Minister of Canada and the provincial premiers, to date in

any event, are contrary to the kind of public debate that the Chief Justice describes. It is no defence to say that committees such as this one and committees set up at the federal level have been constituted and numerous witnesses have appeared. I was in Ottawa two weeks ago speaking to the Senate committee. They are doing a terrific job in hearing witnesses and asking both intelligent and critical questions but, even so, it is no defence to say that those committees are set up, in fact the government has already announced that it is not going to pay attention to any of those committees, as it has done.

**1110**

As Duff says, it is the essence of public debate that it flow both ways. A one-sided public discussion with a government determined on a fixed agenda is a sham. If the first ministers claim otherwise, then in addition to acting arbitrarily they are also acting hypocritically. In my submission, as I have stated previously, their action is contrary to law.

What is next then? Are the Prime Minister of Canada and the provincial premiers above this law? It boggles my mind that I should have to ask this question but I do. Have we as a nation and our British forefathers before us struggled for 650 years to be free of the arbitrary action of sovereigns only to have it replaced in a period of months by the arbitrary action of first ministers? I suggest not.

The same question was asked by a distinguished British jurist and his response was as follows. I am quoting from *What's Next in the Law?* written in 1982 by the Right Honourable Lord Denning, Master of the Rolls:

"All these powers of the Prime Minister are not contained in any statute. These are said to be so strong that they are part of our Constitution. But I would ask the question: suppose our future Prime Minister should misuse or abuse the power? Would it be lawful? Would it not be contrary to the Constitution? Would not the courts interfere to stop it?" I suggest they will if they are asked and I may have to ask the courts to do exactly that.

I am hopeful that the Prime Minister of Canada and the Premier of this province will respond favourably to my request. I am certainly not making it just for myself; I am making it for all citizens of this province and of Canada. I suggest to the Prime Minister of Canada and the Premier that they respond within two weeks.

I think it is fair to members of the committee that I spell out what I think appropriate action is,

if there is not a public announcement or if there is a negative public announcement. Quite frankly, I am asking for help from everybody; I am asking help certainly from the membership of this committee.

If the Prime Minister of Canada and the Premier of this province answer in the negative, and by negative I mean anything other than "Yes; hold on a minute. If it is not clear already, we are open to debate; including any amendments that kind of debate indicates are warranted." If they suggest anything other than that, then I think further action is required.

I intend to ask members of this committee, and not only the members of this committee but also all members of the Legislature and the federal House of Commons, to move a vote of censure, censuring their first ministers. I realize that would be very difficult, certainly for government members, but I think there is a very big principle at stake here.

This is only appropriate, since the House of Commons, and the Legislature in particular in our system of responsible government, are ultimately responsible to the people. My source here is Eugene Forsey in a booklet published in 1982 by the Department of Public Works.

I suggest that elected members' responsibility to their electors on this issue is more fundamental than party discipline. If this action is necessary, I will be seeking the assistance of the media to encourage all Canadians to write or telephone their federal and provincial member to express their view on the first ministers' arbitrary action.

I also intend, by open letters, requesting the premiers of the other provinces who have not yet approved the accord to delay taking any further action until the Prime Minister of Canada publicly clarifies Canadians' rights to meaningfully engage in this public debate. I will also be requesting the premiers of those provinces who have approved the accord to publicly state that they have no objection to a delay by the remaining provinces to facilitate genuine public debate and that they are open to amendments if the public debate warrants such amendments.

Second, I intend, if necessary, to petition the Lieutenant Governor of this province and the Governor General of Canada to take such steps as are necessary to secure the rights of genuine public debate of this accord. Again, I will be soliciting the assistance of the media in involving the public in signing the petition to Her Majesty's representatives.

Third—and I stress I hope I do not have to take any of these actions—I intend, if necessary, to ask



the appropriate court for a declaration as to whether the arbitrary action of the Prime Minister of Canada and the Premier of this province, in so far as they affect genuine public debate, are within the law.

Last, but not least, I pledge that I will fight this serious threat to our democratic principles with every ounce of energy that I can muster and I will not cease fighting until the rights of free debate in this country are manifestly secure again.

I am hopeful that Canadians in all walks of life will join me in this fight. I would add that this trend to arbitrary action by first ministers seems not to be an isolated incident in terms of Meech Lake, that, with large majorities in both the federal and some provincial legislatures, it seems to be accelerating and therefore it is all the more dangerous and therefore all the more necessary and imperative that this trend be arrested quickly before it gains any further momentum.

In conclusion, I wish to stress to you how distressed I am personally to be addressing this issue at all. As I noted earlier, it is ironic that the issue of arbitrary action by first ministers is being disputed, particularly in the context of an amendment to the Constitution Act and the Charter of Rights.

My only solace, quite frankly, is the words that are contained on the editorial page of one of our newspapers, "The subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures."

I thank you for this opportunity to address what I consider is the most fundamental issue before the country, and for your attention throughout. I would be pleased to try to answer any questions.

**Mr. Chairman:** Thank you very much, both for this presentation and also the document which you sent to the committee earlier. I think it is fair to say that you have raised a number of questions and issues around the accord that I do not think we have focused on in quite the way that you have.

I think, in particular, the quote from former Chief Justice Lyman Duff is a very interesting one and certainly raises a number of questions which have come up in terms of process and one that has troubled us a great deal, not only in terms of the situation we have found ourselves in in dealing with the present accord, but also recognizing that whatever happens to the Meech Lake accord, provincial legislatures are bound to be involved in constitutional change in the future.

We have to give some pretty serious thought to how we ought to be involved and clearly, although I do not think we have said this before, I do not think anyone would want to be involved where something is signed and presented to you for comment after the fact. We find ourselves in a different situation in this context, although I think I should underline that in terms of the process we are involved in I think there are times when there are hearings and there are other jurisdictions that are also either going to have hearings or have said that they will have hearings.

It strikes me that on this one, the political process is unfolding and that a lot of things have been brought before this committee as well as other forums. None the less, we listen, we hear and we have to go back and consider this, regardless of what other commitments other people may or may not have made.

**1120**

We are directed by the Legislature, and I emphasize "by the Legislature," to report back to the House by the end of June. We will probably complete our public hearings later this month or early in May, and then we are certainly going to have a lot of very serious discussion in determining where and how we go. I think you have set out your thoughts quite clearly and we appreciate that. We will turn to some questions.

**Miss Roberts:** Perhaps I may briefly comment. I appreciated your comments and concerns and the very definite steps you are going to take. I assume you are committed to them. That, indeed, is your right and I look forward to what you decide upon doing.

You have brought up, as the chairman has indicated, a very important part of it, and that is the process itself. Have you sort of thought beyond this particular situation to what the process should be to change the Constitution and how it should really work? When we brought back the British North America Act at the first of this decade, we never really thought about the process; and that process, I think, was one that occurred in a way that was new, maybe, for Canada.

What process should we have now? Should it be enshrined in the Constitution? Should it be enshrined in bills in each Legislature? Have you thought about that?

**Mr. McDonald:** Yes, I have. The process, as you are hearing all the time, is part of the problem. The process, in my opinion, would have been so much better if the Prime Minister and the premiers had said, "We have negotiated

the greater part of 24 hours and we have come up with something we think is going to be good for the country." They have said that, but then they went on—

**Miss Roberts:** Before you go on, do not think about Meech Lake. Think about any process. You know the charter is flawed. You know the BNA Act has to be changed. You know all those things. Do not think about Meech Lake. How are we going to get at those flawed documents now? Do you expect executive federalism to exist to such an extent that they will set the agenda for us to look at, or do we as Canadians set the agenda as to what should be looked at by them and then returned to us?

**Mr. McDonald:** There is, in my opinion, the responsibility of elected people to initiate and take leadership, but we are way beyond—as McLuhan points out, everybody on spaceship Earth wants to be crew, and so we are way beyond the point where elected representatives can say, "This is the way it is going to be." There is the feeling that all Canadians want to be involved in fundamental changes.

There are some laws that not too many people express much interest in, but certainly on matters like the Constitution, all Canadians want to be involved. The Prime Minister and the premiers would have been so much better by stating, "We have done our best and now we are completely open to debate and to amendments if necessary." They did not do that. They took a very hard line and said: "This is it. We have made a deal with Quebec. We got Quebec back to the constitutional table and the rest of you guys had better honour your commitment to Quebec." That is regrettable because it has alienated all sorts of people. Certainly there were comments by very, very capable witnesses. It is regrettable those comments are not being listened to.

**Miss Roberts:** You have not thought about any other process to the extent that you can verbalize it today.

**Mr. McDonald:** I do not think there is any alternative, other than elected representatives taking an initiative but leaving it open for that initiative to be responsible to the comments of citizens from every walk of life. I have not thought of any alternative to that.

**Miss Roberts:** Have you thought about a referendum? Is that the way this public debate should end?

**Mr. McDonald:** I do not rule out a referendum. It seems to be, in some people's minds, anathema to our form of government. I think we

have to explore those avenues. I think we have to let people express their wishes and desires in those kinds of democratic instruments.

**Mr. Harris:** I want to congratulate you for taking the time to make the presentation. I enjoyed it and I agree with you, I think the process is severely flawed. This committee has heard a number of witnesses; most, I have to tell you, have zeroed in on the accord itself but some have dealt with the process and the problems they have with it.

I want to ask you one question. Most people get concerned about a process if they do not like the product. In my view, and we seem to be relatively new as a nation in amending our Constitution, particularly since it has been brought home, but through that whole process this process is, to my way of thinking, probably more democratic than the process we went through in 1982.

I was not very happy with that process either. I am not saying, therefore, this process is OK; most of the people who have come before us and talked about the process have really condemned the first ministers for the way they went about arriving at Meech Lake. I do not accept the 24 hours tag; I think that was a culmination of perhaps 20 years and a lot of work and prework that went on with officials, that this is the fruit of what happened in 1967, 1977 and 1982. I do not think that is a fair criticism to make, even though it culminated in that meeting.

You have not talked in your brief at all about the accord. As I say, most people who have come and talked about the process do so because they do not like something in the accord. Is there anything in your motivation? You have stuck strictly to the process. You do not like it. There has not been public involvement. Are you happy with the accord?

**Mr. McDonald:** No. As I indicated in my original brief—

**Mr. Harris:** OK; I have not read it, I apologize.

**Mr. McDonald:** The document is simply not written with sufficient clarity to be an act of a Legislature or, indeed, an act of the House of Commons. I hark back to the Fathers of Confederation in the BNA Act. They did not have any preamble. They did not have any accompanying text as such, but they spelled out first the separation of powers, sections 92 and 93, and in section 93 they spelled out that the right to denominational schools would continue, which was a recognition of the French fact at that time in the province of Quebec and of the English-



speaking and largely Protestant fact in Ontario at that time.

They went on to spell out in section 133 that the official languages of both the federal House and the Legislature in Quebec were both English and French. They recognized the diversity and distinct societies of the two primary provinces at that time, but they did so in such a way that everybody understood it. It was clear, legal language.

The phrase, "preserve and promote the distinct society", without supporting examples included in the text, is an object of mischief, future mischief, countless wasted hours of litigation; a lot of private citizens' moneys down the drain and a lot of lawyers who are going to be completely perplexed in terms of giving advice to their clients; a waste of time for a very valuable resource, namely, the Supreme Court of Canada.

It is on that fundamental point that I think the accord is flawed. There are other smaller issues—not smaller issues; there are other issues which I leave to people who have the most vested right. I think it is almost criminal that the Northwest Territories and the Yukon have to have unanimity in terms of being a future province. I think that is criminal.

1130

Why make reform to the Senate only by unanimous consent and, paradoxically, at the same time put it on the agenda for next year's constitutional conference? If the western provinces thought they got a coup on that, they must have not realized they had agreed for that point to be covered by section 42 in the charter.

**Mr. Harris:** If you agreed with the accord, if you thought it was a good accord, would you still be here?

**Mr. McDonald:** If I thought the accord was good, yes, I would still be here if both the Prime Minister and the Premier were saying, "This is it boys; we are not listening to any other point of view." If there was a contrary point of view, even if I personally thought it was good, then I think it is fundamental that the contrary point of view be heard and responded to. That is called minority rights.

**Mr. Chairman:** I want to thank you very much for coming in this morning, both for your focus this morning on the process as well as for your other brief, which goes into more detail in a number of areas.

I regret, again, that time goes by and we still have another witness. As I noted, this committee still has a lot of work to do and a lot of thinking to

do and I hope by the time we get to the end of that we will be able to find our way through what is perhaps a landscape of minefields—at the very least, eggshells. Quite frankly, on the testimony that we received, I do not think any committee could have listened to what we have listened to without realizing the seriousness of the issues that are at play here. We thank you very much for joining us this morning.

**Mr. McDonald:** I am aware of your restraints, Mr. Chairman, and the committee. I thank you for your time.

**Mr. Chairman:** I will call upon our next witness, Miss Jane Pepino, Ontario representative of the Canadian Advisory Committee on the Status of Women. Thank you for coming. While we are running somewhat late, we will certainly make sure that you have sufficient time to make your presentation and allow us a period of questions.

#### CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN

**Ms. Pepino:** Good morning, members of the committee; and thank you, Mr. Chairman. As you indicated, I am here as a representative of the Canadian Advisory Council on the Status of Women. Although I am a lawyer, I do not hold myself out as a constitutional expert. You have heard, however, from constitutional experts previously, including, of course, Professor Mary Eberts and Professor Beverley Baines.

The Canadian Advisory Council was established in 1973 on the recommendation of the Royal Commission on the Status of Women chaired by Florence Bird. The council is composed of 27 part-time volunteer and three full-time paid members appointed by the federal government. Collectively, the council represents the regional, cultural, ethnic and linguistic diversity of Canada. I am one of four representatives from the province of Ontario.

The objective of the federal council is to bring before the government and the public matters of interest and concern to women. Thus, the council provides the federal government with advice on both the impact on women of existing policies and programs and the development of new measures to improve the status of women in Canada.

Specifically, and we are known for this, the council undertakes and publishes research on issues of interest and concern to women with a view to achieving needed reform. The council is well known and recognized for its cutting-edge research to benefit thinking in Canada.

We also promote an awareness of these issues through public and media relations and contribute to the development, we believe, of a substantive body of Canadian resource material on women's issues.

I have filed with this committee a copy of the council's brief to the special joint committee that the federal government held in August 1987, which also includes a reference to a resolution passed by all members of council. I would stress for members of this committee that the members of council are anglophone and francophone from the province of Quebec and anglophone and francophone from outside the province of Quebec. All of the members presently serving on the Canadian Advisory Council on the Status of Women have been appointed by this present federal government.

I do not propose to take you through either the brief filed with you or the resolution in detail. You have had a lot of reading to do and you have a great deal to do in future, I am sure. I would like to simply use my time to indicate to you that I will draw now on a brief that was presented by our president, Sylvia Gold, to the present Senate hearings under way, which I believe reasonably and appropriately summarize the concerns of the council.

The first issue I wish to address with you on behalf of the council has to do with the federal process and the Meech Lake accord. Last summer, a number of national women's organizations, including the council, told the special joint committee that the accord put women's charter-based equality rights at risk. Carol Gilligan, a noted scholar, has stated, "As we have listened for centuries to the voices of men, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak."

When you compare, as I know you have been asked to do in the past, the briefs and testimony of the women who made those arguments to the special joint committee with the response of that special joint committee, it becomes clear that none of us was heard. By this, I wish to make it clear I do not mean simply that the committee disagreed with our views. They in fact did not hear our views and our evidence.

In its September 1987 report, the special joint committee refuted three main arguments it claimed were made by women's groups about the impact of the accord on women's charter-based equality rights. They claimed we had argued, first, that the "distinct society" clause should not be entrenched. The second allegation they made

about women's submissions were that gender equality rights should be treated as a special case. The third misleading statement they made was that women argued that gender equality rights should be given a guarantee of automatic paramountcy.

I think a careful review of the briefs presented to the special joint committee and of the committee's report makes it very clear that none, not one single women's organization, ever made any of those arguments attributed to them. The arguments that those national women's organizations did make were never addressed in the report. We would ask the members of this committee to set aside, for those reasons, the findings and recommendations of the special joint committee as they pertain to the submissions of all equality-seeking groups, but specifically those of women.

This committee, as the other was intended to have done, is charged with the task of understanding, analysing, summarizing and relaying the evidence that has been placed before it over these past three months to the Ontario Legislature. Your report represents the last opportunity in this province to correct the record of inattention to and misunderstanding of women's arguments on the Meech Lake accord. I know from my review of some of the transcripts of evidence placed before you that some have gone so far as to say it was a deliberate misrepresentation of women's views. I simply wish to leave it as inattention.

With regard to the history of women and the Constitution, I think it is clear that although women were not present when the Fathers of Confederation got together in 1867, we are no strangers to the process of constitutional renewal. In a sense, it all started by women and with women in the Senate over the meaning of the word "persons" in the British North America Act of 1867, but there is obviously more recent history of women's involvement with regard to constitutional renewal.

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For example, in 1978, in the dying moments of a first ministers' meeting, as part of the public session—but one still does not quite know what brought it to that part of the public session—the federal government conceded, in the way of almost a gratuitous offer, jurisdiction over marriage and divorce to the provinces. That immediately provoked and brought to action a substantial lobby by women concerned about uniform divorce laws and enforcement across Canada of custody and support orders.



In 1980 and 1981, women had to lobby twice to secure equality rights in the charter and carried on the struggle to support aboriginal women in their quest for constitutionally guaranteed equality rights. In 1983, women were called upon yet again to lobby to forestall an unexamined proposal to include property rights in the charter. If I may stop right there, I would just like to address in that regard Mr. Harris's question to the previous speaker, that is, "Is the process flawed even if the product is acceptable?"

It is our submission that the process is as important as the product. Even if the Meech Lake accord had been acceptable to national women's organizations and those women in Ontario, we believe still that the process is extremely flawed. I think these four or five examples I have given to you have indicated in a summary fashion why it is.

We are constantly being asked and required to react to deals that are made behind closed doors without sufficient time for public consultation, without sufficient input. I do believe, Mr. Harris, that in 1980 and 1981 women did have a much greater voice on the accord than certainly even, with respect, the previous committees on the Meech Lake accord have afforded us.

In her expert testimony before this committee Professor Eberts concluded that this decade of constitutional activity, at least from the experience of women, can be characterized in a number of ways. I will simply choose two examples.

First, constitutional decisions of great significance to women are made by men without notice to women, without consultation, and, as I think is patently clear from the result, in the absence of any essential awareness of women's interests.

Second, resistance to women's concerns about constitutional initiatives ranges from the patronizing "Trust us," which we heard last summer and last fall, to—when we actually challenged that and brought forward our own experts, and to our great dismay our own examples, the target continued to move—ridicule or misrepresentation of our arguments and silencing. Women are also threatened, as are all Canadians, that if we do not accept the deal as presented, the alternative will be worse.

These characteristics were present in the making of the charter in 1980, 1981 and 1982. I believe they have certainly been demonstrated as being present and paramount in the process surrounding the Meech Lake accord. I am not going to elaborate further here as I am conscious of the time and I recognize that the procedural aspects were thoroughly reviewed for you in their

impact and insult to women, in some of the briefs I read in the very early days in February.

I would like to turn now to our specific concerns about the Meech Lake accord, again in summary.

The council's brief, which I have filed with you, constitutes in large part a legal analysis of the Meech Lake accord almost on a section-by-section basis. It is nevertheless also, we believe, an evaluation of the possible consequences of the accord for the women of Canada and for the women of this province, both francophone and anglophone and those who have neither of our federal official languages as their first language, as well as all other equality seekers.

This evaluation is based on—and I stress this—numerous consultations with council members, with diverse and well-respected women's organizations within Quebec and beyond, with constitutional experts: not only academics but also lawyers, civil servants and bureaucrats, those who are charged with implementing constitutional reform. Of course, it is also a result of significant and nationwide consultation with those women who toiled unremittingly in 1981 to secure equality rights for women.

Before I go further, however, let me make it perfectly clear that the council joins with all Canadians, men and women, in welcoming the entry of Quebec into the Canadian family. We do not wish to have the misrepresentation labelled against our council that by criticizing the Meech Lake accord we are somehow against Quebec.

The first part of our brief that I would like to discuss is the section on equality rights, which is found in paragraphs 12 through 34. Our concern about the impact of the accord on charter rights arises mainly, but not exclusively, from section 16 of the accord.

Briefly put, we believe that section 16 will invite the courts and perhaps legislators to adopt a hierarchical approach to the Constitution in interpreting the rights within one part of one constitutional document, such as the charter, or between documents themselves, such as rights grounded in the Constitution Act, 1867, coupled with the eight sections of the Meech Lake accord which would fall back to the 1867 act, versus the Constitution Act, 1982, the charter, some sections of which have been post hoc included in the Meech Lake accord, leaving only section 16 to stand on its own as the 1987 document.

Our position, in brief, is based on the following reasons:

First is the principle of statutory interpretation that when certain things are specified in a law, for

example, the protection in section 16 for only certain charter provisions, things that are not mentioned, for example, all the rest of the charter for all other groups covered and given equality rights under the charter, those things not mentioned will be excluded. When I go, as I have, across this country and throughout this province to speak on the Meech Lake accord, I try to define that as, "Mean what you say and say what you mean."

Second is the potential effect, which we believe, of course, was unforeseen by accord drafters—they may be visionary, in certain persons' eyes, but they certainly cannot be prescient—the potential effect unforeseen by the accord drafters of the June 25, 1987 decision by the Supreme Court of Canada in the Reference re an Act to amend the Education Act.

In that regard as well, I wish to simply state and stress the fact that we do believe that Madame Justice Bertha Wilson's decision, writing on behalf of the majority, as well as the comments of the separate decision of Mr. Justice Estey—because again, those were the decisions that supported the overall results that are of great difficulty and raise this concern.

Our arguments are set out in some great detail in our brief. In an effort to be constructive in our criticism, and again after extensive consultation which included Quebec women, anglophone and francophone, the council drafted an amendment to the accord which would resolve our concerns on the risk to the charter. That amendment is found on page 11, paragraph 32 of the brief and is set out in its specifics at the top of page 12.

The amendment, which we are satisfied is necessary to remove the risk to equality rights of the charter, would constitute an amendment to the Meech Lake accord by adding immediately after section 1 of the accord the section set out on page 12, requiring that the Constitution of Canada be interpreted in a manner consistent with the charter. To be consistent, we would delete subsection 95b(3) of the Constitution Amendment Act, 1987 and section 16, by virtue of redundancy.

It is our position that it is that amendment and only that amendment which is necessary to guarantee that charter rights will remain in balance. Despite the statements in the report of the special joint committee, our recommendation does not and was never intended to create a paramountcy for gender equality rights. I believe it is the history of women in this country that we do not attempt to advance our rights at the expense of other disadvantaged groups. Our

recommendation would simply make the charter equal to other constitutional documents.

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In addition, women's claims for equality rights are rarely, if ever, achieved without opposition and the Supreme Court of Canada has not yet provided a statement of how it will interpret the equality rights of the charter. In the only gender equality right, the Justine Blainey case, leave to appeal was dismissed but no reasons were given. Women's organizations have laboured painstakingly through litigation and through research to ascertain a clear statement but none is yet available.

We are not willing to wait to see if the accord has repercussions on equality rights as many in support have urged us to do. They are simply too important. This is why the council also adopted a recommendation calling on the federal government to refer the question to the Supreme Court of Canada, and we ask this committee to recommend to the Ontario Legislature that the question be referred through this Legislature on to the Supreme Court of Canada through the Ontario courts before ratification. That process was adopted on certain issues in 1981 and is one we welcome, invite and request.

Briefly, as well, we have concerns about the issue of federal spending power, and I will now turn to our submissions in that regard. A substantial part of our brief, paragraphs 35 to 67, contains a review of section 7 of the accord which deals with national shared-cost programs. Many of our comments stem from a concern about the inherent ambiguity of virtually every phrase or clause of this section.

It may well be appropriate to couch constitutional documents in general language that will withstand the application and extension of principles in diverse and unforeseen circumstances. You will get no argument from me in that regard. However, section 7 does not constitute a general statement of principle. It is a specific rearrangement of the conditions under which the federal government will exercise its spending power. Virtually every operative word in this section is newly coined and/or ambiguous and it is this point that most troubles the council.

The very unpredictability of the section may prove to be an impediment or disincentive for federal leadership in the area of shared-cost programs and for clarity in the view of provincial legislatures in knowing what is and what is not deemed to be acceptable within the intention of section 7.



We are not suggesting that provinces do not and should not exercise initiative. However, Canadians want and, by virtue of section 36 of the Constitution Act, 1982, are entitled to equal opportunities for wellbeing, the reduction of regional disparities and essential public services of reasonable quality. Women have looked and will continue to look to the federal government to exercise leadership in ensuring comparable access to and quality of services no matter where they live. For this reason the council has recommended that amendments be made to this part of the accord.

The last part of our brief, paragraphs 68 to 72, speaks to the process of constitutional reform in Canada. Canada's Constitution is more than a simple legal document. It sets out the framework for decision-making and power in Canada through institutions such as the Supreme Court of Canada, the Senate, the House of Commons, the provinces and territories and now through a process of first ministers' conferences. But there is a reality gap with regard to our Constitution. Historically, women have not been and are not yet participants in that fundamental process, nor are women's experiences taken into account in our decision-making and power structures.

It is the council's firm conviction and recommendations that the federal government and all those charged, including provincial legislatures, with safeguarding the democratic process in Canada take every step to ensure that in the exercise of political responsibility and prerogative, the women of Canada are provided with a meaningful opportunity to contribute at all stages of the political and legal Constitution decision-making process.

In the drafting of a Constitution, as in all other tasks, there exists a linkage between the form and the function, between, as Mr. Harris noted this morning, the process and the product. The quality of this linkage and of the process inevitably is reflected in the product. We believe that, like the process, in this specific situation the product is unacceptably flawed. Our analysis and consultations across this province and across Canada on the Meech Lake accord lead us to the conclusion that there are risks and ambiguities which must be redressed.

We hope you will be persuaded to recommend these amendments when you have had an opportunity to fully read and digest our brief. However, what we ask first and foremost is that you rely on the arguments as we present them and respond to them on those terms. There is always the potential. We have been told, "Well, of

course the assurances given now will be considered by the courts in the future." Unfortunately, part of that record is the report of the special joint committee, which is wrong and which is not a fair or accurate representation of women's concerns and their submissions.

We urge you in this committee to attempt, as far as you can, to set that record straight and to prepare us for those tasks in future. We ask you, therefore, to rely on the arguments as we present them and to respond to them on those terms. Although public hearings are not required to date as part of the existing process for constitutional amendments, we believe firmly that the public does have a place in the constitutional process. You, in this committee, have an important opportunity and responsibility to ensure that the public record is fair and accurate. We look forward to your report and we believe it is finally time for the Mothers of Confederation to be heard. Thank you for your attention.

**Mr. Chairman:** Thank you very much for your presentation and also for bringing to us the brief which was submitted last August to the joint committee. I think the point you have made about the way in which the various women's groups views were set out in the report has been mentioned on a number of occasions.

**Ms. Pepino:** Yes.

**Mr. Chairman:** I would say that we are mindful; I certainly hope we are. The danger of trying to interpret at times and getting it wrong has been made clear, so I think that as we go and prepare our report, we are going to make sure that, however it is, we are setting out the views that have been expressed. We want to make absolutely certain that we do not misinterpret what has been said.

**Ms. Pepino:** Thank you, Mr. Chairman. That is very important to the council. As I noted in my submissions to you, obviously the brief may appear dated, but I attempted to also incorporate present and existing concerns. That certainly is one of them.

**Mr. Chairman:** We will start the questioning with Mr. Harris.

**Mr. Harris:** The first question deals with something you did not talk about, which by its absence may tell me and this committee what you think of it. There has been more and more discussion in recent months of the possibility of companion resolutions when legislatures are having difficulty with aspects of the accord, with trying to live within the guidelines that have been set down by their premiers as to what they are to

do with this accord and trying to live up to some commitment to those who have come before them. If they feel strongly enough, perhaps a companion resolution is the way to express that. Could you comment on that from your organization's point of view? Have you talked about it?

**Ms. Pepino:** I confess that by virtue of the fact we meet only quarterly, with executive meetings in between, the council has not taken a council position on it, but I believe that I am safe, without straying from council's position, in saying the following: I was aware of the fact that this committee has had floated out for discussion and comment the whole concept of companion resolutions. I simply ask the committee, when discussing them, to recall and trace it back to its root. As I understand from some of the research provided to me, it first came out to deal with the issue of aboriginal rights. Those individuals have nothing and a companion resolution, being perhaps less than half a loaf, is certainly more than they have.

With the greatest of respect, I think the different positions and the different problems make it very clear from that point of view that women's groups certainly have not adopted that. We believe our problem is quite different and therefore the solution is quite different.

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The other comment I have is simply to ask: What kind of companion resolution? What would be the linkage between that and the Meech Lake accord? It is the position of the Canadian Advisory Council on the Status of Women that as a result not only of consultation but also of research, the only way to handle the issue of threats to equality rights is an amendment. A companion resolution, in my understanding, would not be an amendment and from that point of view would be absolutely unacceptable in approaching the difficulties we have brought before you. It simply would not cut it.

**Mr. Harris:** As I understand the term, "companion" implies that as well. The difficulty, I suppose, with "companion" is that you are saying Meech Lake is approved and—

**Ms. Pepino:** That is right. That is the problem that is not acceptable. There are three or four versions of the companion resolution I have heard. If, for example, it is intended in that scenario to leave the Meech Lake accord unchanged and to pass another resolution for submission to the first ministers' conference at some future time, that is a variation on the "trust me" theme. With respect, that is just unacceptable.

Number one, we have been burned too many times in the past, and number two, the process being so sufficiently flawed, with women's voices not being at that table and many of those first ministers being the same, yet again we have no assurances that our concerns would be addressed.

If a companion resolution is intended to go forward and to say, "We have ratified Meech Lake but we have also passed the other and we are floating that out for present ratification; other ratifying bodies can pick and choose as they wish," that, again, is unacceptable. That does not go to the root of the problem, which is the accord itself.

If a companion resolution is, as we would hope, an actual amendment, that is, "Meech Lake should be ratified only if it incorporates the following amendment," then, of course, why do we not call it an amendment? That is what it is. It is a resolution to amend the Meech Lake accord in a way that the women of Canada and this province are requesting. In those circumstances, I think it would simply be labelling it in a way that might mislead the public as to what your recommendation would be. I do not know exactly what it is, but if it is those first two things I mentioned, those are not acceptable.

**Mr. Harris:** Second, on the process, involving women in the process—the companion resolution, by the way, as you say, does not do anything to involve women in the process or to guarantee women's equality in the process.

**Ms. Pepino:** Yes.

**Mr. Harris:** If we are going to get into process, and I am sure this committee is, we are going to have to deal with that as well, because one of the ways to amend the Constitution is for an amendment to be initiated by a Legislature or the Senate or the House of Commons and then circulated, and if the required number of provinces agree, that is it. That still does not address the whole process issue we want to deal with, and I am sure native peoples would have problems similar to those that women's organizations do in the process.

I would like to ask you specifically: If women's groups were to be involved other than through their elected representatives, which has not put too many women at the table historically so far, and the government of Canada or Ontario were to say, "We want to involve women at every stage," as you have suggested, who do we go to; is it the Canadian Advisory Council on the Status of Women? If we said, "Look, you are at the table and you are an equal partner in whatever



this process is"? You have not got specific on how it is going to be done. You have just said you want to be involved. Is that the group?

**Ms. Pepino:** The Canadian Advisory Council on the Status of Women could certainly be one of the groups at the federal level. That in fact is our mandate and role already. We comment on existing legislation and on initiatives of the government, as well as suggesting new initiatives to it. You will note the detailed sections of our brief speaking very specifically to the appointment of Supreme Court of Canada justices. We have asked for a specific, formalized role in commenting on those nominations and bringing names forward, as I can advise you the federal government has invited us to do in the past.

With regard to federal judicial appointments, the council has been invited by the federal government to make nominations. That, under the terms of the Meech Lake accord, would be absolutely shut off, so an existing practice would be foreclosed to women. There could be a number of groups. I am not going to be particularly helpful to you in this regard because the council did not wish to suggest a specific or best method of ensuring the kind of procedural guarantees we had looked at.

Rather, what we hoped to do was to establish a number of principles that could be applicable in each individual province, representing and recognizing their differences. I am aware, for example, that this province has traditionally had an advisory group, so-called, on intergovernmental affairs. This province may choose to include a formalized representation from provincial women within it. You may choose to call on ongoing appointments. You may choose to bring to the table the Ontario Advisory Council on Women's Issues. It could be in any one of a number of ways.

**Mr. Harris:** Can I?

**Ms. Pepino:** Certainly.

**Mr. Harris:** The difficulty I have is that perhaps it has not been so important because none of the women's groups have had any power, so there is no big deal attached to it.

**Ms. Pepino:** That is right.

**Mr. Harris:** I do not say that facetiously.

**Ms. Pepino:** No, I recognize our concerns have been disposable.

**Mr. Harris:** Now we are saying women have to be involved and we must give them some power.

**Ms. Pepino:** Yes.

**Mr. Harris:** I agree with you. I know that as native groups have been involved—or at least I am told—when they actually were to be given some say—it has sort of been taken away now, it appears—then the great difficulty was, who is going to speak for the native peoples?

**Ms. Pepino:** that is right.

**Mr. Harris:** You are asking for some power. Are we going to get into difficulties? A difficulty I have with you and your group, and with the Ontario advisory council, is that you are appointed by order in council, which in essence is the Prime Minister.

**Ms. Pepino:** Yes.

**Mr. Harris:** In Ontario, it is the Premier. If those two guys can exercise the same control that they can over their members, what is the point of having you involved?

**Ms. Pepino:** I understand that and it is for that reason as well that we did not wish to identify a specific process. I think it is clear from the example of both the federal advisory council and the provincial advisory council—

**Mr. Harris:** I have not seen them ever be able to have that control, but I—

**Ms. Pepino:** Thank you very much.

**Mr. Harris:** I did not want to—

**Ms. Pepino:** It was the Canadian advisory council order-in-council appointees in the main who broke ranks and broke silence and refused to be silenced in 1981 and 1982. I made the point that all of the existing members of the Canadian advisory council are order-in-council appointees of the present federal government, and yet you have our brief.

**Mr. Harris:** Yes.

**Ms. Pepino:** Having said that, I think of paramount importance is that there be an opportunity for women's groups, including the two advisory councils, to have input. If in this province, for example, it is by way of ensuring that there is consultation, perhaps through hearings like this, on an agenda that this particular province intends to bring forward for constitutional renewal, then that might be an appropriate way. I do believe that we cannot substitute particular advisory groups or advice for the democratic process. We are only asking that the democratic process be exercised in a democratic and open fashion. I cannot be of any further help to you in that regard.

**Mr. Harris:** I am going to pass on to the others to take their turn.

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**Mr. Allen:** First, I want to express my appreciation of the comprehensiveness of the brief and the detail in it. I think it is extremely well done and I want to compliment you on that.

The first question I want to ask really follows up from the good questions that Mr. Harris just put to you. I guess one would say, or would you say, that if women were adequately represented in the legislatures and Parliament of the nation and therefore, on the various committees and decision-making bodies related thereto, there would be no need for the kind of special input that you are now suggesting.

Is that the case or not? Or is there some other purpose to be found in your proposal?

**Ms. Pepino:** Through you, Mr. Chairman, to the questioner, Mr. Allen, we would only wish. I frankly have some hope—I am an optimist and I believe that we are working to that goal, but at present rates, I believe it is somewhere into the year 2080 when we would come close to achieving that kind of representation.

The second point I would make is that, within our democratic system of party politics—and the evidence frankly, is brought to you again and adverted to by Mary Eberts in her brief, and I sat in rooms and I sat in that special joint committee hearing room in Ottawa last summer and I saw it—women who are part of partisan politics, and those circumstances where the numbers are small, before we get to what I have termed “critical mass” where they are free to be women first and party members second—we are not at that point and I think it would be quite some time before we are at that point, if ever—can effectively be silenced through party loyalty, through the kinds of things that are appropriate in party politics and in a governmental system that includes a government and opposition.

Cabinet solidarity is important. Party loyalty is important. That has the effect, in so many of these circumstances, of silencing women who are at the table. That, in my judgement, happened in 1981. That has happened, with only two exceptions, with regard to the discussion on the Meech Lake accord.

So, in my submission, it is not sufficient. The other point perhaps I could make here, although it is in part in response to Mr. Harris's question, even then I do not believe it is sufficient to leave the process untouched, because the process includes unseemly haste to a decision, unseemly haste to ratification, and if we are lucky, we can pry out some consultation that has been predestined in this result.

It is that process alone that I think so many Canadians and so many people who have come to this committee have found offensive and frankly, a charade. It is that, as well, which must be changed, in our submission. As part of those changes, it would give all women and all equality seekers, and all those interested in constitutional renewal, an opportunity to come to the table.

I think the pace of constitutional change must be slowed down. This is not simply a piece of legislation.

**Mr. Allen:** I certainly agree with the latter point and most of our committee members have expressed a lot of concern and that is on the record, around that whole matter, the process and speed and haste.

I do not have any problem with structures which allow as much access as we possibly need in these circumstances, to get it right. I certainly have no problem with, if you like, affirmative action measures which make certain that women's organizations and their spokespersons are there and heard in the councils, committees, etc.

What I am not quite sure whether I hear you asking, and what I think one or two groups have suggested, is that some amendment to the Constitution be made to put in place actually, for example, women's formal representation through national bodies, on structures that would be part of a decision-making or recommending process with regard to the appointment of Supreme Court judges, for example.

In other words, are you asking or suggesting through your remarks some constitutionalizing of that presence as distinct from major participation in the lead-up processes?

If I can just say that the background of my concern is of course, the kind of response that one anticipates getting, that women become formally written into the Constitution in a way that men as men are not, notwithstanding the power that men have in the system on a de facto basis, if you see my distinction. I am just wondering where you go on that.

**Ms. Pepino:** The council has not specifically come up with a recommendation as to whether women's voices should be constitutionalized or merely institutionalized. I believe I would be safe in saying, however, that if there was a constitutional guarantee, that would be ideal. That is what we are asking for, for charter rights and for equality rights. We have made it clear, however, that we would like formalized, certainly with regard to Senate reform, whatever the eventual system may shake down to be, and certainly with regard to Supreme Court of Canada judges'



decisions that there be a formalized structure put in place to incorporate the ability of women to have that input. Under the Meech Lake accord, we have found ourselves losing a right of input, because that right has not been enshrined in any legislation or Constitution.

I hesitate to say specifically that it must be constitutionalized. I do believe that there may be other ways of accomplishing it, but if it can be done carefully, carefully drafted with input as to the language, if it was done at a pace that permitted everyone to have looked nine ways to the centre to ensure that there would be no impact on any of the other constitutional goals and purposes, then yes, I think that would certainly be acceptable.

I am not being helpful with you because I cannot say the council has said this is preferable to that, but our goal is to ensure that they are enshrined in some fashion. If that can be done through a constitutional amendment without damage being done to the remainder of the document, I certainly think that would be the best.

**Mr. Allen:** Let me say I appreciate your answer the more for not being tight and quick.

Could I ask you, why is it necessary to restate section 36 vis-à-vis the application terms of reference of spending power that is already in the Constitution?

**Ms. Pepino:** To restate it?

**Mr. Allen:** Under your spending power comments, you said that among the items that you would want changed in section 7 was that section 36 of the 1982 document, the Constitution Act of 1982, which spells out the equalization and regional disparity principles, should be written into section 7 concerning the spending power. What I am asking you is, why is that necessary since it is already a fundamental and clear part of the statement of principle that kind of equalization shall take place in the Constitution Act of 1982?

**Ms. Pepino:** Part of that had to do, as I understand it—and here is where I have to restate that I am not a constitutional expert. My understanding of that specific recommendation by the legal experts with whom we consulted had to do with the issue that the charter does not necessarily flow back into the 1867 act, whereas section 7 was one of those which was intended to get set up in a hierarchy of rights. As I understand it, the belief was that it would be a clear intention to ensure that, first of all, that there be equality for all groups and, second, to deal with this entire issue of setting a national standard, if I could call

it that, where there would not be the opportunity to the same degree as we believe the existing wording would permit for significant regional disparity.

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**Mr. Offer:** Thank you very much for your presentation. I especially appreciate the comments with respect to Mr. Harris's question on the companion resolution. I think that is extremely important, indeed, in terms as to how you characterized it. I glean from your response that you are taking a look at what the purpose is, the object, for this companion resolution.

**Ms. Pepino:** What would it accomplish and when.

**Mr. Offer:** Right. If it is to be an amendment, well, just call it that and nothing else.

**Ms. Pepino:** Yes.

**Mr. Offer:** I would like to carry on in another aspect in a similar field, something you just touched on in your presentation, and that is the whole question surrounding court reference. I have taken a look and I have not seen anything in the presentation by the advisory council on the whole question of court reference, but you will be aware that many groups have come before us saying there should be a court reference. Again, there are questions as to what the object is, what it will accomplish, how it is to be phrased, very much like your response on the companion resolution.

I wonder if you can share with us your thoughts with respect to the practicality, almost, of a court reference, keeping in mind its purpose, intention, what it will accomplish and how, and will it accomplish it in any case.

**Ms. Pepino:** Its purpose would be to prove who is right in this debate. I would love to be proven wrong because if I am proven wrong, if the women of Canada and their submissions that there is concern are proven wrong—the courts say, “There is no concern. Charter rights are not affected”—then we have a Supreme Court of Canada precedent stating that. It is one of the few times in my life that I would love to be proven wrong.

If we are proven right and the courts say, “Yes, charter rights are affected detrimentally,” there we are. All of those fears, concerns, what we believe are reasonable apprehensions will be proven right. You will note that one of the conditions I said, of course, was before ratification, so that we are not having to unwind something and go back and fix something that could easily be fixed right now by simply not

completing it for a while until we find out if it is right.

I noted with interest the knitting example that was given to you, and the unravelling. It was perfect.

That was the purpose. Are we right or are we wrong? If we are right, that is a more difficult answer because that means we then have to continue on with our submissions and our lobbies and our write-in campaigns and all of those things the women's movement has done in the past with some success. It will be exhausting, but it will be done, because then we will have judicial right behind us.

If we are wrong, that too is delightful because then we have a precedent against which no further judicial interpretation could be made to jeopardize women's rights.

As to how it is done at the federal level—and the council passed a resolution in September 1987 very clearly stating there would be certain conditions on it. The first, of course, would be that the reference should be made prior to ratification because of the difficulties in unravelling something that is half done in some of the provinces.

The second is that there be full consultation, as I understand there was in 1981-82 with women's groups and concerned equality seekers.

As to the language, it is easy enough to push off a question and to get an answer, but if the answer turns out to be bad for the referring legislature, if it turns out to be bad for the referrer, they can say, "Well, that is not the question that we needed to ask in any event." We would want to have input on the question and we would want to be guaranteed that there be some standing.

I recognize the difficulty if you have 147 people lined up requesting the ability for standing, but I can assure this committee that there has been sufficient consultation across this country and through this province of the various women's groups: the Ad Hoc Committee of Women on the Constitution, the Women's Legal Education and Action Fund, the councils on the status of women, both federal and provincial, and two or three others such as the Business and Professional Women's Associations, the National Association of Women and the Law. I believe there could be easily put together a group of four, five or six women's groups only, which would be justified and required in our scenario to be given standing to avoid that potentiality.

It is not without administrative difficulties and it is not, I suppose, without its own inherent

risks, but frankly, sitting here, I would rather run those risks than the risks of having the charter affected as we believe it will be by having Meech Lake ratified in its present form untested and unamended. Our first goal, of course, is amendment. Failing that, we believe that it should not be put into final form until it has been tested.

**Mr. Offer:** If I might carry on with that, just for a moment, to my mind, if there were to be a court reference, the object for which you would have that is, as you say, who is right and who is wrong, but it would be for some clarity, for some certainty as to how one matter affects another. I just cannot leave it at that. Most deputations leave it at that. I want to take that next step: Would those purposes or could those purposes be accomplished?

When we take a look at some of the past court references, there was a focus, there was a specificity, a "raison" for the reference. There was in the Anti-Inflation Board case, and certainly in the type of case of the commission of rent review or at the egg marketing board. Even in 1981 and 1982 there was a more specific focus as opposed to saying to a court, "Tell us generally how this affects that." I am not certain that a court would even entertain that, personally, number one; and number two, even if you tried to bring a focus using a fact situation—

**Ms. Pepino:** You might leave out the flexibility, yes.

**Mr. Offer:** How many variables are there in court situations? What reliance is there? That is something I have had a terrible time grappling with, and I am wondering if you can share with me, in dealing again with the purpose for which a court reference would be instituted, and keeping in mind the very clear realities of what would be required, whether that purpose is ever achievable or whether we have to do it as we are doing it with respect to the Charter of Rights: case by case, fact situation by fact situation?

**Ms. Pepino:** It is because of the technical problems that Mr. Offer raises that the women of Canada have said our foremost goal is to amend the document. It is that simple. I speak to a reference only reluctantly and as very much a second- or third-best solution, as a fallback solution. I hear what you are saying. It is discussion that we certainly have had around the table and on which we have sought guidance, and we are aware of that.

But the problem is that until we have sat down, as I understand happened, although I was not at that table in 1981 and 1982, and actually attempted to draft the questions, we cannot



guarantee that it cannot be done. So because we have not been given that opportunity to say it cannot be done, we believe that with goodwill and good minds, both of which we are willing to offer, there is some potential. But it is in recognition of those pitfalls that we have said that, in our judgement, the only way Meech Lake can be dealt with appropriately is by amending it.

**Mr. Offer:** Thank you very much.

**Mr. Chairman:** Just in closing, could I ask you one question? You mentioned at the beginning in your comments in terms of your council that the brief that was presented represented the views of the members of council, and that meant both francophones and anglophones.

**Ms. Pepino:** Yes.

**Mr. Chairman:** One of the dilemmas for us as a legislative committee for a specific province—in this case, Ontario—is that we are being asked to deal with something which, whatever other importance it has, certainly is very important to people in Quebec and to French-speaking Canadians. There have been, not before our committee but in other forums, different viewpoints expressed by, in the one case, the *Fédération des femmes du Québec*.

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I am not saying that just because they may have expressed a different viewpoint, therefore they are correct. The point of my question is, have you sensed in your own discussions with francophone women, whether your colleagues on the council or perhaps through other contacts, fundamental differences in approach? Are these nuances? Is there a concern there about what this might do to the charter? I think one point that has been raised with us is a certain feeling that everybody should come together, that this has been negotiated and the Premier of Quebec feels that this is right and, therefore, within Quebec, should be done. Are there nuances? Are there some things there that you stopped and thought about, or in the council did everybody come together and really say, "No, look, there are some fundamental problems here that we have to address?"

**Ms. Pepino:** A couple of comments in that regard. First of all, with regard to the position of the *Fédération des femmes du Québec*, I just stress that they have not said that the Meech Lake accord should not be amended. They have supported an amendment. They have very clearly stated for the record that they would accept an amendment to section 28 to ensure that their

English-speaking sisters beyond Quebec and within Quebec are not put at risk.

First, I think it is part of the misrepresentation, the big lie, to say that francophone women resist an amendment to the Meech Lake accord. Certainly the FFQ does not.

Second, turning specifically to the council, you may have read some history on the council. We are at any given time in our history—and I have done some reading about the history—anything but a homogeneous or particularly bland group. Yes, of course, there was discussion; there were heated discussions. We were copying the people who were drafting the Meech Lake accord: we had all-night sessions. But I can say to you in full confidence that the brief that is before you today and the submissions I have made are supported by every member of council. The concerns that were raised by the francophone women from Quebec were those that were not the legal argument but the political argument, the big lie: If we touch this fragile document, if we touch this fragile agreement, it will unravel. Yet somehow this fragile agreement has become a big stick with which the women of Canada are being laid about the head and shoulders.

When it was very clear that it was the council's goal to achieve protection for equality-seeking groups throughout Canada without unravelling the political deal and that there were ways we believed it could be done, we are saying, I suppose, that we will, to this extent, take the first ministers at their word. They said: "We did not intend to affect charter rights. Trust us." Our answer to them, I suppose, is, "If you trust one another and if your goal is equality rights and not affecting the charter in any detrimental fashion, then presumably, gentlemen, you could go back to the table and make that agreement without reopening the Meech Lake accord." To that extent, I suppose we are willing to take them at their word and to indicate that they are deserving of our trust.

I simply do not accept the fact that if the political will were there and if the fathers of the new Confederation meant what they say when they say to us, "We did not intend to affect the charter of rights," they could get together yet again and not reopen any other aspect of the deal. That is what we are asking them to do. It is because of that—because the political reality of having Quebec finally in the Confederation is so important to all Canadians, because our group is a federal group and we believe strongly in federalism, in the recognition of Quebec as a distinct society and in the recognition of duality

throughout this country—that we say you do not have to unravel the deal or have this fragile thing fall apart simply to give us surety with what we believed was your guarantee all along or what you say was your guarantee all along. So, from that point of view, I am sorry it is a long answer, but I can say to you that the resolutions and the brief I have brought before you today are the council position.

**Mr. Chairman:** Thank you very much. I appreciate your making that even more clear. That is the way I read you at the beginning, but it is something which comes up from time to time. I was not intending to suggest that the Fédération had said, “Look, we think Meech Lake is perfect,” but I think it is important for us when, as in your case, you are a member of a federal organization that does have both francophone and anglophone members, that we recognize what this brief is and what has been stated there.

**Ms. Pepino:** Thank you, Mr. Chairman. I thank you too for your recognition that the Fédération had not taken the position that it wanted to see the Meech Lake accord left untouched. That, unfortunately, has not been necessarily part of the public record. Indeed, what instead we have been attempting to overcome is the absolute misrepresentation that women in Quebec are unwilling to consider any change.

**Mr. Chairman:** Thank you very much for coming in this morning and, I guess, into the early afternoon. We very much appreciate your statement, the document you have left with us and your answers to our questions.

**Ms. Pepino:** Thank you, Mr. Chairman, and members of the committee.

The committee recessed at 12:36 p.m.



## AFTERNOON SITTING

The committee resumed at 3:39 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD  
(continued)

**Mr. Chairman:** Good afternoon. I would like to call our first witness, Philippe LeBlanc, if he would be good enough to come forward, representing the United Church of Canada. It is a pleasure to have him here. I should state for the record that Mr. LeBlanc and I worked together a number of years ago. He has been very involved in issues related to human rights, multiculturalism and citizenship and is a fountain of sage advice in all those areas.

We are very glad to have you here this afternoon, and why do I not just let you proceed with your presentation and we will follow up with questions?

UNITED CHURCH OF CANADA

**Mr. LeBlanc:** Thank you very much, Mr. Chairman. The United Church of Canada welcomes this opportunity to bring its perspective to the debate on the Meech Lake accord. On the basis of its tradition of participating in shaping communities and in working towards a just and inclusive society, the church would like to offer its comments to ensure that the constitutional process will lead to a better society for all.

I have three items I would like to raise with you. I understand that copies of my brief have been circulated to the members of this committee. The first item I would like to deal with is Quebec's acceptance of the Canadian Constitution. The United Church of Canada welcomes Quebec's inclusion in the circle of Confederation. The Meech Lake accord is intended to bring that province into full and active participation in the Canadian Constitution, which was adopted in 1982 without Quebec's consent.

The accord's proposed section 2 of the Constitution Act recognizes the duality of our country and that the existence of both French-speaking Canadians and English-speaking Canadians "constitutes a fundamental characteristic of Canada." The accord also recognizes that "Quebec constitutes within Canada a distinct society."

The United Church of Canada rejoices over this recognition. However, we do realize that the "distinct society" clause has raised some concerns among groups such as aboriginal peoples,

women and francophones outside of Quebec. There is a concern, for example, among francophones outside Quebec that the language in subsection 2(2) should say that the role of the Parliament of Canada and provincial legislatures is not only to preserve but also to promote the "fundamental characteristic of Canada" referred to in paragraph 2(1)(a) of the accord. It is important that Quebec be a full participant in the life of Canada at all levels, and we can only celebrate Quebec's accession to full partnership in the Canadian Constitution.

The second item I would like to deal with is the call of aboriginal peoples for more participation in this process. The United Church of Canada supports the call of aboriginal peoples for justice and fair treatment in the constitutional process. The church appeared before the federal special joint committee on the Constitution of Canada in 1980 and declared:

"Section 24"—or another section; we were talking of the draft document at the time—"of the proposed Constitution should set forth, in detail, guarantees with respect to the aboriginal and treaty rights of native peoples. Representatives of aboriginal nations should be full members of all future constitutional talks."

In his own presentation to the special joint committee on the 1987 constitutional accord, Georges Erasmus, speaking on behalf of the Assembly of First Nations, said:

"I must remind you that the Assembly of First Nations is on record as stating its support for Quebec's aspirations to be a functioning partner in Confederation. However, two points must be made with regard to our support: First, the circle of Confederation is not complete simply with the entry or re-entry of Quebec alone into the Canadian family. The circle will only be complete when the rights of the aboriginal peoples of Canada are unequivocally expressed and protected in the Constitution and, when the relationship between the first nations and the rest of Canada is respected.

"Secondly, it is our strongly held position that any arrangements or agreements struck by the federal and provincial governments must not, implicitly or intentionally, diminish or prejudice the rights or status of the first nations of Canada, and I cannot stress that strongly enough."

The United Church of Canada supports the call of aboriginal peoples for renewed constitutional meetings to ensure that all the founding nations,

including the first ones, the aboriginal peoples, are fully part of the Constitution. The United Church of Canada deeply regrets that the first founding peoples are not yet included. We urge the premiers and the Prime Minister to delay the process of ratifying the accord until such time as the aboriginal nations have come into the circle of Confederation.

It is unconscionable that the second and third founding nations should come to a constitutional agreement that includes only themselves, while the first nations are left out of the circle. The United Church of Canada is committed to stand in solidarity with aboriginal people until their rights are fully enshrined in the Canadian Constitution.

We are suggesting some amendments to the Meech Lake accord, and I will deal here with two key issues. First, the Meech Lake accord needs to be amended to include people, especially women and the disabled, who are not explicitly assured that the rights guaranteed them in the Canadian Charter of Rights and Freedoms will not be overridden by Meech Lake.

A number of women's groups have expressed concern that the "distinct society" clause in reference to Quebec may allow that province to override such guarantees in the charter as equality before the law on the basis of sex, found in section 15. They are also concerned over the implications of the inclusion in the accord, at the last minute, of section 16, which affirms that the charter sections related to native and multicultural groups, sections 25 and 27 of the charter, are not subject to the "distinct society" clause.

Does this mean that the "distinct society" clause of the Meech Lake accord would supersede the Charter of Rights and Freedoms in dealing with women's rights under sections 15 and 28? Why were only native and multicultural groups singled out in the accord as an afterthought? On the basis of these concerns, we recommend that section 16 of the Meech Lake accord be strengthened and amended to ensure that none of the rights of the charter is affected.

Second, we further recommend that the proposed subsection 106A(1) of the accord be amended. This section states that the government of Canada should give reasonable compensation to a province that chooses not to participate in a national cost-shared program "if the province carries on a program or initiative that is compatible with the national objectives." Apparently, the original draft of the clause included the words "national standards" rather than "national objectives."

Our concern is twofold: (1) of equal justice for all peoples across the country; and (2) that individuals in some parts of Canada might not be provided with the same level of social services as those in other provinces. For example, a provincial government could receive federal moneys aimed at eliminating poverty which it would spend on job creation through the private sector rather than on direct services to the poor.

We recommend therefore that the word "objectives" in the accord should be replaced with the original word "standards." This replacement would still allow provinces flexibility in developing their own programs but would ensure that provincial programs meet national standards and that federal grants will be spent equitably and in a consistent manner.

I thank you, Mr. Chairman and members of the committee, for your attention. If there are any questions, I would be pleased to respond to them.

**Mr. Chairman:** Thank you very much for the submission. In terms of the United Church of Canada, is this a presentation of the Ontario United Church or is this the full body, just to be clear on its origin?

**Mr. LeBlanc:** Part of the answer is in the second paragraph, which I skipped actually, which states that the General Council of the United Church of Canada has assessed a number of issues and developments in society and has addressed a number of issues—for example, French-English relations, minorities, disabled women—and this would represent general council policy, policies that have been adopted, flowing from those policies.

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**Mr. Chairman:** Thank you. I will turn now to questions.

**Mr. Allen:** Mr. Chairman, like yourself, I am very pleased. Although I have not worked with Mr. LeBlanc, I have had some very close associations with various of the national church officers on social issues, programs and problems, and I am delighted that the United Church is here giving us its help with the difficult problem we have in this committee with the Meech Lake accord.

Perhaps just a fairly straight and direct question to you. I do gather that your statement is that the Meech Lake accord should not be ratified until we have completed the aboriginal round and the whole question of aboriginal self-government is settled in Canada.

**Mr. LeBlanc:** That certainly is the gist of our recommendation. They have not been part of



this. The constitutional talks with natives should be reopened, and the Meech Lake agreement should be delayed until this can take place.

**Mr. Allen:** Does that mean you have no confidence that round will be reopened, and that what has happened here was simply a move towards another phase of constitutional reform directed at the problem of Quebec in the federation, and you doubt very much, however, that the country will come back shortly after the completion of that discussion and the first agenda items to the question of aboriginal rights?

**Mr. LeBlanc:** I think it is more a question that we, as second and third nations, are hammering out an agreement among ourselves, and yet we have not been able to hammer out an agreement with the first nations. The aboriginal groups feel very strongly that the solution should be sought for their issues, and then we can resolve the issues of the second and third nations, really. The suggestion we are making is that we try to resolve the first nations' issues, bring them into the picture.

**Mr. Allen:** I understand the moral urgency, and I do not think there is probably any member of this committee who would not agree with you on that point. I guess the consequential question is are you prepared to accept the political heat that comes with not solving other problems that might be more easily resolved while we get on with a longer-term agenda, which obviously is the one that you propose?

**Mr. LeBlanc:** I am not certain that we will be getting the political heat.

**Mr. Allen:** Presumably the United Church has to exist in all parts of Canada.

**Mr. LeBlanc:** Yes.

**Mr. Allen:** You exist in Quebec. You must have some concern about possible consequences in Quebec of the Meech Lake accord's not being ratified or potentially the problem of the place of Quebec in Confederation in the wake of the 1982 settlement's not being resolved and going unresolved for, I do not know how long it is going to take. If we have Mr. Vander Zalm, Mr. Getty and Mr. Devine in place in western Canada for the next decade, then we obviously will not be able to resolve the aboriginal question for the next decade; therefore, we will not be able to resolve this question for the next decade.

What I am trying to get from you is a sense of what kind of tradeoffs you are prepared to make down the road in order to maintain the moral protest. As I say, I fundamentally agree with you, but there are lots of things that we address

politically that are easier to solve than others. We run a lot of little bills through this place that are not very difficult to pass, and then we have a few that take us a lot longer to deal with and which are of more moral consequence than the little ones. Sometimes we have to get the little ones out of the way just because there are a lot of little nagging problems out there that have to be solved, and we just do that; but it does take away from our addressing the bigger issues, there is no question about that.

**Mr. LeBlanc:** I think in the brief it is stated very clearly that we certainly welcome Quebec's inclusion in the full circle of Confederation. That is the first statement that I made. On ethical, moral and social justice grounds, we feel very strongly about the second one. How one reconciles that in the political arena is another issue. I certainly understand the questions that you are raising, but we feel that those two issues are both of paramount importance and we are in solidarity with the aboriginal peoples on that question.

They feel that in the four meetings that they had, and especially in the last one where they were claiming to be also a distinct society—and I have quoted some of Georges Erasmus' statements at the end—the premiers and the Prime Minister could not accept the idea of an undefined self-government or distinct society for native peoples; but on this one we seem to be going ahead, and I am quoting from their presentations.

We probably have the luxury or the liberty or whatever of putting forward both, which is celebrating Quebec's inclusion in the Confederation but also reminding society and ourselves of the second one, the fact that the first nations are not part of this.

**Mr. Allen:** Can I just briefly ask you about the spending power subsection, 106A(1)? My sense is that the word "standards" could be used in as limited a way as the people who object to "objectives" think "objectives" could be used. The word "standards" could, for example, quite simply apply to a national program that required that the administration be done in certain ways, meeting certain elements of fiscal and economical standards, manner of administration and style of delivery, and really, perhaps, never get around to really substantial content. What I would like to know is, what is it that has persuaded you that "standards" has more content than "objectives?"

**Mr. LeBlanc:** The example that is usually given is the one of day care. If it is national "objectives," and they could be stated in fairly vague terms, then federal funds could be used for

a variety of services; whereas if there are national "standards" that are set, for example for day care, that must be met by provincial programs, then we would not have uniform day care across the country but we would have a set of national standards below which programs should not fall.

So, that is where I would see the distinction, as I understand "standards" and as I understand "objectives." The objective could be to provide service to children in Canada, whereas the standard could be that day care facilities and services must meet certain standards. It is similar to the Canada assistance plan. There are national standards. With medicare there are national standards. That means that, whether you live in Newfoundland, British Columbia or Ontario, there are standards that must be met. That is my view of the distinction, and I think it is a very important one.

**Mr. Allen:** It is an important distinction.

**Mr. LeBlanc:** Yes.

**Mr. Allen:** All right. I would suggest that perhaps you contact the Canadian Council on Social Development and ask it for a copy of the paper that it delivered to us in which it articulated a view of "objectives", which was that the objective of a child-care program in Canada would be a national program, universally accessible and nonprofit in orientation, incorporating the international agreements that Canada is bound to by international treaty and other legal commitments that Canada has with respect to children and their status in the community. I would not want to close my door too quickly on this issue, but I refer you to that because I think you will find that document very interesting.

**Mr. LeBlanc:** Thank you. I do have the Hansard so I will look it up.

**Mr. Chairman:** I think we were in Ottawa the week of March 21. We found their description of the four categories, of some length, describing objectives which, as Mr. Allen said, put another perspective on the issue.

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**Mr. Offer:** Thank you very much for your presentation. My questions are carrying on very directly from those of Dr. Allen.

In the beginning of your presentation, you bring home very strongly the necessity of Quebec's inclusion in the circle of Confederation, and then the presentation goes on to talk about the requirement for justice and fair treatment of the aboriginal peoples. We have heard the presentation and very, very strong arguments.

The presentation then seems to say you cannot have or ought not to have or should not have one without the other; that if there is not going to be any meeting of the aboriginal concerns, then the Meech Lake accord ought not to be ratified and, as such, the necessary impact might very well be that the circle of Confederation would not be completed.

I would like to get your thoughts on this. Could it not be argued that to complete the circle of Confederation with Quebec would be a very important and very necessary first step in meeting the need for justice and fair treatment of the aboriginal peoples? If Quebec were not part of that circle of Confederation, really what chance is there that the country as a whole, through amendment of the Constitution, would meet the question of justice and fair treatment of the aboriginal people?

**Mr. LeBlanc:** I think there is a feeling, and this is represented in our paper, that once the Meech Lake accord is ratified we will have accomplished, or we would feel in our country that now we have solved one problem, so let us—brownie points for us—and before we would reopen the discussions to include the first peoples it may be a very long time down the road.

The reason for recommending a delay is that we are in the process of looking at how we organize ourselves as a Confederation, as a country; why not try to deal with the two outstanding issues at this point in time? There are no plans, as far as I know, to reopen the Constitution in the near future to bring the first nations into the picture. This is the opportune moment to do it.

**Mr. Offer:** I understand what you are saying. My question to you would be that the mere fact that we do complete that circle of Confederation with Quebec inside, and that committees such as this across this country are looking into this very question with respect to constitutional reform and constitutional process, in fact—I guess I ask for your comments—by ratifying this agreement, which calls for annual constitutional conferences, which has precipitated committees across this country which are dealing with the vexing problem of process, we may be opening the door as never before to finally meet the whole question of the aboriginal concerns.

I was just wondering if by projecting we are really closing the door in a very, very—

**Mr. LeBlanc:** Our recommendation is not to reject, it is to merely delay. We support the inclusion of Quebec, and our recommendation is



to delay so that this process could take place at this same point in time.

**Mr. Offer:** I see, thank you. In your presentation, you talk about your concerns, "one, of equal justice for all across the country, and two, that individuals in some parts of Canada might not be provided with the same level of social services as those in other provinces." That is on page 6.

We have heard through questions from members and through presentations that services are not equal across this land, that there is a wide variance in the types of services and that they are very much reflective of the area and the province where these services are provided. My question to you is, on the particular section 106A, the spending provision, do you not see this as giving the provinces a flexibility to meet and to grapple with the unique characteristics of the province? As such, it would be that the wording of section 106A, might very well have as its impact a very proper application of particular services giving it a flexibility which was not there before.

**Mr. LeBlanc:** Yes, and I agree with you. Actually, the conclusion of the paragraph is that even if the words were changed, it is hoped the province would not lose that flexibility. The concern, and Mr. Allen was mentioning that the Canadian Council on Social Development has come up with a different definition of objectives, is that if one uses the English language, I think "standard" and "objectives" have very different implications.

We consider that the word "standards" would indicate that, at least, there are certain standards below which national programs could not fall, whether it is day care or other programs. Hopefully, the flexibility would be there in terms of numbers, in terms of quality overall, but that the standards would be the same if they were using federal money. I think it is a semantic discussion and I am sure that this could go on. But we feel strongly that objectives can be very vague and very general, whereas a standard is something that one can relate to.

**Mr. Offer:** Yes. I guess my thought has always been that with respect to whatever word is going to be used, because we are now: (1) entrenching in the Constitution the right of the federal government to enter into shared-cost programs, an area of exclusive jurisdiction on one hand; and (2) the right of the province to opt out with compensation as long as they carry on; that when all is said and done, it is going to allow, to my mind, the different interest groups, when there are these national shared-cost programs, to

come to the provincial government, not only the federal government, but also to the provincial government and say: "Listen, this is the national program. We think that it is good and we think that you should implement it", or secondly, "We think you should opt out because these are the very particular characteristics of this province and you now have the option with dollars, with compensation, to do so".

I am wondering if you can comment on whether to your mind it would give to those particular social groups and social agencies a new place, specifically the province, to carry forward their very particular and very genuine worthwhile concerns?

**Mr. LeBlanc:** If we are talking of the Constitution of this country, we know that down the line there could be some groups, as you suggest, who would take the governments to court, for example, and the debate would be around whether the province is meeting the objective or the standard.

We are talking of a constitutional document here. Language then becomes very important because down the road it is interpreted in the courts. We know since 1982 the decisions that have been made in the courts really usually revolve around one or two words. So words may be semantics but they become very important. In a sense that is the difficulty I would see because in my opinion, it is much easier for a province to meet an objective than to meet a standard. And once you set standards then we know what we are talking about. So that is the concern.

**Mr. Offer:** Thank you.

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**Mr. Eves:** I want to thank you for, I think, a very clear and concise presentation. I think that all the points you have made in it are very valid ones and ones which our committee should be addressing.

I want to key, though, on the two suggestions you have with section 16 of the accord with respect to protecting everyone's rights under the Charter of Rights and Freedoms and also with respect to the treatment of the aboriginal peoples.

I, perhaps personally, would like to see some amendment, especially with respect to section 16 of the accord, as you would, to protect and make it unambiguous, if you will, that everybody's rights under the charter are protected, and that has been suggested to us by several witnesses.

On the other hand, though, we have had several witnesses who have also testified that, in fact, is done by the present wording even though it may be ambiguous.

Another solution short of amending clause 16 itself is to ask the Ontario Court of Appeal through way of reference with respect to this particular problem, whether or not, in fact, anybody's rights are derogated from or abrogated under section 16 of the charter. Would that be acceptable to you, assuming that we are unable to get any amendment to the actual language of the accord?

**Mr. LeBlanc:** It certainly would be helpful for future interpretation, really. It would probably satisfy some of the groups that have been raising this issue. I know when Gérald Beaudoin was here before you—I read it in Hansard—he, from his point of view, thought that it was all covered. But then it is when you come, with a specific case, before the Supreme Court or before courts that you realize that it is not covered. Our suggestion is that section be either amended or strengthened or if, for example, an opinion can be obtained from the Ontario courts to say that no, there is no problem, then this probably would help in allaying peoples' fears.

**Mr. Eves:** Thank you. With respect to aboriginal peoples, I feel very strongly, as do you, that their rights certainly have not been protected by the accord. In fact, they are not even acknowledged as being in the second round of constitutional talks. I understand there may be some discussions under way now that will, in fact, get them back into the constitutional arena.

However, there was a suggestion by one of the aboriginal groups that appeared before us—I think as they put it—I do not want to put words in their mouth—that dealt with the political reality and recognized the fact that they probably would not get the language of the accord amended per se. They were suggesting to this committee what, at that time, was a novel idea of a companion resolution which would, at least, get their item on the agenda for the next round of constitutional talks and would also, of course, deal with their inherent rights of self-government and other issues pertaining to aboriginal people. What do you think of that suggestion?

Actually, as I understand it, a companion resolution is really initiating an amendment to the accord which will have to go through all the legislatures of every province and, of course, have to go through the federal House of Commons. But at least it gets the ball rolling.

**Mr. LeBlanc:** I think one of the potential flaws in that is the possibility that the aboriginal peoples would not be involved in the constitutional process. In other words, this would be the potential flaw in that if this companion resolution

could come from the federal government as a resolution and they do ask to be involved in the first ministers' conferences relating to the Constitution as much as they are concerned. That is the flaw I would see. Now, I cannot speak for native peoples, but I could see the flaw legally on that basis.

**Mr. Eves:** That is a very valid point, but I am certainly not here making excuses on behalf of either the Prime Minister or any of the premiers, but, perhaps, that problem could be addressed simply in a statement by the Prime Minister and the premiers that they were prepared to include aboriginal people in their discussions.

**Mr. LeBlanc:** If they were to include in the companion resolution self-government, I do not think it would go very far. But that is another point.

**Mr. Eves:** Thank you.

**Mr. Chairman:** Just flowing along from section 16, one of the problems in the accord is in the relationship with the charter, this balancing of collective rights and individual rights.

Presumably, as Quebec looks at the definition of "distinct society" and one looks at the charter, the charter itself says some things are collective and some things are individual. This is not so much in terms of the United Church, but I think I am speaking here to your own background in the area of human rights, both internationally and within Canada.

One of the dilemmas is that one can accept that Quebec, being the only French-speaking province with the only French-speaking government, would want at certain times to take steps to protect what it saw as the existence of that French-speaking community, however you want to define that, and that might have implications—not necessarily—then for individual rights, or at least there is a concern about that.

Do you see that as a problem that just cannot be solved; or if there is a clash between a perceived collective right and an individual right, we must be very clear that individual rights take precedence; or is that not an issue that, in a sense, can be resolved, and there will always be a certain tension both within the charter and within the Canadian nation in terms of those two rights?

**Mr. LeBlanc:** There certainly has been a lot of debate about that issue. I am not certain that collective rights are protected under the charter. There is no question that the rights of individuals are protected under the charter. There are some clauses which speak of the multicultural nature of Canada, but that certainly does not protect the



collective rights of ethnocultural groups in Canada.

There is a statement about the aboriginal rights also, but one has to question whether it protects the collective rights of aboriginals in this country. The charter really protects the individuals of this country, so I am not certain of—

**Mr. Chairman:** So even in terms of the discussion of the language rights within the charter, the education rights and so on, you would see that really those are addressing an individual's right to education in French or English as opposed to—

**Mr. LeBlanc:** Yes, and they do protect the language rights of two collectivities in this country. There has been a lot of ink spilled on collective rights. I am not certain how a collectivity could appeal an infringement of rights.

**Mr. Chairman:** Is that, in your view, one of the basic problems that Quebec might have in accepting a charter override? There is perhaps a concern on its part that there might at some point be a conflict with something that it wanted to do in terms of language policy, for example, in the province that might conflict—

**Mr. LeBlanc:** If you are speaking of collective rights, you have to speak of the collective rights of French Canadians in Quebec, and really what we are talking about is an agreement which brings together provinces and the federal government. We are talking here of the authority of a duly elected government in Quebec. That is what the Constitution is all about. It does not necessarily protect the collectivity or collective rights in the exact sense of the word. So what Quebec wants as a government or a province, it can do. It is a collectivity that happens to have a government. It is institutions, it is educational, it is political and it is a code of law; so it is a collectivity in that sense, but it is a recognized province.

A collectivity would be women. Are women's rights per se protected in the charter as a collectivity?

**Mr. Chairman:** As opposed to as individuals.

**Mr. LeBlanc:** As opposed to individuals, yes. And what is that collectivity? There has been a debate going on at the United Nations about collective rights versus individual rights, and we come down to it, but our Constitution, our charter, protects individuals, I think.

1620

**Mr. Chairman:** I want to thank you very much on behalf of the committee for coming here

this afternoon and sharing the views of the United Church with us, as well as answering our questions on the different points.

I call upon our next witness, John Strecker, if he would be good enough to come forward. I think it is fair to say that you have come from the farthest point in Ontario to address the committee, from Kenora, I believe. We are very pleased that you could come today. I will let you go ahead and make your presentation and we will follow up with questions, if that is all right. Please be seated and welcome.

JOHN STRECKER

**Mr. Strecker:** Mr. Chairman, I just heard about this not quite two weeks ago, so whatever I have here, I did the best I could with, and I will answer your questions to the best of my ability.

**Mr. Chairman:** That is fine.

**Mr. Strecker:** This is my own opinion of the Meech Lake accord.

**Mr. Chairman:** We appreciate very much that during our hearings a number of private citizens have come forward with their own views, not necessarily with a particular organization. We do appreciate that. We ourselves are not experts in any sense either, so we look forward to your comments and questions.

**Mr. Strecker:** This is strictly my own opinion and viewpoint.

My name is John Strecker. I am a former dairy farmer from beautiful sunset country, Jaffray and Melick, on the outskirts of Kenora, Ontario. I have been asked by your group to voice my opinion on the Meech Lake accord.

The Meech Lake accord can sound the death knell for Canada as we know it. As I see it, this agreement could eventually lead to two countries with two different constitutions and two different languages, promoting two different and distinct sets of values.

The accord recognizes Quebec as a distinct society within Canada. What does this mean? No one really seems to know. It reads that the role of the Quebec Legislature is "to preserve and promote the distinct identity of Quebec," apparently to recognize the existence of French-speaking Canadians in Quebec as well as those elsewhere in Canada. It is also to represent English-speaking Canadians outside and inside Quebec. It is to recognize the unique culture and linguistic status of the province.

My question is, why stop there? What about our aboriginal people? History would seem to indicate that they were here long before any of us; yet they are not recognized as a distinct society.

In fact, some would argue they are not recognized, period. After all, they have been fighting for self-government for years, and that seems to be falling on deaf ears.

We have heard of the cases in Manitoba and Saskatchewan which proved the French are entitled to trials in their own language, even if they can understand English. Again, what about our aboriginal peoples?

I am from northwestern Ontario. I believe we have the largest aboriginal or native population in Canada. Three years ago, I had several native Indian parolees working for me on my farm. They could not understand why they were tried by a white judge and jury for crimes committed on their own reservations. They too would like to have been tried in their own language and by their own people. If the French have been given this consideration in Quebec, why can our natives not be treated in the same fashion, not only in Quebec but in Manitoba and Saskatchewan too?

When the Mulroney government took office, Quebec had not signed the constitutional accord. The Prime Minister hailed the Meech Lake accord as the agreement which brought Quebec into the family, but at what cost? Prime Minister Mulroney claims when he took office two Canadas were emerging, those Canadians who accepted the Constitution and those who had been left out. He says there is now one Canada, strong and united.

Given that fact, Quebec issued five ultimatums before agreeing to the deal. It would appear that province was given a little more to say in the wording of the agreement than any of the other provinces. Is this type of bullying Mr. Mulroney's idea of a binding, unifying spirit? The Prime Minister's kowtowing to Quebec gives weight to the argument that his drive for the deal was based largely on his determination to increase the Tories' standing in Quebec.

Quebec Premier Robert Bourassa got everything he asked for before signing: the "distinct society" clause, a Quebec veto on constitutional change, Quebec participation in the selection of Supreme Court judges, constitutional powers over immigration and a limitation on federal spending powers. I have already touched on why I am opposed to the "distinct society" clause: the fact that it gives Quebec special status. Now on to the other points.

Just why should Quebec have the power to veto any change? If we are so unified, why should there be such a need? Would we not want to agree on any change? As for the selection of Supreme Court judges, the accord would give the

provinces the power to select their own representatives for the court. Up until now, that has been a federal responsibility. If it is handed over to the provinces, who is to say their choices would have the interests of the whole country at heart? For example, what if a Quebec candidate had separatist leanings? That person would be placed in a position where he would be making decisions affecting the whole country, and the rest of us would have no say about it.

On to the immigration clause. Quebec asked that the provinces have control over the number of people coming into the province. It has not been said that the logical assumption would be that, in keeping with their distinct society and cultural philosophy, they would likely give preference to the immigrants who could blend in with more ease, namely, those who could speak French.

Finally, Quebec asked for a limitation of federal spending powers. In other words, if the provinces are not keen on the wording in a federal-provincial cost-sharing plan, they could change the wording to better suit themselves. The federal government would still hand over its share of the money, but the provinces would have the final say in how the money would be spent. That would naturally lead to the provinces vying for more and more power. Ten provinces, all power grabbing. Is that Mr. Mulroney's vision of a unified country?

As I mentioned earlier, I am from northwestern Ontario. Because of its proximity to Manitoba, people from my area have always felt a kinship with that province. Manitoba has long been considered one of the country's have-not provinces. It is one of the provinces which have been pushing for Senate reform, namely, a triple-E Senate: elected, effective and equal. Opponents of the Meech Lake accord have said there is no way Ontario and Quebec will ever be persuaded to accept a triple-E Senate. Because Quebec has the veto, it has the power to make or break proposed changes to federal institutions, like the Senate or the House of Commons, so any changes have to clear two formidable hurdles. First of all, the provinces have to reach agreement; then they must hope Quebec does not wipe out the change at one fell swoop. Why should any one province be able to dictate to the others, which supposedly are fair and equal partners?

In 1759, France lost control of Quebec at the battle of the Plains of Abraham. After that it was a British colony. As New France, which consisted of Quebec and a small part of Ontario,



had been defeated, it now had to accept British rule and the English language. Why now, hundreds of years later, are the rules changing? Why is the rest of Canada being forced to make amends in an issue so long ago decided?

The rest of Canada was part of the British empire, because all the water that flowed into Hudson Bay and the Arctic basin belonged to Prince Rupert's Land. Nova Scotia and New Brunswick already were gone with the expulsion of the Acadians. So all they had left was Quebec and that little fringe of Ontario that probably ran up to where our northwestern Ontario starts, at the French River line.

So far, I have been speaking solely about the provinces' concerns, but we also have two territories, and they have reason to be concerned as well. For decades, our neighbours to the north have been struggling for recognition. Now they learn that if this deal goes through, all the premiers would have to give their consent before any part of the Yukon or the Northwest Territories could be created into a province. But the provinces now in existence could extend their boundaries into the territories without the consent of any person or jurisdiction in the north.

Northwest Territories Justice minister Mike Ballantyne makes a good point when he says it would cause havoc if the provinces were to extend into other provinces. He used Manitoba becoming western Ontario and Prince Edward Island being annexed to Nova Scotia as examples.

Former Alberta Premier Peter Lougheed has already suggested extending that province's boundaries into the resource-rich north. It is an insult to the northerners that the provinces would be given the power to displace legislatures and democratic institutions in the territories.

1630

We have expressed an overwhelming desire through this agreement to be fair to Quebec's French, to recognize their distinct society, but in the same agreement, we give ourselves the right to take over an area long inhabited by aboriginal natives and we do not make any effort to preserve their cultural identity. In fact, the safeguards regarding linguistic minorities such as the Dene, Inuit and Inuvialuit are pretty much nonexistent.

Northern leaders have tried just about everything including appealing to our morals to try to have this accord put aside, but to no avail. The Yukon and the Northwest Territories both lost a court bid to have the accord declared a violation of the Charter of Rights. The Alberta Court of Appeal ruled the charter could not be used to

challenge any other parts of the Constitution, but the Northwest Territories executive council has not given up and neither should other concerned Canadians.

The Meech Lake accord in its present form is unacceptable. If it is not scrapped, it should at the very least be revised and clarified. The fact that not one word or comma can be changed is absurd. It is too hard-line to say, "With any alterations, the deal falls apart." This sounds as if those who drew up the agreement were insecure about what it contained and had to be rigid for fear it would all collapse.

We are talking about our future. How can tired, bleary-eyed politicians working 20 hours straight, fuelled by nothing but a ham sandwich, make fresh, clear-headed decisions affecting the direction of our whole country? The Meech Lake accord profoundly affects each and every one of us. It should not have been drawn up in the dead of night in haste and secrecy.

I have spoken a good deal about the French. I would like to make it clear that I am not some redneck bigot. I am a Canadian who fought for and deeply loves his country. It upsets me a great deal to see this accord, which tried to correct a perceived problem by overcorrecting it. The French want consideration, but with this deal we elevate their status to a level far above other Canadians. Once again, our native people come to mind. They were here before the French, the English or anyone else.

What am I to say? Where does this all end? This agreement has encouraged anti-French attitudes by virtue of the fact that it is not fair and it is not for all Canadians. We must not let the Meech Lake accord tear our country apart. Thank you for listening to me.

**Mr. Chairman:** Thank you very much, Mr. Strecker. I must say you have looked at all aspects of the report and clearly have done a great deal of reading and thinking about it. You have put forward a number of points and suggestions which have come up at other times in our hearings but not necessarily in the perspective you have brought to them. We appreciate very much your taking the time to do that.

We will start the questioning with Mr. McGuinty.

**Mr. McGuinty:** I am always wary when somebody begins his remarks by saying he is just an ordinary citizen who has no expertise and then goes on to give a very thoughtful, compelling and, in some aspects, very convincing presentation. I thank you very much for your very thoughtful and sincere rendering of your own

views. It would be very sad if the word got out to the community that only experts versed in law were qualified to have opinions on this type of thing. Certainly, that is not the situation.

I will tell you the problem I have and I would ask for your advice from your perspective. I too have concerns with aspects of the Meech Lake accord, the implications with, say, women's concerns. I have listened to the expressed concerns of native peoples, English minorities in Quebec and French minorities outside Quebec. It has been suggested to me by a number of people who have had very long experience in matters of constitutional revisions over the years that there are aspects of the accord which, by reason of concern, it is suspected that Quebec at this time would not reconsider in terms of amendments. To require amendments to the accord on these issues would be, in effect, to take an action which predictably would torpedo our opportunity to bring Quebec into the Constitution at the present time. That is the position that people have expressed. Perhaps we should go along and accept the accord in its present form and then in future explore and make companion resolutions to follow after. What is your view of that approach, Mr. Strecker?

**Mr. Strecker:** As far as I am concerned, I would like to see a lot of debate on that before accepting any of the accord because if Quebec has a veto power, that would be just like Russia at the United Nations 30 years ago. You will get nowhere. If the Russian says no or Bourassa says no, what are you going to do? We do not need to listen to one man. That is what we fought a war for: democracy, the right of speech for all Canadians.

Our mother tongue should now be English whether we come from China, Japan, Turkey, Russia, Germany, Austria or no matter where it is. We should forget about—sure, culture is all right in its place, but this is a united country we are talking about. First of all, Quebec wants to have its little linguistic and cultural distinct society. Then the west is talking about separating. What are they going to separate for? We need the whole country together. We do not want it apart.

I would not give in one iota at all until the thing is talked over. As I said, a deal that is made in 20 hours is no good. In the dead of the night, the men were tired and they wanted to go home. They were kept there and they signed the agreement. That is nothing. That is no good. That is not democracy. That is not even business. You would not make a business deal that way.

This is running the country. This is Canada. This is not some South American or Central American republic. This is here.

This is what I was over there for nearly five years for, eating mutton and cheese, but you had a good meal. I do not know. I could not solve the problem. I wish I could. I think if I were given a couple of months with about half a dozen people who looked into it, we would come up with something. To accept any of the accord in its present form is pretty hard to swallow.

**Mr. Offer:** Mr. Strecker, I would like to thank you for coming before the committee. It is very important that this committee hear not only from the large associations and the eminent scholars of all different fields, political science, history and legal, but also from the individual who has sat down and thought about this matter and how he feels it will affect him as a Canadian. I think you should be commended for coming to this committee.

I would like to ask your opinion on the whole question of process. In this respect we are talking about not only the Constitution, which you have gone into in some detail, but also about a process by which Canadians such as yourself will have an opportunity to give us your opinion. This committee will be dealing with how we can best obtain that input.

**1640**

We are also going to have to come to grips with whether a provincial legislature should be available to the people of this province to obtain that type of input. I would like your opinion on whether you think there is a role for provincial legislatures to play or whether we should say, "Well, this is a federal committee and that is all there should be." I want to hear from you whether you believe a provincial legislature, however it is composed, ought to play a part, so that you can have a place to make your comments.

**Mr. Strecker:** I think it should. I think it should start right at the grass roots, right in the municipalities back home, right from the township all the way through, from the reeve and the councillors, the town and the mayor through to the province. I think they should play a bigger part than the federal government. When they get all this information together, then they should approach the Prime Minister; not have him say, "This is the way it will go," or "That is the way it will go."

**Mr. Offer:** So in your opinion the province, this Legislature and whatever committee such as this—



**Mr. Strecker:** Yes, such as these committees here. They should send out questionnaires, draw them up properly and ask all the people about their different viewpoints, have about 50 or 100 questions on them and let them answer as many as they feel like and get everybody's viewpoint, from the native right through to the person who ended up in a reformatory or a jail, because he has ideas too.

I am speaking from a little experience because I was in Belgium during the war. If people think that was a smooth-running country at that time, they have another think coming. There were two different languages, the Flemish and the French, and I do not think there was a great love one for the other. I hardly think so. We were there and we knew what it was all about.

**Mr. Offer:** I thank you for your comment, because we are going to be dealing with the whole question of process. It is going to be very important to have on the record the response you have just made, that you as a Canadian living in this province feel that there is a very definite role for the Ontario Legislature to play in obtaining public input.

**Mr. Strecker:** Absolutely, and it does not matter which party it is.

**Mr. Offer:** No, it does not.

**Mr. Strecker:** It should be coming right from the Legislature here.

**Mr. Offer:** Thank you.

**Mr. Chairman:** Thank you very much for coming and joining with us this afternoon. Again, we appreciate your taking the time not only to prepare your submission but also to come from Kenora to be with us this afternoon.

**Mr. Strecker:** I thank you very much for having me here.

**Mr. Chairman:** We will now take a recess until five o'clock. One of the witnesses was unable to come. Our next witness will be at five.

The committee recessed at 4:45 p.m.

1703

**Mr. Chairman:** We can come back to our session. I would like to welcome our next witness, Kirk MacGregor, who is here in his capacity as a private citizen. We want to welcome you here this afternoon. As we have said to a number of people who have come forward as private individuals, we really appreciate your taking the time and effort to put together your thoughts and join with us this afternoon. I will turn the mike over to you to go ahead with

your presentation, and we will follow up with questions.

KIRK MacGREGOR

**Mr. MacGregor:** When I heard from John Craig that I would be able to make a presentation here, I considered calling it off right then, because I certainly am not expert enough to tell anybody exactly what the Meech Lake amendment will amount to. I am sure I am not going to tell you anything that you have not heard 27 times already. Actually, right about now, I would rather be back at work instead of taking time off and coming down here.

**Mr. Chairman:** We are glad that you nevertheless took the time to come before this legislative committee. We were joking earlier about all the wires and technology of this room, but basically what we are trying to do is get the views of individuals, so I am glad that whatever was going on in your head at that particular moment in time, you refused the voice that said no and accepted the voice that said yes.

**Mr. MacGregor:** OK. Anyway, at any rate I figured there was one reason to come, which was simply to say that one more ordinary citizen had read Meech Lake, thought about it, felt that the odds were that it would be bad for Canada and was willing to make the effort to come down here and say that.

Before I go into things that you have no doubt heard many times before, I would like to explain that I am going to use the term "Meech Lake amendment" for this amendment. It is a constitutional amendment. I think the word "accord" is just a piece of skilful publicity for it and I would rather look at the thing itself without that piece of hype hooked on to it.

As for what I do not like about it, frankly, I do not think I have seen any objection to it that I could not at least partially agree with, but four among them particularly strike me. The first is the antidemocratic aspects of the amendment, which fall into three general areas. One is the way in which it is being railroaded upon Canada with a minimum of public consultation, or at least it was prior to hearings such as this.

The second relates to how it is likely to work if it is passed. Just in passing, one suggestion I am inclined to make is that the problem of its being railroaded in a rather undemocratic fashion is quite soluble within Ontario in that if it were given a free vote on the amendment, with an adequate amount of time for MPPs and constituents to communicate, this would essentially

eliminate any objection that it was done in an undemocratic manner.

As for the undemocratic aspects that are likely if it is passed, these fall into two general areas. A minor one is the annual conferences between the premiers and the Prime Minister which tend to shift a certain amount of power and initiative away from directly elected representatives to a more indirectly created body. The second is that there are definitely things in the accord the meaning of which is only going to be determined by what the courts say they mean. This again transfers power away from elected representatives, to a nonelected court.

Going beyond that, my second concern about it is that it is murky and self-contradictory in its language. There are a number of examples of that. One can be found near the beginning where it says, "The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed." Then it goes right on to say, "Nothing in this section derogates from the powers, rights or privileges of Parliament." It is not clear how Quebec can do more without Parliament being restricted to doing less.

One can note also the agreements on immigration. One possible interpretation of them, I guess, would be that they are simply the same as the original section 95 with a few little differences in wording. Then again, it says, with regard to amending agreements made between the federal government and a provincial government, "An amendment to an agreement referred to in subsection 95B(1) may be made by proclamation issued," and so on, "only where so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of the province that is a party to the agreement," which implies that the federal government loses its ability to override in matters of immigration. Certainly, immigration is one of the key things controlled by a sovereign state. Once again, what does this mean?

A few other little examples: Comments like, "Nothing in this section extends legislative powers of the Parliament of Canada or of the legislatures of the provinces." Mind you, I think I picked one that I did not really want that I had marked out there.

1710

The last interesting one is this general section right at the end, "Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class

24 of section 91 of the Constitution Act 1867." When you go back through the various amendments, section 2 of the Constitution Act, 1867—I hope I am not working with a typo here—is now section 2 in the Constitution Amendment, 1987. It has the business about the "distinct identity" of Quebec in it whereas section 27 of the Constitution Act, 1982, says, "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Once again, which is going to go in Quebec, multicultural heritage or the promotion of the distinct identity of Quebec as seen by the Quebec government?

I think that covers some of the main examples there.

My reaction to this is that as a constitution, I find something like this appalling. A constitution ought to be a clear statement of principles that can be followed with a minimum of interpretation, or at least that is how I feel it should be.

There is a feeling that a constitution should be totally obscure and open to interpretation, so that if the constitution is hard to amend, like the Canadian one tends to be, then it can adjust to the times by the courts reinterpreting it. Frankly, I would rather have a comprehensible constitution that is adjusted to the times in a democratic manner rather than a murky one where the courts decide what it means and the elected representatives do not have much say. So much for murkiness and another hack at undemocraticness.

Another thing concerns me about the Constitution or about the Meech Lake amendment; to a certain extent, it has always concerned me about Canada. I have always had that slight feeling of incompleteness, that one year I might wake up and find that I had lost a part of myself because my country was gone. Meech Lake is another step in that direction. At least the best guess I can make is that it is another step in that direction. It is very hard to be sure what it means.

Giving the provinces more control over the Senate and more control over the Supreme Court of Canada, not to mention whatever additional practical influence they get by these annual conferences, will tend to provincialize the country at least to some extent. Obviously, the extent depends on what the Supreme Court says when conflicts over the various things I have mentioned are brought to it, but with three members of the Supreme Court from Quebec and the others partially picked by provincial governments, which are generally not likely to pick strong federalists, it would be fairly easy for the



Supreme Court to wind up deciding in a way that tends to provincialize the country.

Also, the whole thing has the potential for being the beginning of a slippery slope because it makes it a bit easier for provinces to get power from Ottawa. All you need, once a decade, is a weak federal government and the provinces interested in some more power. The power gradually moves from the federal government until Canada possibly becomes essentially a collection of 10 different countries in all but a few little bits of name.

Once again, whatever that means in purely bureaucratic terms and in terms of interfering with people who want to move from one province to another, it still at some level hurts me in the heart to think of my country being broken up like this.

At any rate, the fourth main thing that concerns me is that any trend towards provincialization of the country is likely to be irreversible, simply because the key aspects of that, the Senate and the Supreme Court, require unanimous provincial consent to reverse. I do not see any way that would ever occur. Whatever breaking up of Canada might happen is unlikely to be reversible by any legal means. It basically offers a risk, never a certainty; it is always possible that the Meech Lake amendment will be passed and will be interpreted in such a way as to have no effect at all. No one can exclude that possibility.

But certainly there are many experts who do not believe that possibility, and on reading it, I think the balance of probability is that it will do something, to some extent, to break the country up; maybe a lot ultimately. I can see eventually, as a very real possibility, getting to a situation where either it becomes necessary to resort to the sort of thing to put the country back together that we are justifiably proud of always having avoided, like war or revolution, or sort of one by one, over the decades, the provinces will wind up joining the United States or something.

At any rate, because of these things, I would like to finish basically by just asking you to do whatever you can, first, to make the initial process democratic by having a free vote in the Ontario parliament, and second, to discourage the thing. Thank you.

**Mr. Chairman:** Thank you very much. I think earlier this afternoon our colleague, Mr. McGuinty, in commenting to another private citizen, noted that people often come before the committee as private citizens and feel that they should perhaps indicate that they are not sure whether they wanted to come or that they are not

experts, and then they go ahead and deal with any number of points in the accord in a very succinct and articulate way.

I think it only serves to underline the importance of getting more of that kind of feedback. In a sense, it deals with your last point. We have thought a lot, as members of the committee, about process and really looking at the fact that in the future, whatever happens to the Meech Lake amendment, provincial legislatures are somehow going to be involved in constitutional amendment procedures. We are going to have to ensure that the kind of discussion we are having with you today can go on much earlier in the process, so that as ideas are brought forward, people have an opportunity to think about them, have some time for reflection and then can come forward and say, "Look, I have this concern," or, "I support this part but I am concerned about that." I think your comments today underline that to a great extent.

#### 1720

Can I ask one question? You have noted, as have others—I think probably those of us around this table would relate to a number of the concerns you raised—one of the principal aspects being that we are not perhaps sure what this or that might mean. It might not mean much; it might mean a lot.

When we look at our Constitution, if we go back and look at 1867 and we compare that to the United States Constitution or the French Constitution, we are clearly dealing with a pretty different animal. We have not, in Canada, made our constitutions ringing documents. Even the charter, which is perhaps as close as we have come to some sort of grand declaration, has some elements in it, such as section 33, where a lot of people would express great concerns about how it was put together. It seems to be the Canadian approach that you have a lot of compromises and so on that you bring together.

I suppose what those who would be arguing in favour of the Meech Lake accord would be saying is: "Look, this is one phase of what has been several phases and there will be other phases. We shouldn't be concerned about trying to get everything into this one." If you like, the term that has been used is that this is the Quebec round; we still have to have a multicultural round, an aboriginal round—a variety of rounds.

What is your sense, as we proceed with this agreement that the 11 first ministers reached? Do you see it as being something that is amendable or do you think it really should be set aside and

everyone should go back to the table and start again?

**Mr. MacGregor:** I do not see any realistic possibility of things like the change to the Senate and the change to the Supreme Court, once made, being reversed, so I do not think either of those in particular are things we should just jump into on the assumption that anything that is not working right can be fixed later. Basically, an amending formula that requires unanimous agreement by everyone is very unlikely to happen, and at the same time, once we have increased provincial power to this extent, I think there is a real risk that it will splinter the country fairly badly.

Another thing is that speaking in terms of Quebec in particular, I am not at all convinced that the Meech Lake amendment will head off separatism rather than encourage it. It does tend to further isolate Quebec from federal institutions and give it the opportunity to become more inward-looking. As far as I know, from just casually reading and hearing things, there are at least a few Quebec politicians who have said outright that from that standpoint, as far as they are concerned, that is the purpose of the Meech Lake amendment, to facilitate building up to separatism.

Looking aside from Quebec, even if we do want to give Quebec more of a special status, I think we should also be paying some attention to the condition of the rest of the country. If we should go a two-nations route, let it be a two-nations route, not one nation, Quebec, and a pile of rubble, with the rest of Canada split hopelessly into nine highly divided provinces.

**Mr. Chairman:** And your reading of what is there is that this would be the result.

**Mr. MacGregor:** I cannot predict the result. The possible results range from all the most idyllic dreams you could have for this, which I agree is possible, though I do not see it as being at all likely, through to starting a process which over a period of decades eventually disintegrates the country, and anything in between. It is entirely possible that no great harm will result from it, but then it is also pretty clear that no great harm will result from not doing it, so why take the chance?

**Mr. McGuinty:** In your written statement you refer to a process of splitting Canada into "a mess of barely united provinces." Then, just a moment ago, you said perhaps the end product might be one nation and a pile of rubble. You go on to state, "As the Meech Lake amendment gives the provinces significant control over who is on the

court, plus a degree of extra influence on the federal government via the Senate, there is little reason to expect anything other than a slow dismemberment of Canada."

I guess none of us wants to wake up and find that our country is gone, whether by erosion or by catastrophe, but I would ask you to examine that reference you have now with regard to the Senate and the Supreme Court.

First, as I understand it, the fact is that the federal government would not necessarily be bound by the recommendations of the provinces in this regard. That is one consideration. Second, it seems to me that what this is doing, in effect, is formalizing what is already being done. Members are appointed to the Senate with reference to geographical dispersement, and likewise to the Supreme Court.

With regard to Quebec being a distinct society, I lived in Quebec for 16 years for four months a year at least. What I think that phrase really means is that we are stating what is already there, a group of people bound together by the essentials of nationhood: culture, language, history, religion.

With regard to the Supreme Court and the Senate, why should that be interpreted as something which will have as its end result the formation of one nation and a pile of rubble or the slow dismemberment of Canada? I cannot put the kind of dramatic after-effects upon these that you do. Why do you interpret that in this way?

**Mr. MacGregor:** It is impossible to predict what will happen, but certainly one possibility is that all these ambiguous things in the accord will be interpreted in the way provincial governments looking for more power would like them to be interpreted. Given the various things that are confusing or even outright self-contradictory, a lot of this is inevitably going to go before the Supreme Court.

At present, while the members of that court are picked in terms of coming from various geographical areas, they are not, shall we say, censored by the provincial governments. With their being limited by both the provincial and the federal governments, they quite possibly could have more of a pro-provincial slant than they now do. Given that Quebec is likely to be in favour of a high degree of independence for itself, quite without concern for other provinces, and thus three of these justices are likely to have been selected for their being at least somewhat favourably disposed to a high degree of independence for provinces, it strikes me as likely that at



least some, if not most, of these ambiguities will eventually be decided in favour of the provinces.

1730

Also, I do not think the provinces are at any point going to want less power. It is always nice to have more power for your own government. I think it is going to shift the balance in this pressure between provinces wanting power and the federal government wanting power, and I see a real possibility that you would get a situation where every now and then a bit of power got transferred from the federal government to the provinces partly by the courts making decisions on the basis of Meech Lake and partly by it just being decided in these constitutional conferences. While I cannot begin to offer any sort of a reliable prediction of what that is going to do, I think it is likely to split the country up into provinces more than it is now, and it could go all the way.

I cannot prove it will go all the way. It may just go a few little laws and stop. But given that one of the provinces, namely Quebec, is basically in favour of highly independent provinces, you have that bias built into the extra power that has been given to the provinces in the Supreme Court and the Senate. I think it is likely to start splitting the country up into provinces, to some extent. I do not see a mechanism that would make it stop at a certain point. I think splitting would just gradually accumulate as the decades go by. Maybe I am wrong.

**Mr. Chairman:** I want to thank you very much for joining us this afternoon. We appreciate not only the brief you presented but the comments that you made. I think no one on the committee could help but recognize the strong feelings that you bring to this issue. We are going to be wrestling with it for some time to come, and we thank you very much for being with us this afternoon.

Next, I call upon the representatives from the Registered Nurses' Association of Ontario: Eleanor Ross, president, Gail Donner, executive director, and Diana Dick, project manager. This is, I suppose, a week for Queen's Park, and it is nice to see you all again. Before you begin, I wonder if you would just let me make one brief announcement while you get your papers organized.

To the members of the committee, I have learned from the clerk that today the period of John Craig, who has been assisting the clerk through all of our hearings and who is a co-op student from the University of Waterloo, has just about ended and he is going to be leaving us. I

just wanted, on your behalf, to say to John how much we appreciate all the help he has given us through the last three months or so of the committee's hearings, and we wish him well back at Waterloo.

We will then simply turn the mike over to you. We have a copy of your brief, and if you want to take us through, we will follow up with questions.

#### REGISTERED NURSES' ASSOCIATION OF ONTARIO

**Ms. Ross:** Thank you for the opportunity to present. We realize that it is the end of a long day for you. Our brief is short, so I will read it since you have not had the brief prior to this.

Basically, to begin, the Registered Nurses' Association of Ontario, or RNAO, is a voluntary professional organization which represents registered nurses and promotes the profession of nursing in Ontario. Nurses, the single largest group of health care providers in this province, speak for health and advocate on behalf of Ontario residents for healthy public policy and programs.

RNAO commends the efforts of the Premier of Ontario, along with his provincial counterparts and the Prime Minister, to reach an agreement which allows Quebec to become a full political partner in Confederation. However, we are seriously concerned with respect to the effect of the accord in three major areas. There are many questions which remain to be answered by the signatories of the accord.

Numerous groups have appeared before you presenting a range of concerns. Our concerns centre on the equality provisions, future shared-cost-programs provisions and the process by which the accord was signed. We are also concerned about the future of Canada as a federal state with the power of national leadership.

To begin, our analysis stems from the World Health Organization goal of "health for all by the year 2000." This goal, agreed to by the 134 participating countries at the 1978 conference in Alma Ata, Union of Soviet Socialist Republics, is intended to mean that all people of the world would have equal access to the knowledge and resources that make health possible.

The conference strongly reaffirmed that health, which is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important worldwide social goal whose realization requires

the action of many other social and economic sectors in addition to the health sector.

Health is affected by many factors such as adequate income, nutrition and housing, clean air, clean soil, clean water, protection from the threat of nuclear spills and warfare.

The health of individuals, communities, of our province and our nation is also affected by access to equality, access to universal and comprehensive health care and the clear sense that we can participate as full citizens in helping to shape the future of our country. These three factors are particularly important in the light of Constitution-building.

We in Canada are fortunate to live in a democratic country rich in resources. Ontario is particularly resource-rich, not only with respect to our natural resources but with respect to the resources that come from people and their productivity and service. We have another key resource, which is a commitment by our Premier that his administration will be governed by the concept of open government.

First, equality—the impact on health. Access to equality is one resource that brings us closer to the WHO “health for all” goal. RNAO is deeply concerned that the 1987 accord puts equality rights of women and other groups at risk. In 1981, after a long struggle, equality rights for women were guaranteed in the Charter of Rights and Freedoms. An accord which puts those hard won—I wish they were worn—hard won rights at risk is unacceptable.

Our recommendation is to amend the accord to read, “Nothing in the accord will derogate or abrogate from any of the rights or freedoms guaranteed in the Charter of Rights and Freedoms.”

Second, access to future shared-cost programs—its impact on health. As the accord now stands, it would be possible for provinces to opt out of future shared-cost programs provided these programs are compatible with national objectives. RNAO is concerned that the accord does not mention the standards of universality, accessibility, comprehensiveness, portability and public administration. These standards have been the cornerstones of a national health care system that has served our citizens well.

**1740**

The Registered Nurses’ Association of Ontario shares the concerns of the Canadian Nurses’ Association on the opting-out powers provision of the Meech Lake accord. That, I believe, is appended in the submission.

The maintenance of a universal health care system is of paramount concern for all Canadians. Along with CNA, RNAO strongly supports this principle and believes that universality could be threatened by the accord. The public health care system in Canada must remain accessible and portable.

Our recommendation is that the accord be amended to require that provinces meet both national objectives and standards in order to be reimbursed for future national shared-cost programs; that the federal government retain the power to introduce and enforce national programs which will benefit all Canadians regardless of the province in which they live.

Third, the citizens’ participation in Constitution-building and its impact on health of individuals, communities and our country. RNAO regrets that the process which led to the signing of this accord has been offensive to most Canadians. As we have indicated, Canada is privileged in that it was founded as a country based on the principles of democracy.

The Constitution of Canada belongs to Canadian citizens. Canadians must have the opportunity for full consultation in the making of our Constitution. The process which has been used for the signing of the 1987 accord and subsequent events, both federally and provincially, in Ontario, have contributed greatly to the public cynicism about the political process and indeed the politicians.

Our recommendation is that a process of meaningful public consultation takes place now and in the future to ensure that Canadians can fully participate in shaping the Constitution of Canada.

Fourth, the future of Canada as a federal state, the health of our country: the veto power granted to each province in the accord will make future constitutional amendments extremely difficult to obtain. The veto provision makes it less likely that Canada will be able to develop as a nation. The prospect of the Yukon or the Northwest Territories becoming provinces is less likely.

Our recommendation is that the pre-accord amending formula be fully incorporated in the Meech Lake accord.

Conclusion: the notion of a companion resolution recently suggested by some members of this committee is unacceptable to RNAO. This action would address only process, not substance; it is too little process, too late.

RNAO participated in the 1980-81 constitutional lobby which succeeded in securing constitutional rights. We are here before you to



reaffirm our commitment to the integration of a constitutional democracy and the health of Canadian citizens. The Meech Lake accord imperils hard-won constitutional rights and protections and, in so doing, imperils our health.

RNAO urges you, as members of this select committee, to safeguard those rights, protections and our health, for this generation and for future generations of Canadians.

**Mr. Chairman:** Thank you very much for a very clear and succinct presentation. I think the areas you have hit on are obviously ones that others have as well. The perspective, in particular, from the whole health care side is interesting and I think we want to explore some of those implications. We will start the questioning with Mr. Eves.

**Mr. Eves:** I want to congratulate you on your well-thought-out brief and presentation here today. I note that every one of your recommendations ends up in suggested amendments to the Meech Lake accord. Actually, one of the questions I was going to pursue, you have taken care of or answered in your conclusion, by saying that the notion of companion resolutions is unacceptable to your group and that in your opinion it would address only the matter of process, not substance. As far as you are concerned, it was too little process, too late.

Although I am sure there are several members on the committee—perhaps all members on the committee—who would like to see some part or other of the Meech Lake accord amended, we are also faced with the political reality that both the Prime Minister of Canada and the Premier of Ontario have said that, quite simply, they will not entertain any amendments whatsoever with respect to the accord, because they feel it has to proceed as agreed upon by the 11 first ministers. There may be some concerns that can be addressed in the future, either by way of future constitutional conferences or, to get the ball rolling early, I suppose, by the novel suggestion of companion resolutions.

With respect to section 16 and equality rights—and actually much more than that, not only equality rights but the rights of everybody at risk in society—my own personal feeling is that if there is one section of the accord that should be amended, it is certainly that one. There is some ambiguity. We have heard constitutional experts, as you are probably aware, on both sides of the issue. We have heard legal experts on both sides of the issue. Some say that it does not abrogate or derogate from anybody's right in the Charter of Rights and Freedoms, and that is what

they intended; others say that there certainly is at least a very real possibility that it will do so at some point in the future.

What is your thought with respect to the idea, if we are not able to amend any part of the accord, and especially section 16, of referring that to the Ontario Court of Appeal for a court reference to see—at least everybody will know where they stand—whether somebody's rights will be abrogated or derogated from?

**Ms. Ross:** I will let Diana answer that one.

**Ms. Dick:** It carries with it a lot of risk. It certainly has been raised with us, but I think the timing of that reference would be absolutely crucial and it would be crucial that there be no further ratification until we have that decision.

**Dr. Donner:** If I might, Mr. Chairman, I would add in relation to the comment about the political realities that we also deal daily with political realities in a voluntary professional organization, but our concern is that it is the perception of many Canadians that there has been too much political reality and not enough concentration on what citizens need and expect, and sometimes we are all faced with the necessity of biting some bullets and admitting that some things may have to go back to the drawing board. With respect, I would submit that our position, as we have stated here, is that this is too important to let political reality, if you will, be its number one driving—

**Mr. Eves:** I quite agree. It is not me you have to convince.

**Dr. Donner:** No, but I think, since you did raise it, it is a concern we have had and, as a matter of fact, it was what went into our organization's debate and discussion as to why we should, though a voluntary nursing organization, come here and talk about this. It has all been signed, sealed and delivered. We think that if there are enough citizens and others in the country who feel that what was signed, sealed and delivered should go back to the drawing board, then we have to say so.

**Mr. Eves:** Thank you.

**Mr. Offer:** Thank you very much for your presentation. I want to carry on with the line of questioning of Mr. Eves, and in particular your recommendation with respect to the process being one of meaningful public consultation. You say that that is what it ought to be. We have, I think, since day one in this committee grappled with that problem. We have heard many representations on that particular matter. I was wondering if you have directed your mind to

what type of process, in your opinion, would meet the phrase "meaningful," as indicated in your recommendation.

1750

**Dr. Donner:** This is meaningful, and this is part of it. I guess our concern is that this be meaningful; and that the comments which Mr. Eves made and which we made around continuing—that paying attention is part of what we refer to.

**Ms. Dick:** I would also add that we would like to suggest that "meaningful" means that in consultation there would then be some changes. Otherwise, it is not meaningful; it is simply a presentation of concerns and then the decision goes forward without consideration of those concerns.

I believe everyone in this province had great hope when we had the promise of open government. It would be well to recall that promise and to live up to that promise. I think it is a real disappointment if indeed we cannot live up to that promise.

**Mr. Offer:** The Meech Lake accord aside, there are going to be ongoing talks, discussions and first ministers' conferences surrounding constitutional reform. It will continue. In what areas? Well, we do not know. We know that the Meech Lake accord speaks to two areas alone.

If that is going to happen—and I do not think there is anyone who thinks it will not happen—should there not be a framework to obtain public input prior to a final decision? Should there not be input in order to determine what should be on the agenda? In your opinion, is there a role for the province to play in such a setup? Should the province have a framework for constitutional input from the public? I am wondering if you have thought about what type of framework we might want to keep in mind when we are grappling with this question, because we shall be.

**Dr. Donner:** I think it is a good question. I do not think we paid particular attention to that, so I think our comments would be what comes to mind right at this time. However, there already is, through the democratic process, a vehicle in which citizens can—we are firm believers that the process can work, that citizens can make their concerns around any issue which is before them known to their elected representatives.

I would go back to our word "meaningful" here, because whether it is Meech Lake or any other opportunity for the public to make its voice known—whether collectively or not so collective-

ly in certain circumstances—the issue we are concerned with is that that be heard and that there be evidence which is clear that that is taken into consideration in whatever goes forward.

Whether there should be a framework in which there are continuous open hearings where people can come and make their voices heard I think depends on how much accessibility and time is available using the already established processes, and I am not sure we are experts in that. I think when the public feels—I know when we feel—that there is an opportunity for our voice to be heard in the regular way, if I could put it that way; and if when it is heard, decisions and revisions of decisions need to be made and that happens; or if, when it does not happen, we understand as citizens why not, then we do not feel the need to have continuous, ongoing committees and select groups studying various issues.

I realize that does not answer your question about the framework, except that I think our concern is that "meaningful" is as the outcome suggests, and we have some question in relation to the accord around how really meaningful the process was in terms of how much was heard and how did the signing happen, etc.

**Mr. Offer:** If I could just ask one further question, with respect to your presentation surrounding access to future shared-cost programs, I think that is extremely important, especially coming from an association such as yours. You are without doubt well aware of the amendment, section 106A in the accord.

I would like to hear from yourself, and certainly from your perspective, that the framework set out in section 106A: (1) gives the constitutional entrenchment of the federal government to enter into cost-shared programs in areas of exclusive provincial jurisdiction; and (2) gives the province a flexibility which was not there before to opt out with compensation in order to address those needs contained in this shared-cost program in a way which is very sensitive and characteristic of that province.

As I think you will know, not only are all the provinces very different in terms of what services are needed and how they are delivered, but probably also within the provinces there are areas where services are delivered in a very different way. My question to you is whether section 106A does provide a very necessary and meaningful flexibility and opportunity for provinces and associations like yourselves to make certain that, whatever the program is, it be delivered in a



manner which is very sensitive to the particular province.

**Ms. Ross:** I could begin. It is one thing to say "sensitive to the individual needs of a province," but our concern—for example, with senior citizens—is that we have health care and we are providing home care services for seniors, and that is part of our health care system. If a province decides that basically, to meet its objectives, it can provide mothers' assistance or something, it may still be meeting the objectives; but the standard of universality, offering portability to seniors in any part of Canada, if someone moved from British Columbia to Ontario or whatever the case would be, we want that left open.

That is where our concern is around the gap that can be created, and that is why we address the standards and bringing in universality, portability and so on, because if it is left to the individual provinces, that is exactly our concern: that there will be groups and gaps in different provinces. It is one thing to address what one sees, but there is also then, let us say, the minority group, perhaps seniors in a young province, that would not be served, so we cannot accept that in health care and the universality.

**Mr. Offer:** I understand exactly what you are saying, except that section 106A talks about areas within exclusive provincial jurisdiction, not matters of federal jurisdiction where that particular example might have carried more weight. It is only within the purview of the province.

**Dr. Donner:** Having participated in fighting the Canada Health Act issue, I can tell you that we are just not prepared to let it go at that. Yes, when one reads it, it looks very good superficially. For us, one concern is health care, but it might be other national cost-shared programs. It protects the health care system, the Canadian system. However, the health care system is administered provincially, and our concern would be that those five principles, unless it is clear that those standards and the criteria in terms of what goes into the national objectives are part of what you could and could not opt out on, leave it too weak.

We are a voluntary organization. We have members all across the province. We have some provincial objectives, for example, around health care reform. It could be that in some regions, that is not a number one priority. However, someplace there are issues of such vital concern to the health, and I use that in the broadest sense of the word, of Canadians that we

are not prepared to allow, quite frankly, for that flexibility.

**1800**

I would use other words perhaps than "flexibility," but I think when it comes to health care, and a very difficult battle having been won to provide a very fine national health care system, it is not enough to say, "As long as you meet the objectives of the national health care system, then if you have to make some adjustments provincially, that is OK." We are not convinced that some of those differences, some of that flexibility, would not erode the system. From our perspective, that is just plain not acceptable. I appreciate what you are saying around flexibility.

**Mr. Offer:** It seems to me that what you are saying is that you are concerned about giving the province the flexibility even within its area of jurisdiction, which is not, of course, Meech Lake, but it is probably something in 1867—

**Dr. Donner:** Oh, I think it is.

**Ms. Dick:** I do not know that there is anything that is absolutely exclusively provincial or federal jurisdiction in terms of the practice of the Canadian Constitution. Perhaps if we go by the letter of the law, but that has not been our Canadian experience. Long ago the provinces decided to band together with the federal government so that we would have a national health care system that had standards. If we go ahead with the Meech Lake accord, it would be very difficult to recover and to have future cost-shared programs which will have to change to meet the changing needs of Canadians.

As an example, in the wording of the accord, a province could be compensated for having an initiative. We already have initiatives. There are many initiatives under way in this province right now. The flexibility is already there. The standards are broad enough and the criteria broad enough that it is very easy to meet the needs of individual citizens and communities with the existing standards. We could be on the road back to what we had prior to medicare, which would be putting Canadians at risk for having to pay for programs and care. I think it is a very serious matter. It is very risky, and I urge you not to go ahead with this accord, framework or no framework for future processes. I believe this matter has to be settled before there is any discussion of framework.

**Mr. Offer:** I appreciate your concerns with respect to section 106. I have been asking a number of people coming before the committee

that same type of question, to try to flesh out, from their perspective, the potential impact on the people of the country, of the province, and the services rendered by the province and by the federal government. I appreciate very much your response. It is something which is surely going to have to be kept in mind when we are deliberating this matter.

**Mr. McGuinty:** Mr. Offer, I think, covered the points I wanted to deal with. I want to commend the nurses' association. I think I mentioned the other day that I have been speaking to a nurse daily for 31 years. One point I have often made is that the nursing profession has not been sufficiently assertive. Then I come to Queen's Park and I find them before the social development committee. I go to lunch today and I find Dr. Scully commending them for their fine contribution. I sit in on the select committee on constitutional reform and see a very fine brief, reflecting not only narrow self-interest as nurses, but something that goes far beyond that. I am most impressed and I am very anxious to get this good news back to Ottawa to my nursing friend.

There is one minor question. It brings me back to my old academic days when you went to a thesis defence and you always had to ask a question, just to illustrate you had read the thesis.

On page 5, you say: "The notion of a companion resolution recently suggested by some members of this committee is unacceptable.... This action would address only process, not substance."

I am not sure if that is quite accurate. As I understand a companion resolution, it might deal with and reflect a concern about women's rights as within the accord, or native rights, or the rights of the English minority in Quebec or the French rights outside Quebec. The companion resolution is not just process, as I understand it.

**Ms. Ross:** Perhaps I will let Diana answer this.

**Ms. Dick:** We understood that the intent would have been to ratify the accord and accompany it with a resolution, and this statement refers to the substance of the existing accord that would not be affected. That is our concern.

**Mr. McGuinty:** Oh, I see what you mean. Sure, I understand that.

**Ms. Dick:** It is not clear, you are right; but that is our concern.

**Mr. McGuinty:** Thank you.

**Mr. Chairman:** On that last point, we have heard from different groups and have in our own

discussion raised different possibilities as we have looked at this. We certainly have not made any decision whatsoever but really we are trying to explore a number of things, so we appreciate your comments on that.

This is probably just a closing thought—I was trying to take us to the closing question or thought—but maybe I can get your reaction to it. Because we are dealing here with the Constitution and are dealing with a specific amendment to it, I think we also have to remember that whether this goes forward or not there is still a political process in this country that involves legislatures and the House of Commons and Senate, and that even if we were to do all of this, let us say, and those changes came about, clearly there are ways in which individual governments can still stymie different kinds of change that we would like to see. I think whatever we do constitutionally, we always have to remember that there is a need for political will, be it at Queen's Park, in Ottawa, Quebec City or wherever.

To take the current example that we are often discussing, which is child care and criticisms of the proposed federal program, it seems to me that a different government with a different kind of will would pursue that differently and likely end up with a different result.

I would certainly agree that constitutions are important and what we put in them are important, but even with that being said, we all know we will have the Charter of Rights and we hope that works the way we intend it to work, and yet we know that, by itself, is not going to eliminate all of the equality problems we have in the country.

Whether it is over the last four or five years—I suppose because we have been into so much constitution-making and constitutional discussion—somehow, and I think it has been clear in our hearings, a number of groups, minority groups or however you want to describe them, have a real problem with the credibility of the political process and have perhaps a lack of faith in that process in terms of what it is that legislative bodies have done.

Clearly, the charter is one answer to that, and one can understand that. I think it has been made very clear to us why you feel so strongly about the charter and why other women's groups in particular felt strongly about that, as have organizations before us, organizations of the disabled, of linguistic minorities and so on, because it is a means of protecting, over and above the whim of an individual legislature.

By the same token, I think we have to remember that we still have to keep driving and



making changes. Maybe in part that will be the increasing number of women in those various legislative bodies. Within our own Legislature, we have 20 women, whereas before, we had much fewer. Within our own caucus we now have 16. I can remember when we would have one or none. That does have an impact and does make a difference.

1810

I am not by any means saying the Constitution is not important. Whether or not it is the lateness of the day, I just felt compelled to say that we still have to ensure that our political process works more effectively so that, as I think you were saying, it may well be that in the normal interaction that your own organization has with the provincial government, for example, that works in a way where your concerns about a variety of issues and topics are much more clearly understood, because that process works more effectively. I think that is one message we have to play back in our own report, that sense that so many have out there that this process is not working effectively.

**Dr. Donner:** If I might, I think what you are saying is very real in the sense that we live in a real world and, as nurses, we deal with matters of political will quite frequently. The lives of nurses are not unlike the lives of women. As a matter of fact, there are many parallels in the women's movement to the nurse's movement. We appeared before the social policy committee a few days ago and talked about legislative changes we felt were important.

Just a personal note. I could tell you something that has become a little watchword for me. The time for securing our place by invitation is gone. We want our place by legislation. I think that is some of the up and down that is a reality for nurses in the health care system and in society as a whole, and some of the reality for women.

While I can say that we appreciate the reality of what you are saying, I think we also feel an urgency around the Constitution and the accord and more certainty around the future. It is not to say that I do not, or we do not, understand what you are saying, but to say that we are moving to step two now, or step five, or whatever it is. I am not sure.

**Mr. Chairman:** I appreciate that and my intent is not to say that is not correct. I think what has been interesting for me as a member of the committee is how this process that we have gone through over the last three months has underlined a credibility problem with our existing political process. There has been a consciousness-raising, if you like, which I suppose I was aware of, but which has become much clearer as we have gone through. A lot of that relates back to the Charter of Rights and Freedoms and the sense of protection that charter has given in a number of areas and which people now feel is threatened at the very least.

I want to thank you very much for coming late in the day to the committee. We appreciate very much your brief and your answers to our questions. We have been at this for a while and we still have some time to go, but I think it is important to say that the decision you made to come and to present your views is important. I trust that when we finish our work and our deliberations and come up with our report, you will feel that it was worth while.

**Ms. Ross:** Thank you. We would urge you to not give up and to go forward because we see the turmoil in the future to be more than it is today if you carry on.

**Mr. Chairman:** Thank you very much. The committee will now continue in camera.

The committee continued in camera at 6:15 p.m.

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## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Wednesday, April 27, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, April 27, 1988

The committee met at 9:50 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**The Vice-Chairman:** I will bring to order today's hearings with respect to the select committee on constitutional reform. Our first presentation today is from the Afro Canadian Congress. Thora Espinet, who is president, is here. I would like to welcome her this morning. Our usual procedure is for you to give your presentation and, thereafter, there may be some questions. Welcome. I apologize for starting late. Other members will be joining us from time to time.

#### AFRO CANADIAN CONGRESS

**Mrs. Espinet:** Fine. I must also apologize for this typing. It is not the world's best, but I was in a hurry. I am here on behalf of the Afro Canadian Congress. The Afro Canadian Congress is a black lobby group and the objective of that group is to promote equal participation for blacks in the Canadian community.

The Afro Canadian Congress is pleased to have the opportunity to inform members of this committee of our concerns with regard to the Meech Lake accord. We are concerned about the possible results of an accord which ignores the history and struggle for equal rights by black people in this country. In fact, it can be said that Canadians have ignored our rights for almost 400 years. In part, this situation is a result of ignorance, but it is more than that. The depressed condition of blacks in Canada is a result of bigotry, discrimination and exploitation by the majority of the white population in this country.

Since few Canadians are aware of the presence and contributions of blacks, we will take this opportunity to provide a brief history of blacks in Canada. First, it is important to be aware of the historical fact that the first black, a young black slave, arrived in this country in 1608. He was brought to Canada by European colonists who were struggling to gain a foothold and open the continent for exploration and exploitation of its riches.

However, slavery was not a very profitable enterprise and the geographical and climatic conditions in Canada were unfavourable for the

profitable utilization of large numbers of slaves. Thus, the small number of slaves who were brought to Canada were frequently used as servants of the more wealthy citizens of the country. Many Canadians would be shocked to learn that records exist of slaves being bought and sold in Canada as any other commodity. It was not until 1834, with the passage of an act by the British Parliament, that slavery was finally abolished throughout the British Empire.

Waves of migration: there were, however, three periods of rapid expansion of blacks in Canada. Beginning in 1782 on the termination of the American War of Independence, there was large-scale migration of blacks to Canada with their Loyalist masters. Most settled in southern Ontario and in the Maritimes. Several hundred free blacks as well as former slaves were promised land by the British in recognition of the fact that these men had served in the British army during that war. It is estimated that more than 2,000 of these settled in Nova Scotia alone.

However, they were allotted very small parcels of infertile, unsuitable land for farming. In addition, they had to await the granting of land to the white Loyalists before their turn came. The result was that the black settlers in the Maritimes found themselves in a condition of abject poverty. Isolated, poor and the victims of racial hostility, they were quick to seize upon the opportunity to leave the country and return to Africa, the land of their forefathers. Approximately 1,200 left Canada and journeyed to Sierra Leone, West Africa in 1796.

The second wave of blacks to Canada arrived as a result of the War of 1812. Again, blacks who fought on the side of the British were promised land and freedom in Canada in recognition of their services to the Empire. Again, they were disappointed. According to historians' records, more than 2,000 of these ex-slaves arrived in Nova Scotia and New Brunswick. Many others entered southwestern Ontario.

As one historian noted, "They could not have arrived at a worse time," particularly in Nova Scotia. A severe winter, poor farming and a poor harvest resulted in near starvation for many. Increasing unemployment led to hostility against blacks by the white population, a situation not unlike the attitude of many Canadians today.

Racism became a destructive force, with increasing degrees of prejudice and discrimination against the black population.

The third and largest migration of blacks to Canada occurred between approximately 1820 and 1865, the period leading up to the American Civil War. Again, Canada received thousands of escaping slaves from the United States through the so-called Underground Railroad, a process whereby many white Americans helped slaves to escape by hiding them from their masters and guiding them to the Canadian border. It is estimated that approximately 40,000 to 50,000 slaves from the United States made their way to Canada and to freedom.

This time most of the escaping slaves made their way to southern Ontario where they received a mixed welcome. Most settled in areas near Windsor, Chatham, Buxton, the Niagara Peninsula and as far east as Kingston. In Ontario they found that the land was better, the people generally more friendly; however, their welcome was not uniform. Some Canadians were not happy about having large numbers of blacks living in their communities. Many blacks lived in all-black communities, the remnants still remaining in various sections of southern Ontario. One historian noted that blacks were "welcomed in Canada while they were escaping slavery in the United States. They were no longer welcomed when slavery was abolished in that country."

The increasing hostility led to a large outmigration following the close of the Civil War. Several thousand blacks returned to the United States where they felt more at home, though they recognized that the ending of slavery would not necessarily bring real freedom from prejudice and discrimination. The result of this migration was that the black population was greatly reduced.

Nevertheless, blacks who remained in Canada, and particularly in southern Ontario and the Maritimes, began to face increasing hostility and discrimination. Restaurants and other places of public accommodation were not open to them. Segregation and discrimination based on colour became widespread. Segregated schools were established when white parents objected to their children attending schools with black children. Employment opportunities were closed to them and racial antagonism increased. By the end of the 19th century, segregation in Canada, as in the United States, had become a firmly rooted social institution.

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The 20th century: the early part of the 20th century brought little change in the position of blacks in Canada. Even in the First World War, blacks were told that they were not wanted or that they would be permitted to serve in segregated units in the Canadian Armed Forces. The situation remained virtually the same until the Second World War. It was not until the post-war period that blacks, having fought to destroy fascism in Europe, began to demand freedom here at home.

By the end of the 1950s, the demand was becoming irresistible and it became necessary for the government to respond, at least in a limited manner. First in Ontario and later in other provinces, governments began to enact laws prohibiting discrimination in employment. Later, laws prohibiting discrimination in housing were enacted. By the early 1960s, Ontario established the first human rights legislation in Canada. Other provinces subsequently followed the Ontario model.

However, it seems clear today that human rights codes and commissions and the more recent municipal actions in setting up race and ethnic committees have had little impact on the negative aspects of race relations in Canada. Discrimination, although in more subtle forms, still exists. Blacks and other racial and ethnic minorities are largely barred from meaningful participation in the major economic, social and political institutions in Canada. The pattern of isolation, poverty and hopelessness which existed for great numbers 200 years ago still exists in much the same form. Black children still find opportunities closed to them. As a result, they drop out of school in great numbers. They drop out of school because they have no faith in the future.

In 1982, the Charter of Rights and Freedoms was viewed by many as a major step forward. It was recognized, based on long experience, that laws and constitutions are no cure-all; but the charter was seen by many as an important tool which had great potential in the struggle for equality and freedom in Canada.

Provisions of the Meech Lake accord limiting the powers of the federal government and increasing the powers of the provinces arouse great concern. As badly flawed as the record of the federal government has been in the past, it is still more important to minorities to have federal protection than to be left to the tender mercies of many provincial governments. This is an important reason why we are here today.

The effect of section 1 of the Meech Lake accord on section 15 of the charter is of grave



concern to us. Clause 2(1)(a) recognizes "that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada."

Clause 2(1)(b) states "the recognition that Quebec constitutes within Canada a distinct society." Further, subsection 2(2) states, "The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada..."

Section 15 of the Charter of Rights and Freedoms states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex," etc.

Section 15(2) allows the government to develop "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex," etc.

These two sections are clearly in conflict. Subsection 2(1) calls upon the courts of Canada to interpret the Constitution in a manner consistent with clauses 2(1)(a) and 2(1)(b). The history of blacks in this country leaves no question which section will gain prominence in a challenge between section 2 and section 15.

What the Meech Lake accord has done is legislate discrimination against those people in this country who do not fall into the two categories set out in the Meech Lake accord. Blacks are English-speaking and French-speaking. Blacks have been here for 400 years. The native people have been here before the English, the French and the blacks. Yet nowhere in the accord, which we are told is important to the unity of Canada, are these people recognized.

What is fundamental about the Meech Lake accord is the single-mindedness with which all the politicians have disregarded the existence and contributions of those members of the Canadian society who do not fall into the two categories set out in Meech Lake. What is also fundamental is that most of the politicians who now tell us how great Meech Lake is for Canadian unity are either Anglo-Saxons or French.

The Meech Lake accord has a far-reaching effect in terms of any programs which affect the non-English, non-French residents of this coun-

try. For example, in terms of employment equity, could a government which has committed itself to employment equity for visible minorities now make the same programs language-based in order to promote and preserve the fundamental characteristic of Canada? This would severely affect blacks and other visible minorities who are underrepresented in the workplace.

Several ethnic groups have been lobbying the government to fund heritage language programs. Could the government not now legally under section 2 refuse to fund these programs as they do not comply with what is required in section 2?

Recently, we have seen an influx of visible minority immigrants into Canada. Can a government, in order to protect and promote, now legally legislate to prevent these persons entering Canada? After all, under Meech Lake, Canada must preserve its fundamental characteristic.

There are several other examples, but this presentation is too short to tell them all. What is important to note, however, is that any challenge under section 15 can easily be met with a defence under section 2 of Meech Lake and, consequently, the disadvantaged individual or group would not succeed.

There is only one way to prevent the disastrous effect of Meech Lake and it is to amend section 2 to recognize all Canadians. Unless this is done, any challenge could be met by the government with section 2.

The government has not been clear on the effects of Meech Lake on the groups not specified in section 2. We, however, hear on the news that it will not affect the rights we now have. Promises and assurances by politicians are of no effect. What we must have is a clear, unambiguous amendment to section 2 of the accord to ensure that the guarantees under the charter are not weakened or removed.

In order to alleviate the concerns we have expressed here today, it is suggested that section 16 be amended to include section 15 of the charter.

**The Vice-Chairman:** Thank you very much for your presentation and, in particular, the last little bit where you set out exactly what you think would be appropriate to meet your particular concern. As I indicated to you just prior to our commencement, we have heard from many people and each time there is a different slant, a different point of view. I am particularly pleased to have you here today because, in my recollection, this is the first black presentation we have had. Your comments here today and the background you have given have been very helpful.

We will have a time for questions and will start with Mr. Allen.

**Mr. Allen:** Thank you. I am delighted the Afro Canadian Congress has come before us. I apologize that other members are not here. Having been absent the occasional early part of a morning because of traffic problems, etc., I think there may well be good reasons why my colleagues are not here to listen to you, but I want to assure you, first of all, that your remarks are on record. We do look at the transcripts when we miss sessions, and that will all be taken into account as we come to a conclusion on these hearings and draw up our report. You should not feel that your remarks have any less force because there are only two of us here and not more of us.

**1010**

Second, I am especially pleased that you introduced your remarks with a short capsule history of the blacks in Canada and in Ontario. You are on the air, as we are, and people are watching; not many of us know that history, even in the short form, and so I am pleased that you gave us that account.

I want to come close to the centre of your concerns. Obviously, the relationship between the charter and this accord is a very complicated matter, as we have had lots of opportunity to discover. What I would like you to explain a little bit more for me is your concern, first of all, about how subsections 1 and 2 of section 15 in the charter are in conflict, because I would have thought that while there is a conflict in the sense that affirmative action programs, for example for blacks, might well mean that other people such as myself might feel we were not getting enough attention in the marketplace or wherever, we would understand that would be to make up for a major disadvantage that the visible minority, or in another case a handicapped person, might have.

If you agree with affirmative action programs to make up those differences, those are a way of overcoming discrimination. Then I am not sure what the conflict is that you are talking about between subsections 2 and 1, which affirms the general proposition on equality rights, for example, with regard to handicap, race, sex and what have you. What is the conflict?

**Mrs. Espinet:** The conflict in the Meech Lake accord is that it would appear here that the groups that have prominence—this is what it says here—are the French-speaking and the English-speaking Canadians. Consequently, I do see that if we put those two sections together and if we

had a challenge under section 15, if I applied for a job now and somebody said to me, “Well, I am sorry, but we cannot give that job to you because we have to make up the number of French people that we have in here.” The fact that there are more English people there, and this is not a sort of attack on the French, but I think the French would be the group that would be given priority.

They could easily say to you, “Well, now we have to try and build up”—because it says “to promote” here and the French have been behind. So what would happen is that you would find a government which has an affirmative action program saying, “Instead of concentrating on these groups—these are disadvantaged groups—then we can concentrate on the French group instead.” As this is written, I think that any challenge under that could be easily met with this, because the courts are also asked to interpret Meech Lake in such a way as to preserve the fundamental characteristic of Canada. That fundamental characteristic of Canada is language duality. Consequently, any other thing would become secondary to that.

**Mr. Allen:** I misunderstood your point on page 6. I thought that you were comparing subsections 1 and 2 under section 15 that had to do with the affirmative action programs. You are talking about subsection 2(1) in the accord which refers to the distinct society.

**Mrs. Espinet:** Yes.

**Mr. Allen:** OK, I understand that point. My next question is, why do you conclude that language duality as a fundamental—just a fundamental characteristic not the fundamental characteristic of Canada—as a fundamental characteristic would take precedence in the courts over section 15 of the charter. One can speculate about lots of scenarios, but why would you conclude that part of the accord would take precedence over the charter, and especially the section 15 equality rights?

**Mrs. Espinet:** Because there is a section here that says that this accord should be interpreted in a manner that preserves the fundamental characteristics of Canada. “The role of the legislature and the government of Quebec to preserve and promote the distinct identity of Quebec referred to....” on page 1 is affirmed. “The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristics of Canada referred to in paragraph (1)(a), is affirmed.”

It would seem to me that, if a court had a challenge under section 15, it could go back to this and say, “Well, this is what we are here to



protect." Because it is not clear to us this gives a great concern to us. I note that in section 16 it says that "Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section..." whatever.

To me, when you put those two sections together, the fact that section 15 is not included in that group—even if we could say multicultural, this section refers to multicultural and aboriginal rights, rights are protected. Because those sections are not there, it would seem to me that any interpretation would be that the "rights" clause in section 15 would have a secondary effect.

**Mr. Allen:** Why would you assume that when section 2, about the "distinct society", is declared to be an interpretive clause whereas subsection 15(1) in the charter is a substantial, declaratory statement of right? It does not say the Constitution shall be interpreted in a manner such as—it says, just baldly and clearly, that "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law..." Even more than that, in subsection 15(2), if you in fact are a disadvantaged group you have a right to affirmative action programs, without challenge, under subsection 15(1).

**Mrs. Espinet:** Yes.

**Mr. Allen:** That is a straight declaration and that does not, in the courts, have the same standing; that to me has a stronger standing before the courts than a mere interpretive clause.

But then if you take the rest of the accord, you have built on to that kind of protection, with that kind of a substantial right in the charter, you have the fact that, under the immigration section, the charter is affirmed and federal standards will apply. You have also the fact that, under section 16—which I think was a misguided section in some respects, but none the less it does refer back to the enhancement of multicultural rights in the Constitution—under the charter it would again strengthen your case as visible minorities among the cultural groups in Canada.

I still do not quite understand why you sense that those are not sufficient protections with respect to the "distinct society" clause, which is largely an interpretive clause, although I think with a little bit of substantive power added.

**Mrs. Espinet:** I think there is a lot of power to that, because if the accord has something to protect, and that thing to protect will be these particular groups, even in section 16. If there were something in there that talks about main-

taining section 15 I think the concerns that we have in the black community, and I think there are some other groups who also have concerns, would be alleviated; but there is nothing in there that says that nothing in this accord takes away any rights that are given under section 15.

As the black community now stands, and several other groups, section 15, we felt, was the most important piece of legislation that was made in Canada because we felt that if it were used by the governments, then we could get something. At this time we are a bit concerned, and I can see how—you know, I hope you will understand why we are concerned, because nobody is really telling us why, telling us how we will be affected, although I would say that just telling how we will be affected is not going to be of political use.

We want to have something written that at least alleviates the concerns that we have that these two sections are not going to be in conflict.

**Mr. Allen:** Thank you very much.

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**The Vice-Chairman:** Any further questions? Thank you very much for your comments. If I might ask one question, you are suggesting then that section 16 in the accord be amended, just to include section 15? Is that your position? I want to be sure. That is what your last paragraph says.

**Mrs. Espinet:** Yes, because if that is included then we will know that the equality rights would be on the same standing as all the other rights. Without it there now, just as a matter of straight interpretation one would say that since it is not set out there then that is excluded, and I think that is very important. It is very important to us, anyway.

**The Vice-Chairman:** The reason I ask with respect to that is that other groups have suggested the whole charter be included in section 16 as well, to make sure the accord does not in any way impact upon any part of the charter itself. I just wanted to hear your comments with respect to that.

**Mrs. Espinet:** That might well be so, but I think what we focused on today was the part that we felt affected us most. There is another section that also affects us, and that is the immigration clause—that affects us—but I see that section 15 is really, really crucial in terms of any type of equality in this country and alleviating the type of problems that the history I have outlined has set up in this country.

**The Vice-Chairman:** Thank you very much for making that clear, because you have come to

us and you have put forward very forcefully your major concern. From what you have just said you have other concerns as well, but you would like us to focus, and you have focused, on behalf of the Afro Canadian Congress, upon what you think to be the most important part.

We appreciate your coming today, and as I said before the information you have given us is from a certain point of view we have not heard before. As indicated by Mr. Allen, this is all part of the record and I can assure you it will be talked about as we go through and attempt to come up with our report.

Thank you very much for coming today.

**Mrs. Espinet:** Thank you very much for having me.

**The Vice-Chairman:** Our second presentation today is from Howard Mountain and Elizabeth Mountain. Would you come forward? Just have a seat there, please.

Welcome. Mr. Mountain, will you be making the presentation or will both of you be making the presentation? Whoever is going to be doing so, would you please start?

HOWARD MOUNTAIN AND  
ELIZABETH MOUNTAIN

**Mr. Mountain:** That is a very unpredictable situation, I am afraid, Madam Chairman. One of the things I have discovered about women in general, and I am sure you are included, is that part of their charm is that they are unpredictable. The one who sits beside me is no less in that category than anyone I have ever known.

**The Vice-Chairman:** We look forward to hearing the presentation.

**Mr. Mountain:** Whatever she says or decides to say, I am sure, will be more a surprise to me than anyone, but quite appropriate none the less.

**The Vice-Chairman:** Thank you very much, Mr. Mountain. Please proceed.

**Mr. Mountain:** Thank you very much.

**The Vice-Chairman:** I believe we have a copy of your original submission, and I understand that you are going to elaborate on that further today.

**Mr. Mountain:** Yes, I hope to.

First of all, I would like to thank you for allowing us to come here today. What we have to say is probably going to be quite different from the submissions you have received so far. However, as they said in the pulpit, this is the second time of asking. On request of the government those many years ago in 1981, we went and submitted then a document which in

many ways says similar things to the one we have presented to you this morning.

We hope to have the committee appreciate that the conditions have not changed, and indeed, the dilemmas of the Meech Lake accord, which we find a subject of considerable controversy throughout the country, are rather universal ones that extend not only through each of the provinces for each of the individuals but also far further across the face of the globe.

As a little introduction: good morning, Mr. Allen. We saw each other before. For the rest of you who have not seen us before—and I think that is everyone—we are both educators, particularly in the gifted area. My wife is a psychology-English type. I am a military officer, film-maker, television person, political scientist—the whole bag of tricks.

**Mr. Morin:** We know each other.

**Mr. Mountain:** Yes, we do. My apologies.

**Mr. Morin:** We had our officer training together many years ago.

**Mr. Mountain:** Yes, right. Gilles Morin and I took officer training together. What a sober and sickly thought that is. We went through a kind of Sandhurst that I do not want to even think about.

**Mr. Morin:** That is right; that is right.

**Mr. Mountain:** Ah, wonderful. It never occurred to me. You rascal, you. You look just the same. I have not changed, myself.

May I begin by going through this, because it may present a bit of a dilemma for you. The essence of our submission is probably best explained by beginning to tell you that my master's is in political theory.

My interest, then, is how a constitution is put together, the balance between the rationals and nonrationals in that constitution and the effect that balance has on the overall conduct of the constitution within the governing capacity of the nation, appreciating the fact that a constitution is a pure contradiction in terms. On the one hand, it must cope with change, and, on the other hand, as a constitution that codifies the law, it resists it.

As content, the constitution then becomes an inhibitor to progress, an inhibitor to change. When that content is inherited from a previous constitution, where the consensus that formed it was, indeed, compounded stupidity and not distilled wisdom, then people who are in the position of Pierre Trudeau or in the position of our present Prime Minister find themselves in an enormous dilemma trying to deal with not only a situation that is specifically designed to persist in time and space, but one that also has, prior to



it—and, in some cases, assumed by it—a set of circumstances that are substantially nonfunctional.

Take one thing, for instance, which is of interest to us both but is only a very small part of this whole dilemma. That is education. It is said that, of course, the provinces have the educational responsibility in this country by the British North America Act.

Can you imagine any industrialized country in the world trying to revise a deficit, trying to ensure educational progress, and not being able to do that on a national scale because there is still that dilemma—and codified, would you believe, for some 100 more years—of the division of the educational elements on a provincial basis, such that the people can look to their migration across the provinces and hope to find, in some other place in their country, the same opportunity that might have been awarded them in an educational institution, say in Ontario, to gain some sort of place in the world in Newfoundland; or given the education system they have in Newfoundland might expect to find a place in the highly industrialized and much more intensively business-oriented community of Ontario?

### 1030

What this brief tries to point out—I would like to go through it for only that purpose—is that when we are dealing with the codification of a document, it originally rests on the consensus that is possible; that consensus is based on information; that information is based on learning; and that learning is based on the individual's ability and the collective ability to learn.

If we are going to consider the validity of a document that is as important as a constitution, we must therefore look not to the essence of its functionality that is the content, but to the essence of its functionality that is the process.

What I have tried to say in this very short and precise piece of paper, since you and I, and especially Gilles, do not like to read a whole lot of whale-feathers and glue, is that we must make an attempt to become a state of becoming, that change, however it is done, however haphazardly and accidentally it is now performed, simply will not suffice in this world of terror, in this world of competition, in this world of scarcity, in this world of compassion.

What I would like to do is to have you appreciate that the "becoming" refers to the process. The state, therefore, for the first time in the world that I know of as a student of political science, needs to begin to consider not simply the essence of a constitution in terms of its content,

but also the essence of a constitution in terms of its process. Only those two in combination will enable you not only to choose initially those elements that are most functional in the document itself, but also then to discard those that are nonfunctional as you begin such a process as Meech Lake, without the rancour and the inefficiency in those terms that have accompanied this process.

What we are dealing with is not a fault in the content, per se, in 1867 or in 1981 or indeed in Meech Lake, but a fault in the process, because the element of consensus that was formed in order to identify the codification in this process was in itself in question.

May I direct you to *Becoming a State of Becoming*, the document we put as one of the group, please. Excuse the opening paragraph because it is my way of lightening the day. The less you understand, the more you must obey. As Gilles will tell you, I was never one for obedience, although we were required to do a fair amount of it in uniform.

**Mrs. Mountain:** He has not changed.

**Mr. Mountain:** No.

But opposite them, understanding and responsibility form a far more productive view of social order. Please, rather than just extend yourselves to look at the micro and the macro, look at the tyranny and the stupidity that accompany family breakdown in the micro concept, and look at the macro concept of the ability of the United Nations to function officially since its inception, and appreciate that the tyranny and the stupidity which plague its halls are rampant throughout the world on the basis that consensus, wherever it is formed, does not pay attention to the process by which it is formed, but only then reserves the right to enshrine the content that is derived.

The consensus which is the foundation of democracy is a collective concept of understanding and responsibility of each individual, based on availability of valid information and the capacity to absorb it. Please note there are two separate and distinct elements that are proposed here. First is the availability of valid information and second is the capacity to absorb it.

Mr. Radwanski, in his recent piece of paper asking for some educational reform, used words we coined some time ago, "learning opportunity," and a learning opportunity is only useful if it is matched with a learning efficiency. My wife and I represent a learning system that we tried to institute originally on a nonprofit basis and now we have instituted it as a company only because

that was the at-arm's-length stature we had to take.

This particular approach is the one we take, the dualism of a learning opportunity and a learning efficiency. Without that dualism, learning how to harvest coconut palms in Baffin Island is not appropriate. You may have the learning efficiency but I do not think the learning opportunity exists.

As consensus is validated by repeated productive application in time and space, our temptation is to codify it to promote stability and the rewards of unified action.

Ah, what a temptation. Lead not into temptation perhaps is the better phrase because when time and space designates that this temptation should be ours and we codify a document, then perhaps only an hour later or a day later or a year later that codification needs to be destroyed and we need then to change; and yet there was a simple formula and this is that the ability to learn equals the ability to change. If the rate of change is nine out of 10 and the learning ability of the lowest common denominator of the group is two out of 10, then they are stuck with either the tyranny or the chaos which intervenes between that two and that 10.

The process by which the original consensus was delineated can only rest on the validity of its information. I think that is self-evident. I really do not think I need to say more. This information is a reflection of learning ability, not only in defining the original consensus but in accommodation to its inevitable erosion under the pressures of change.

Not good any more. We must get rid of this part of our law. It is not good any more. But how do we get rid of it except by the cumbersome method by which even you, as political individuals, face that horrible phrase which your enemies foist upon you, which is "political will." Then really what it is dealing mostly with in the case is the difference between the awareness you have as politicians and the opportunity or the capacity of your electorate to change at the rate at which you know that ought to happen. And so the lag is not only a lag which causes you enormous distress, it causes you to perpetuate elements within legislation that should have been abandoned many years ago.

Hence, the primary safeguard for the quality of consensus both initially and over time, is the process by which it is formulated.

A constitution is our best attempt at universal consensus, codified to form a basis to lesser laws that follow. So important this is, because as we

have seen this morning and you have seen—my goodness, how many hours now?—this is the bulwark; this is the cornerstone; this is the beginning. A constitution safeguards your freedom and a constitution protects you from tyranny. Without it and without the ability to change it to conform with the elements that are out there, and change is a very large object these days, then as soon as it becomes less either in the original or in the deterioration, and the further away it gets from the reality, the less useful it is, and unfortunately, the more destructive it is.

#### 1040

Since a universal is by definition a concept that will accommodate both time and space—by definition only, notice—the most vital part of its validity must be to ensure an efficient process to accommodate change; for this same concern recognizes that its initial form—in our case 1867, the Magna Carta, how far back do you go?—will be as accurate to the moment of codification as possible.

Now the tough one, short and sweet. My mother told me write only one sentence in a paragraph if you want it to stick. It is senseless to codify the content of any consensus if you cannot at the same time codify the process.

Content is what you have learned; process is your ability to learn it. Here we are in the self-evident category again. Pardon me, please, but a precedence of logic reverses that order so that learning how to learn becomes both our primary act and our primary concern.

A constitution, by definition, is our most universal codification, coming as close as possible to establishing a consensus for "all of the people all of the time." Where have we heard that one before?

Without understanding, it is tyranny; without responsibility, it is chaos. Do you not know it, you elected officials? How about being accused of tyranny when what you are trying to do is implement order? How about being accused of chaos when all you want to do is extend freedom? All of these things are a result of the learning ability of the electorate, not only those who sit in office, but each person who must interpret these laws, this Constitution to their end, to their way.

Both understanding and responsibility come from learning, whose only basis is knowing how to learn.

My mother said to me there are two things you must do in order to succeed. One is to ask the right question. I think we have managed. I hope you will at least have consideration for how we have managed. Others—you, Mr. Allen, have an



appreciation that at least we have made a hard shot at the solution. Not only has Mr. Radwanski said how to learn ought to be a part of this province's educational system, so that the education system has a system of education, not only that but also the original individual who began and for years served as its director, Dr. Jackson of the Ontario Institute for Studies in Education, has remarks which are available to you in a document you will be passed very shortly in which his recommendation was, years ago, that this be instituted.

Mrs. Deller, do people have these other pieces of paper?

**Clerk of the Committee:** Not yet.

**Mr. Mountain:** OK. The concept of the constitutional document as a law may seem to you to be rather far away and absurd and ethereal, and the concept of learning how to learn may not have a direct or attached part of that association.

Would you give out, please, "Justice Has a Birthday"?

Perhaps you can appreciate my sense of humour once again, which I refuse to repress in this world of mediocrity and idiocy; you know, poor hamburgers and various things.

Great Scott, he's done it again. Justice has a birthday. Many happy returns. Not Sir Walter or he of the Antarctic, but General Scott—that is a military comment, please—or more rightly, Attorney General Scott.

Reason has always suffered at the hands of emotion and violence but neither of the latter could be considered a cornerstone of civilization, and given you can muster the functional literacy—By the way, may I claim something? In 1952, I was the first one who published that well-known and often vilified phrase "functional illiterate." As we get through this document—not this one, another one—I hope to clarify what that really means and not what people have been using it for in the United Nations and the federal government, on and on. We may have all found a glimmer in the dark.

The remark I refer to is the one in which we are all asked to consider the reduction of the mandatory incarceration of a first-degree murderer, from 25 years to a lesser term.

This will not appeal to the recently disappointed advocates of capital punishment, but if we can rise above the eye-for-an-eye, tooth-for-a-tooth mentality, it would seem that Mr. Scott has pointed to a better path. The eye-for-an-eye, tooth-for-a-tooth mentality is rampant these days.

Noting that after a period of 25 years behind bars, rehabilitation would be very unlikely, to say nothing of the public cost for those years, robbing from the rest of us over a million dollars, Mr. Scott suggests that with a reduction of sentence, a greater potential for rehabilitation is possible.

Some perspective emerges if we can imagine, when after conviction at 18 years of age and a 25-year stay in prison at a cost of a million dollars, at age 43 the prisoner could emerge with a potential for four more decades of mischief, murder and mayhem, then to pass on quietly at public expense after costing us all well over \$2 million to apprehend, convict and confine him for those decades. We do it.

Does that seem only expensive or simply fictitiously absurd? If so, count the cost of all the positive contributions lost to a life of crime and how many lives destroyed or disfigured are victims to a single lawbreaker in the whirlpool created by his or her lawlessness.

An expensive cure, to be sure, but one rendered many times every day. But why civilization has followed this design for eons with such little success is not obvious to all.

Why am I reading this? Because this is one of the laws that is passed down from the Constitution and this is how it fits.

How is it that a viewpoint, a philosophy, a plan, an operation for the prevention of this dilemma has evaded our perception, let alone our purpose?

My grandmother often said to me as a child that criminals were people who never learned their lessons. Perhaps she could have spared herself the last two words: criminals are people who have never learned.

Could it be that they never learned how to learn, and is it just possible that no one had taught them how to learn, and therefore must we conclude that no one knew how to teach them how to learn? But enough of that difficult path for the moment.

So that you do not think I am one of those cold people who deals in logic alone, please note that Mr. Scott's call may be for mercy, compassion, love, humanity, forgiveness, if that is your choice, but if not knowing how to learn sent you to jail, will any one of these exercises of generosity cure the condition?

If you have an education system with a system of education which teaches the most important subject in school, that is how to learn, all parties—victim, society and prisoner—would escape without penalty and the subsequent positive

outlook and action is something we can only imagine, yet something I am sure we would all welcome.

Crime and punishment as a simple consequence of cause and effect have been the stupid binary approach to law and order that has been our curse for centuries, not only on an individual basis but a collective basis, I might add.

Now Mr. Scott has broken the chain by questioning the severity of punishment in favour of rehabilitation. Yet he is on record also to have us appreciate that restitution is also a substantial element of many awards.

Can we look forward to every judgement considering punishment as only one of its elements, restitution as the second, and finally rehabilitation; rehabilitation reflecting the forgiveness, mercy and compassion we have always been urged to extend, but now a functional possibility because there now exists a system to teach people how to learn; whose same simple understanding administered before the fact may save us all the enormous cost in suffering and misery we all seek to abolish.

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Each time we lay to rest a victim, a policeman, a prison guard, a convenience store worker, a refugee or even a head of state, the reality of murder ignites such an outrage that our only response may be revenge. Revenge is only a little more futile than mercy if no design is in place to safeguard the process of rehabilitation. That process only comes from learning, which in turn only comes from learning how to learn.

Time flies.

**The Vice-Chairman:** Yes, it does. May I just suggest to you that I find this extremely interesting, but I hope you can confine yourself so that we can ask you questions with respect to your opinion on Meech Lake and, in particular, your first presentation about the process, so that we can have time to ask you questions.

**Mr. Mountain:** Right.

**The Vice-Chairman:** Perhaps you could sort of tie into Meech Lake as much as you possibly can.

**Mr. Mountain:** OK. Allow me one more. Would you give out "First Aid," please?

**The Vice-Chairman:** I enjoy your sense of humour.

**Mr. Mountain:** Thank you very much.

**The Vice-Chairman:** We all do.

**Mr. Mountain:** I will impose it on you whether you enjoy it or not.

**The Vice-Chairman:** Just as long as you let me impose mine.

**Mr. Mountain:** Oh, indeed, yes. I have my wife's imposition daily and I could not live without it.

Sometimes if you write a book, it is no good unless someone reads it.

**The Vice-Chairman:** But it is not any good until you write it either.

**Mr. Mountain:** No, that is true.

**The Vice-Chairman:** That is one of the most important things.

**Mr. Mountain:** If you can get a book on one page maybe it would be a good idea, because maybe more people would read it.

First Aid.

How much of sickness is

Not knowing the prevention

Not knowing the treatment

Not knowing the cure

Not knowing

Not knowing how to learn.

One more perhaps. How much money do you spend on health care? It should be spent on teaching people how to learn because there is the prevention. There is the treatment and there is the cure in a new dimension.

Deborah has more things for you. Not just now please, my dear, because I am going to stop for questions, which I hope you will find interesting. I would commend, Mr. Allen, because of your kind and sombre face and your attention to us the last time we came to a committee, please read "Last cry—last laugh." With the chairman's sense of humour, I am sure you can sit together and enjoy it over a coffee, but do not invite Gilles.

**The Vice-Chairman:** Thank you very much, Mr. Mountain. I do appreciate your comments. It is a pleasure to have a private citizen come as well and to take the time and the effort to look into one of the major political situations that has ever been faced in Canada. Your comments and your original brief I found extremely interesting. Are there any particular questions anyone wishes to put? If not, I have one if I might.

You are very general in your comments with respect to just exactly what you are suggesting in the process. I liked your one paragraph, the paragraph saying that, "It is senseless to codify the content of any consensus if you cannot at the same time codify the process."

**Mr. Mountain:** Right.

**The Vice-Chairman:** May I just ask: am I wrong in interpreting that you think somewhere in the Constitution there should be a process for



the growth of the Constitution? Is that a fair way of putting it?

**Mr. Mountain:** That is one fair way of putting it.

**The Vice-Chairman:** OK. Do you have any other comments you would like to make?

**Mr. Mountain:** Yes, I do. If the submission we made in 1981 is on record and I believe I gave you—no I did not, but I will supply copies if you wish, of that submission.

**The Vice-Chairman:** You can supply a copy to our clerk and that would be sufficient.

**Mr. Mountain:** Yes, at that point in time.

There are two facets to becoming a state of becoming. The first one is learning how to learn, because it controls the quality of the consensus. Please stop me if you say, "I don't know what you're talking about."

**The Vice-Chairman:** I understand.

**Mr. Mountain:** If it controls the quality of the consensus—he is talking to me again—then that consensus is codified into law and you can then be abused or punished or assisted or confined by that law. Then surely it is your right as a citizen—in fact, it is your initial right as a citizen—to be taught how to learn, as that is the access you have to the content.

Your job as politicians, and indeed the job of academics throughout the world and of scientists, is we have all this information, but so little of it is being used. The world is so far behind its time. What I am looking at is that 97 per cent of the people in Uganda are functionally illiterate; they cannot read and write. Yesterday I heard a report that within 10 years that same 97 per cent are predicted to be dead of acquired immune deficiency syndrome. What we are looking at are the fundamental elements that enable us to learn for our own protection, for our own happiness, for our own interest in the world, for our own growth, for our own safety. I think you all have a copy of "Learning on the High Wire." Do they all?

**Clerk of the Committee:** Is that the brochure?

**Mr. Mountain:** Yes.

**Clerk of the Committee:** Yes.

**Mr. Mountain:** May I commend that to you, in terms of all the other things we missed today in the short time, and to look to Meech Lake as saying two things. First—please, please—think of the impossible task that faced those individuals and faces you because this province is a signatory to that document if it is going to mature; and appreciate the fact that in a political sense,

without the kind of involvement that comes from an informed electorate, the elements of a Constitution, whether in 1867, 1981 or today, are going to be based upon nonrational elements in the first place because the consensus was a bad one, because not only in 1867—I do not want to go through the circumstances of the separation of church and state, etc., but I do want to say that in that whole pattern the ability to learn of the individuals within the nation, as well as the ability to learn of the politicians, administrators, bureaucrats and sovereigns in that case who were involved, made a consensus which makes this Meech Lake thing three generations later extremely difficult to deal with.

What I am saying in simplest terms is that two things need to happen. Knowing how to learn must be a codification in the Parliament of Canada itself and in the Constitution because the process precedes the content. I know how to carve good statutes; therefore, I carve good statutes, not the other way around. It is an initial prerequisite of Meech Lake. The difficulty is that what my dear wife and I are here to do today is to say God bless you all, you are having a wretched time. The reason you are is that you are trying to make a buggy with two wheels. It will not stand up because over here is the content and over here is the process and this little guy sitting in the seat is the personality. If you do not have that stability, I am afraid you are going to have a constant fight in trying to ensure it.

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First, it talks about the process of learning how to learn to initiate the constitutional dilemma and say this is not good or this is not bad. That is the balance between rationals and nonrationals that can only happen in the correct ratio when you really understand how to learn how to understand; not learn how to believe, which is quite different.

Second, after you have codified that original Constitution to your best ability in time and space, it is absolutely useless, as we have seen throughout the world, unless the people understand it, unless they appreciate it, unless they can translate it, unless they can take advantage of it. Learning how to learn is not a document or an exercise reserved for few individuals. That is the absurd part of many constitutions throughout the world.

If you codify the Constitution here and the rate of change is 10 out of 10, if there is no process to move that Constitution at the same rate as the rate of change—and that is the ability to learn not only of the Parliament and the administrators but also

of every citizen, because what is not seen to be fair is not fair—then the Constitution deteriorates in its validity and therefore incites either chaos or tyranny, one or the other.

**The Vice-Chairman:** Thank you. I think Mr. Allen has a comment he wishes to make.

**Mr. Allen:** When I was arriving this morning on the Toronto Transit Commission version of the Metro or the underground or the subway or whatever you call it, I encountered an ad which applied Kierkegaard to Crunchies.

**Mr. Mountain:** That is a stretch.

**Mr. Allen:** The Mountains have come this morning, and I listened to their becoming a state of becoming. I gather they are applying Hegel to Meech Lake and I am not sure whether they are telling us that Meech Lake is Crunchies or what it is. I am not sure whether I understand exactly what it means to say that this exercise really amounts to a carriage with two wheels. I think I get the basic point you are making, but I would like to know in quite specific ways how well the Meech Lake undertaking codifies either content or process.

There is process. Whether the process is codified in language, it is there in precedent in the way it was done. That is often the way things get codified, in our constitutional past in any case. Can you briefly indicate whether you think Meech Lake is totally irrelevant, bad, awful, whether it is indifferent, whether it has some good points or where the specifics are that are problematic for you?

**Mr. Mountain:** Sure. I think Meech Lake was a document in which—careful, Howard—the press of time and space almost propelled people to a need for a consensus. The propulsion led them, unfortunately, not only to make some ill-advised choices for that moment, in my opinion, because they were politically viable, they could be sold in one or another part of Canada; but the difficulty in selling them in one or another part of Canada was not based irrationally, it was based on the learning ability of the individuals in those various parts of Canada and to what degree their support of Meech Lake would be rational or nonrational. Does that make sense?

I can take it one step further. I would be glad to be specific with you, but it would take some time. What I am saying also, though, is that when Meech Lake was put together it suffered from the difficulties of 1981, the difficulties of 1867, the difficulties of the Anglo-Franco wars, the difficulties of the American incursions and pressures from the south and all of the historical elements

which led to structures, which are not necessarily viable but in fact are very destructive today, not only because they interfere with the rights and freedoms of individuals living in the country, given the various subgroups that are not served by that document, but indeed what they do is penalize us all because they are a bad consensus.

That bad consensus is not seen to be bad at all in terms of many people, because they look at it in this time and space; but unless there is an accommodation to the kinds of things we have been talking about, that is that the ability to change is part of the constitutional element—and for Heaven's sake, for politicians this is so essential. Do not nail me down, please, but if you get a province in Canada where the learning ability is three out of 10—and you can think of one, maybe; I do not know, maybe you cannot, but if you can, try thinking about one—then its resistance to change is three out of 10.

Or if you get a province where the learning ability is on a norm, six or seven or eight out of 10, but one small area is intransigent and it is vital and it will not move from it because it cannot change it from a nonrational to a rational point of view, it is self-destructive at that point. That is the essence of what we are trying to say today in terms of putting an education system with a system of education and enlarging the whole perspective of human behaviour so that the content becomes an element of their understanding in the same way that process becomes an element of their understanding.

I know what I am doing, because I know how I did it, and once I know how I did it, I can undo it. But if I went in and did it without having the faintest idea of how I did it, I am stuck and I cannot undo it, because someone says, "You are not loyal," "You are not kind," "You are not fair," or "You are not just," and all of those things may make one dead. To me, that is stupid. Stupid is not an entity in itself; it is a measure of a person's ability to learn. No one should be criticized for not having that ability, because I only know how to fly a plane because someone taught me, and it was not you.

**The Vice-Chairman:** Thank you very much.

**Mr. Morin:** Just one question.

**Mr. Mountain:** I hate this. This is the worst part of the whole thing.

**Mr. Morin:** It is nice to see you after 37 years.

**Mr. Mountain:** Isn't it marvellous?

**Mr. Morin:** You have changed a bit. Your hair is white; mine is a bit receding.



**Mr. Mountain:** You are better looking, though. You really are.

**Mr. Morin:** I think the message you try to communicate—and tell me exactly if I understood you well—is that before you implement any laws, make sure people understand them clearly, make sure you have full participation.

**Mr. Mountain:** Right.

**Mr. Morin:** Make sure you do not sign anything unless you really understand it clearly. Do not become prisoners of your own laws. Give yourself a lot of flexibility. Make sure people participate. Make sure you get involved: that if you write a constitution which is fair it is fair to everyone, that you take into consideration the strengths and the weaknesses of the people.

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**Mr. Mountain:** Yes.

**Mr. Morin:** The other message I have received, and it is very clear, is do not sign it until you really know what you are getting into. You feel yourself that we are not ready for that. Am I correct?

**Mr. Mountain:** Yes. I agree with everything you say, Gilles, but may I add one thing more? All of those good things you talk of rest on people's ability to learn. All of those good things for politicians, all of those good things for the people rest on that single post. All the intention and all the goodwill and all the rest of it can come to naught if the learning ability of the individual or the group is not capable of absorbing the idea, even if it is in their own best interests. Elizabeth?

**Mrs. Mountain:** I just want to add that to this point in time learning ability has been assumed. It has been taken as a given. I think Howard is trying to make the point that to this point it has been subjective, random, intuitive, accidental and therefore can be either efficient or inefficient. What teaching people how to learn does is to objectify people to that process by a deliberate educative experience that guarantees a level of efficiency that can be projected and identified and not assumed.

**The Vice-Chairman:** And therefore not haphazard.

**Mrs. Mountain:** Not haphazard.

**The Vice-Chairman:** Thank you very much, both of you, for coming and for your interesting presentation. I am looking forward to reading the rest of the documents you have left with us. Again, I would like to say it has been extremely helpful to me to read what you have put forward and to listen to you answer the questions. It is

certainly something that is going to be discussed when we look, in particular, at the process and what has happened before Meech Lake. Thank you both very much for coming. We really do appreciate your taking the time and the effort to be here.

**Mrs. Mountain:** Thank you very much.

**Mr. Mountain:** Thank you very much, Madam Chairman, members of the committee. Thank you very much. Special thanks to Gilles.

**The Vice-Chairman:** Thirty-seven years have not hurt him that much.

I would like to call on our third presentation for this morning, Professor Watts.

**Mr. Mountain:** Sorry, I will move my case here.

**The Vice-Chairman:** Do not forget your recorder.

**Mr. Mountain:** Oh yes, my other mind.

**The Vice-Chairman:** Good morning, Professor Watts. I do apologize for being a bit late, but we appreciate your coming here today and taking time to make the presentation. As you have seen, or I am sure you are aware, we will listen to what you have to say and then we will proceed with questions. Thank you very much.

DR. RONALD L. WATTS

**Dr. Watts:** Thank you very much, Madam Chairman, and to the committee for the invitation to appear before you.

I have not made an individual submission to the select committee, but I was one of 11 Ontario academics who jointly made a submission to the committee, entitled Strengthening the Federation. However, I am not here as a spokesman for that group but rather in my individual capacity. I simply want the select committee to know at the outset that I endorse everything in that statement, which was sent to you in February, I believe. I am not proposing today, however, to talk about that particular written submission. I simply draw it to your attention and say that I support it wholeheartedly and everything in it. I would, of course, be happy to answer any questions, if you have questions on what is in that.

Second, I would also want to emphasize that my views have been shaped by my experience as one of the two Ontario representatives on the Pepin-Robarts commission, when I had an opportunity to travel all across Canada and hear the views of Canadians on constitutional matters, and as a consultant to Mr. Trudeau's government during the summer of intense constitutional negotiations in 1980. But here I am not a

spokesman for any party or any group. I want to emphasize that what I say is in my capacity as a private citizen, albeit with perhaps some special experience as an academic and in Canadian affairs.

Since my area of primary scholarly activity has been the comparative study of federal systems, it occurred to me that it might be of most use to the committee, given the lengthy sessions you have already had, if I did not simply try to recover all you have heard, but rather looked at the issues you are addressing from a comparative context, perhaps to shed some different light that you may not yet have heard. So I am going to focus my comments on the 1987 constitutional accord, particularly in the comparative context and in relation to the experience of other federations.

While we in Canada must deal with our uniquely Canadian problems, I think too often we fail to look sufficiently at what we can learn from the experience of other federal systems. Oh, yes, we refer from time to time to the American experience, but very rarely to the relevance of, say, Switzerland, which is not a bilingual but trilingual federation, or to Australia, which followed the Canadian innovation of combining a federal system with parliamentary institutions, or to the Federal Republic of Germany, which has perhaps developed most extensively the institutionalization of intergovernmental relations, and even some of the developing federations.

I wonder how many Canadians, or for that matter members of the committee, realize that the independence constitutions of India and Malaysia were based largely on the Government of India Act of 1935, which in turn was modelled very closely on the British North America Act. Therefore, if you look at their federal constitutions, you can find a great many close parallels, and both of them are federations that involve multilingual or multiracial constituents. On a number of the issues relating to the accord, I would like to try to draw from comparative experience and suggest that these may allay some of the concerns that have been expressed by the critics of the accord.

The views on the constitutional accord seem to be in sharp variance. The critics have given the impression of the accord that, first, it represents an abdication of the federal government and a massive transfer of powers to the provinces; second, that the recognition of Quebec's distinctiveness is a first step to inevitable separation; third, that the accord will prevent any new shared-cost programs; fourth, that the rights

enshrined in the Charter of Rights and Freedoms are threatened; and, fifth, that further Senate reform would be prevented. Of course, you have heard a lot of others as well, but I am picking on perhaps five of the major ones.

The supporters have taken a contrary view on each of these positions, arguing that, first, the inclusion of numerous nonderogation clauses ensures that federal powers remain basically unaltered; second, that the failure to reconcile Quebec as the one province that did not assent to the constitutional amendment of 1982 will lead inevitably to Quebec separation; third, that the federal power to engage in shared-cost programs in areas of exclusive provincial jurisdiction will be explicit in the Constitution for the first time under the accord; fourth, that the Charter of Rights, and especially those enshrining gender equality, is legally secure; and, fifth, that the accord represents an interim step towards further Senate reform.

To come clean at the outset, my own general position on the constitutional accord of 1987 is that although the accord is not in every detail precisely the way I would have wished or would have drafted, and all constitutional amendments are compromises, taken as a whole and on balance I believe the accord will strengthen rather than weaken the Canadian federation. Indeed, that was why we chose the title *Strengthening the Federation* for the submission that the group of us made. That experience of other federations bears this contention out.

Furthermore, I am concerned that a rejection now of this effort to reconcile Quebec, after it has been accepted and approved by Quebec, will almost certainly, if now rejected, have harmful, long-term consequences for Canada and Quebec's position within it.

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I would also argue as a proud Ontario citizen that my province, given the key role it has played within Confederation as a conciliator and promoter of Canadian unity in the past and as the province which contains the largest francophone community outside Quebec itself, has, I believe, a special responsibility for promoting good relations between Quebec and the rest of Canada.

When considering the accord in a comparative perspective, I propose to comment on three aspects of the accord: first, its objectives; second, the seven elements of the accord; and third, the processes by which it was arrived at.

First, the objectives: a major area of criticism has been by those who argue that the accord does not address such problems as the development of



aboriginal self-government, the improvement of the Charter of Rights by removing the possibility of governmental overrides, the incorporation of fuller provisions for multiculturalism, the eventual provincial status of the northern territories and so on.

In my view, this criticism misses the point that the constitutional accord was not intended, and should not have been intended, to resolve all outstanding constitutional issues. Rather, it was designed to deal specifically with only one area, that is, the reconciliation of Quebec to the constitutional amendment of 1982.

The irony of that new Constitution of 1982 was that despite the fact that it was the rise of separatism and the Parti québécois in Quebec that made the constitutional issue a central concern in Canadian politics from 1976 to 1982, and despite Prime Minister Trudeau's promise during the referendum campaign in 1980 that a rejection of the PQ proposal for sovereignty-association would lead to a renewed federalism, the 1982 constitutional amendment was, in the end, assented to by every province but Quebec, and it was rejected by every major party within the Quebec National Assembly, including the Quebec Liberal Party. Thus, in effect, politically speaking, the 1982 Constitution was politically imposed upon Quebec.

As long as the PQ was in power, there was very little room for negotiating Quebec's voluntary assent to a renewed federalism and, therefore, this situation was understandable. The lack of Quebec's agreement could be understood. But with the election late in 1985 of Bourassa's Quebec Liberal Party, committed to negotiating Quebec's assent, the opportunity for constitutional reconciliation of Quebec occurred. Thus, the objective of the accord, publicly announced by the premiers at their Edmonton meeting in 1986 and by the Prime Minister, was to deal with this issue first and then address the other constitutional issues.

I think here we can learn a lesson from the Swiss. Instead of trying to solve all our constitutional issues in one grand amendment every time we amend the Constitution, let us look at what the Swiss do. The Swiss have tackled constitutional issues incrementally, bit by bit, in an evolutionary manner. Indeed, in the 140 years of their federal history, they have made some 88 constitutional amendments—on an average, more than one every two years. In this way, they have avoided cataclysmic political tensions over total constitutional amendment, like those Canada experienced from 1980 to 1982.

Thus, I think we should evaluate the accord in terms of its limited overt objectives, not for the things that it does not do but for the things that it set out to do.

Furthermore, I believe the effort in the accord to make the discussions of the first ministers' conference on constitutional issues routine and incremental, as the accord proposes and as the Macdonald commission before it proposed, is a step in the right direction of the incremental adjustment of the Constitution.

Turning to the second area, the seven elements of the accord, I will look at each very briefly. The first is the recognition of the linguistic duality of Canada and of Quebec's distinctiveness. Critics have argued that this represents a special status for Quebec and thereby establishes two Canadas, but I think we must note that this is not something new in the accord. Not only is the sociological and cultural distinctiveness of Quebec a reality, but so is its constitutional and legal distinctiveness. This is exemplified, for example, by section 94 of the British North America Act, which recognizes the original provisions of 1774 for property and civil rights in relation to Quebec and has express provision that the federal government may make uniform legislation for the other provinces in this area but not for Quebec. So even the British North America Act treated Quebec in a distinctive way.

Furthermore, I would point out that supporters have argued that the reconciliation of Quebec into the Constitution, in fact, removes the division of Canada into two nations, one which agreed to the amendment of 1982—that is, the English-speaking provinces—and one which never assented to it—that is, Quebec.

In terms of the comparative aspect, I would note here that the experience of other federations has been that recognition of diversity and distinctiveness at the state level rather than the suppression of diversity has in the long run been a source for greater federal unity. I could go into this at some length, but simply cite Switzerland as a classic example of this.

Moreover, other scholars of comparative federalism have noted that virtually every federation in its political dynamics contains elements of asymmetry, that is, asymmetry in terms of the relative power and influence of the different units within it. Those of us from Ontario have to be conscious and sensitive of this in relation to the smaller provinces, but one can also look at the different leverage, say, that California exercises in comparison with Rhode Island within the United States; so this is not unique to Canada.

To those who fear that this provision of the accord represents a massive decentralization of power, it is worth noting that the final text, approved in Ottawa on June 3, includes a clause explicitly saying that this section of the accord does not derogate any federal jurisdiction.

To those who fear that the accord would be used to limit rights under the charter, I am not myself a constitutional lawyer or political scientist, but I have cross-examined some of my colleagues who are constitutional lawyers closely and have been assured by individuals such as Bill Lederman that that is not the case. I noted, as well, that Quebec's women's groups have, by and large, been in support of the accord rather than opposed to it.

On the second element of the accord, the proposal for shared policymaking in the field of immigration, critics have argued that this should be solely a federal responsibility for national policy, but they seem to forget that the British North America Act of 1867 defined two areas—agriculture and immigration—as areas of concurrent jurisdiction, that is, as areas of shared jurisdiction between the two levels of government. The accord retains the federal paramountcy within this area of concurrent jurisdiction.

Furthermore, all that the accord does is basically to constitutionalize what have been already working arrangements arrived at under the Cullen-Couture agreement in 1978 under Mr. Trudeau's prime ministership.

In comparative terms, I would note that our Constitution, of all the federal constitutions I have studied anywhere in the world, contains fewer areas of concurrent jurisdiction than any other. We seem to have assumed that almost everything has to be put on one side or the other, in terms at least of our constitutional documents. In practice, of course, we have found that the two levels of government have to work together. I, therefore, feel that clarifying this area of concurrent jurisdiction is not the sort of threat that some seem to think it is.

With respect to the third element in the accord, the limitation of the federal spending power, critics are concerned that this will limit future federal initiatives for shared-cost programs, such as that in health care in the past. Here again, I would note that the limits apply only to programs in areas of exclusive provincial jurisdiction.

Furthermore, since the provinces compensated when opting out must develop programs compatible with national objectives, to me, one of the pluses about the accord is that it may encourage the federal government to develop

objectives more carefully than it did in the past when, for example, it established the established programs financing arrangements for post-secondary education, which happens to be another of my close interests, and thereby abandoned any sort of federal objectives for what had previously been a shared-cost program.

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It is also noteworthy that for the first time, the federal spending power in areas of provincial jurisdiction would be explicit in the Constitution rather than resting merely on judicial interpretation. I find it fascinating that many of those who criticize the Meech Lake accord for its ambiguity are opposed to what it has to say about the spending power because it is made more precise and less ambiguous.

Again, looking at the comparative area, I think it is enlightening. Shared-cost programs in the United States have been the major instrument leading to the dominance of Washington over the states. Indeed, this has led many commentators to question whether the states any longer exercise legitimate, genuine, political autonomy.

By contrast, in Australia, concern with exactly these issues has led to the establishment of substantive areas of intergovernmental transfers that are unconditional in form. It is interesting that Mr. Trudeau's established programs financing followed the Australian pattern here rather than the American one.

Four, nominations by provinces for Supreme Court appointments: the critics have argued that this will produce a Supreme Court that panders to provincial interests, but it seems to me that implicit in this criticism is the assumption that the Supreme Court justices are not now impartial but lean to the federal government which appoints them.

In most federal systems, it is worth noting, it is recognized that the Supreme Court serves as the umpire between the federal and state governments, and that therefore both sides should have a role in the appointment of the umpire. In the United States, this was originally arranged through the role of their representatives in the Senate having to endorse appointments to the Supreme Court. In the Federal Republic of Germany, for example, half the members of the constitutional court are appointed by the federal government and half the members by the states. I do not want to go on cataloguing examples, but simply want to point out that comparative examples suggest that the role of the Supreme Court as an umpire should involve a provincial role in their appointment.



Some critics have commented that the proposal in the accord provides no form of conflict resolution or deadlock resolution if the provincial nominees are not acceptable to the federal government. I am not sure that such a deadlock-breaking mechanism is necessary in formal terms. The United States has no such deadlock-breaking mechanism when there is a deadlock between the Senate and the President in the appointment of Supreme Court justices and we have just seen in the last year a real series of deadlocks which ultimately got resolved as each side found it necessary to reach some mid-point of compromise.

The fifth element of the accord is the proposed constitutional amendment process that expands the number of amendments requiring unanimous agreement of the provinces. The critics say this will make constitutional amendment more difficult. This is undoubtedly true, but it is only a moderate change. It is worth noting that, under the 1982 Constitution, there was already a category requiring unanimous agreement of the provinces for amendment. This category is slightly expanded under the accord, but the general clause requiring seven provinces representing 50 per cent of the population remains the provision for most constitutional amendments.

It is worth noting that the extension relates mainly to areas where Quebec is represented in the central institutions. Therefore, that representation could be affected without Quebec having any say. It is also worth noting that this is an area where Mr. Trudeau, in 1971 and again in 1981, offered Quebec a veto, but it was the English-speaking provinces that refused.

### 1130

Regarding the amendment process, it is worth noting that virtually all federations require, for those most sensitive areas involving both federal and provincial governments or federal and state governments, some process of extensive involvement of both levels. I mentioned the Swiss case of the frequency of amendment, yet if one looks at the degree of consensus required for each of those amendments, it is very extensive indeed. I could elaborate on that in detail, but to save time I will not.

Six, the interim amendment procedure for Senate appointments proposed in the accord is one by which the federal government would appoint senators from lists of provincial nominations. Critics say this will make the Senate a representative of provincial interests.

My response to this one would be that Canada is the only federation in the world that I know of

where the central government appoints all the senators. In most federations, the members of the Senate are recognized primarily as representatives of particular regional interests in national affairs.

In the United States and Australia, they are elected on a state-wide basis. In the Federal Republic of Germany, the upper house consists of what we would call the state premiers and cabinet ministers. In India, the second chamber is composed of members indirectly elected by the state legislatures. In Switzerland, the choice is simply left to the cantons to decide. They can choose whatever method they wish for the election of members of the central upper house. Even Mr. Trudeau's Bill C-60 proposed that half the members of the revised House of the Federation be chosen by provincial legislatures.

I suggest that our current Senate is badly deficient in its function of representing regional interests in national affairs, at least by comparison with all other federations.

The seventh element of the accord is the proposal that the meetings of first ministers' conferences on economic and constitutional issues should be regularized. Critics argue that this would enhance the role of the premiers in national affairs at the expense of national leaders and would bypass legislatures.

My response would be that compared to other federations that combine a federal system with parliamentary institutions, we are the least institutionalized in this respect. If you compare us with Australia or the Federal Republic of Germany, Canada has fewer institutionalized meetings of the first ministers. Where you have a parliamentary system combined with federalism, the others have found it necessary to facilitate intergovernmental co-operation through regular and routine meetings. Indeed, it is worth noting that the Macdonald commission proposed that these should be made more routine and more regular.

Finally, in relation to the accord, as to the processes by which the accord was arrived at, critics have argued that there was insufficient prior public discussion, that it was negotiated behind closed doors and that it was arrived at by only 11 men rather than the legislatures. Let me just briefly address each of these points.

First of all, in terms of prior discussion, I do not know where everybody has been on this, but the issues discussed in the constitutional accord were of course very thoroughly canvassed in the period from 1976 to 1982. Whatever one thinks of Mr. Mulroney's keeping of promises on other

issues, on this he did declare openly in the 1984 election campaign the objective of a constitutional amendment to reconcile Quebec.

The Quebec Liberal Party explicitly included its five negotiating points in its platform for the 1985 election. Quebec's five points were referred to at various intervals, from the Mont-Gabriel conference in May 1986 right up to Meech Lake in 1987. The wording arrived at in the subsequent Langevin conference at Ottawa in June a year ago attempted to include some amendments and revisions in the text to take account of the comments that critics had made in the intervening month.

That is not to me a picture of a set of issues that has not been at all publicly discussed. It seems to me that the media were the ones who were caught off guard on this one, because they did not really think an agreement would arrive and therefore paid insufficient attention to these preceding deliberations of the year beforehand.

On the issue or closed discussion, I simply suggest that in most other federations where compromises have been negotiated, it has been found that only behind closed doors has it been possible to reach compromises. The great Philadelphia convention in the United States that produced the Constitution of the United States, for all that one says about American democracy, was behind closed doors.

#### 1140

We saw for our own edification the effect of an open effort to negotiate in the first ministers' conference of September 1980, which ended in total failure, and if one wants to see the problems of getting amendments as a result of open discussion and negotiation, we need only look at the failure of the equal rights amendment proposal in the United States.

So if we want to get something that is adopted, if we want to get compromises that take account of all views without those on each side being boxed into their extreme positions, some process that allows negotiation is necessary.

Finally, on the process of ratification, for the first time in Canadian history, if the Meech Lake accord is adopted a major constitutional amendment will have taken place, following ratification not just by Parliament but by all 10 provincial legislatures. It is worth noting that this contrasts with the 1981 kitchen deal between the federal representatives and the provincial representatives, which led to the 1982 constitutional amendment and which was subsequently debated only in Parliament, not in the provincial legislatures.

I find it ironic that if we were following the 1981-82 procedure and applied it to this accord, this committee would not be meeting. Indeed, given that all the major party leaders and the majority of each of the major national parties in Parliament have come down in favour of it, the accord would virtually be adopted right now. This accord is going through a more thorough and more careful review than any other constitutional amendment in previous Canadian history, and so I would conclude on process that, despite what the critics say, the real danger in relation to the constitutional accord is that we may talk it to death.

Let me conclude by making four fundamental points that I would like to leave with you as points of emphasis before I stop and pause for questions.

First, no constitution can avoid ambiguities. While it is right the critics should emphasize that we should avoid ambiguities as far as possible—in this respect I note that the current legal text, that is the Langevin text, has clarified many of the points made in the earlier Meech Lake accord—ultimately any constitutional compromise requires concessions on all sides and even the occasional creative ambiguity, just as there certainly were in the constitutions approved in 1867 and 1982, and certainly in the charter itself, not to mention the United States Constitution which last year celebrated its bicentennial.

The second fundamental point I want to leave you with is that the obsession of the media with whether the federal or provincial governments have gained with respect to the other misses a fundamental point about federalism. Federalism conceived merely as a struggle between competing governments—that is, as a zero sum game where gain by one level of government is automatically lost by another level of government—is self-defeating.

As other federations I have studied indicate, to be effective federalism involves a positive sum relationship, a partnership in which the sharing of powers by both levels of government provides mutual benefits both for national and provincial interests. In my view, the accord, as revised, would not weaken Canada but strengthen it by affirming the positive role and capacity of the federal government for meeting national objectives while allowing for provincial diversity in policy design and application.

Third, we must not confuse unity with uniformity and we must avoid the delusion that unity can be imposed by simply concentrating all significant powers in the central government.



The Fortress Ottawa mentality as the solution to national unity has proved counterproductive in the past. As Daniel Elazar, a noted American scholar of federalism, has pointed out, the real strength of federations is not measured by the strength of their central governments but by the strength of the framework that holds all their governments together. Indeed, ultimately the notion that only the central government can guarantee strength is a denial of the federal principle itself. That is, it is a preference for a unitary system not a federal one.

The suppression of linguistic duality and of provincial and cultural diversity are not, in my view, recipes for unity but for increased resentment and alienation, whether in Quebec, the west or the Atlantic provinces. If we are to have, in the words of the Pepin-Robarts commission, a future together as a united Canada, we must learn not only to tolerate but also to cherish and glory in the diversity Canada possesses as a homeland of many peoples. If there is one lesson I have learned from examining the Swiss federal system, it is that the overt and explicit constitutional recognition of internal diversity can itself become an extremely powerful bond of unity.

Of course, greater recognition for the aspiration of disenchanted provinces will not by itself hold Confederation together, unless at the same time we develop a wider sense of genuine participation by all groups in the destiny of Canada, a sense of shared destiny that will serve as the glue to hold us together; but in this sense the voluntary incorporation of Quebec into the Canadian Constitution represents a real advance and fulfilment of the promise of a renewed federalism, made to Quebec during the referendum campaign if separatism were rejected.

My fourth and final point is to emphasize that unity is not something that can ever be achieved once and for all, whether by the Meech Lake accord or by any other constitutional document. Like the protection of liberty, the sustaining of unity within a federation requires a constant, ongoing and continuing effort that is never completed. As our history has made clear, the task of creating and recreating Canada has never been easy, but that will be the challenge that will continue to face us, as Canadians, stretching decades ahead.

In that enterprise, I would like to close by drawing to your attention words spoken 88 years ago by that great Prime Minister of Canada, Sir Wilfrid Laurier, in an address to the Canadians of Nova Scotia. He spoke of a cathedral he had seen while visiting Britain for Queen Victoria's

jubilee. He referred to it as "a marvel of Gothic architecture which the hand of genius, guided by an unerring faith, had made a harmonious whole in which granite, marble and oak were blended. This cathedral is the image of the nation I hope to see Canada become," he declared.

He continued: "As long as I live, as long as I have the power to labour in the service of my country, I shall repel the idea of changing the nature of the different elements. I want the marble to remain marble. I want the granite to remain granite. I want the oak to remain oak. I want to take all these elements and build a nation that will be foremost among the great powers of the world."

Canada will continue to evolve, and in that development I think Laurier's vision of Canada as a magnificent cathedral, building into a harmonious whole elements which continue to remain distinct, provides us all with an objective to strive for.

The constitutional accord of 1987 is, in my view, in that spirit, and if adopted will represent a step forward, albeit only one incomplete step towards that objective.

**The Vice-Chairman:** Thank you very much, Professor Watts. I speak on behalf of the whole committee, I am sure, in saying that your presentation gave a very brief and concise outline that you have spent many years in putting somewhere in the back of your mind, and I certainly do appreciate it. Also, your ability to put forward to us, in an understandable way, comparisons between other federations and our own is something we have not had presented to us before, and we thank you very much for that.

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**Mr. Allen:** I thought I saw some other hands that were in advance of mine, but let me begin none the less.

Professor Watts, thank you very much for coming. This is certainly one of the better, more comprehensive, reflective presentations we have had, and I am not surprised at that. You have also had your own experience in dealing with administrative systems at Queen's University—

**Dr. Watts:** Itself a federal one.

**Mr. Allen:** —a certain kind of federation, the management of which obviously has enriched your own perspective on federal systems in its own way.

Could I perhaps come first of all to the question of process? You did not defend it as a perfect process, and I want to acknowledge that. I suspect that what many people who have come

to us concerned about the process have been trying to say is that out of the experience of long years of having to get unanimity in the federal House and throughout the provinces before approaching Westminster and then out of the experience on the other hand of 1981-82, which appeared to issue an equality document that suggested that everybody would be sort of cut in on access to participation, to recognition of rights and all those things, we really expected a lot more out of the process and process change than actually happened.

I think one of the main points many have suggested is that at least some preliminary presentation of issues and response in legislative select committees, before premiers moved on to the level of consolidating a document, would have been very helpful; and that perhaps even a process of less than total commitment by the premiers which then allowed some commentary, some return to the document before they themselves consolidated their own minds, could none the less have been helpful and might have spared a lot of the reactive element that has now taken place with respect to process.

Would you comment on that. Is there a better way, and how would you construe it?

**Dr. Watts:** Yes. I find myself largely in agreement with what you have been saying. That is, I think first of all that one of the problems has been that what we did in 1982, which was good as far as it went, also aroused expectations which are extremely hard to realize, not just in Canada but elsewhere. I point to the example of the equal rights amendment process in the United States, which has not come to fruition and which shows how difficult it is to get consensus while getting widespread public discussion. That does not mean we should not try for it, though; I am not opposed to trying for it.

I fully agree with the desirability in future of the sorts of processes you specifically referred to; that is, having legislative select committees discuss these issues in advance. Indeed, I note that was a specific proposal of the Macdonald commission. The Macdonald commission made such a recommendation, and it is one I would have endorsed as a process that should become the norm in future. This would give Parliament and the provincial legislatures, through possibly a standing committee on intergovernmental relations or some such body—without trying to be too explicit about how each Legislature should define it or work out its own processes, some such body could discuss issues in advance and

would help the Premier or Prime Minister, as the case may be, in terms of views and so on.

In terms of positions arrived at, obviously it is a delicate position. On this whole business of once you have reached a compromise how far could you reopen an issue and so on, it seems to me when I look at the difference between the texts of the Meech Lake accord and the Langevin accord, if I can use those two terms, it is quite significant that quite a few textual details in the Ottawa agreement show some awareness of the discussion that occurred between the two events.

I think perhaps it was a pity that other provinces did not follow the Quebec example of actually having legislative discussions between the two. That is, within Quebec, if I recall correctly, there were discussions of the accord within the legislature, within a legislative committee prior to the Langevin signing. Now of course the large majority of the members of the legislature, but not totally the Parti québécois, were in support of the accord. It seems to me that would have been a grand opportunity for it to occur elsewhere.

Now that it has not occurred, however, I would hate to see the accord thrown out simply because that did not occur. One of my great anxieties here would be, having offered a reconciliation which they themselves in the Quebec National Assembly have approved, what message do we give to Quebec if at this stage we then withdraw? I cannot think of anything that would provide better ammunition for the PQ, or whatever takes its place the next time around when separatism rears its head, and if history is any guide there are ways in which this arises.

Next time around, if we have let this fall by the wayside, I can see the answer coming: "There is no point in trying to reach a reconciliation. In the end, they will never agree to it, so we might as well go our separate way." That is my anxiety there. So I agree with what you say about the process and share some of your criticisms of that process, but I think that having got to this stage the greater disaster would be to fail to adopt it rather than to adopt it.

**Mr. Allen:** Can you tell us a little bit more about the Swiss approach to amendment? Of course, one of the elements of our present situation that makes many people nervous is that we do not have a history of being involved in successful amendment.

**Dr. Watts:** We did not have a process until a few years ago.

**Mr. Allen:** We did not have a process, and it was a long struggle, it was always traumatic and



there were so many failures. Now that we are into it, but in a focused, step-by-step way, many people are nervous that this is the last shot and therefore they all want to pile in and get their particular innings at this point in time. How have the Swiss effectively avoided that and why is it they have been successful in going through their amendment process successfully, but without, I gather, this temptation always to solve every problem at that particular juncture of another amendment being in debate?

**Dr. Watts:** I think it is a simple thing in a way. Whether by accident or by great foresight, they adopted two amendment processes, one for what they call total revision and one for incremental revision. What has happened of course is that from time to time total revision has been proposed, but total revision which really involves a major revision has actually occurred only once, in 1874, in Switzerland. But there have been these other 88 incremental amendments.

I think in the Swiss case, at a point when there was no heat in the process, as they sat down and looked at what ought to be the amendment processes, they simply adopted two specific, separately identified ones. I am not suggesting at this stage we could do that in terms of the formal process, but I think that helped to create a mindset which created the notion that you do not have to have total revision every time you revise the constitution.

Our tradition, unfortunately, arises from perfectly good historical reasons, there was an oversight in 1867 when we did not include an amendment process. The Australians learned from our experience, by the way, and did include an amendment process, even when they were a colonial federation, one which involved federal parliament approval and approval by special majorities by referendums in each of the states. Not quite our process, but they did include that.

Our problem is that through oversight in 1867 we did not include a process, and of course ever since the 1920s, up until 1982, we have been agonizing over what sort of process we should adopt. That has made the whole issue into such a big one that I think we have it in our psyches that any constitutional amendment is a big, total enterprise. I think the routinizing of this is something we need to work at to counteract the box we have got ourselves into, a situation where every time we try to amend one little thing, everyone who is not included in that particular amendment feels, "My goodness, we're left out

of it"—the aboriginal peoples, the multicultural peoples and so on.

Their concerns are important, I am not suggesting they are not important at all; but if we try to amend everything each time we amend the Constitution, I think we are doomed to failure. That is why we had such difficulty for so long getting agreement even on the patriation process.

**1200**

I think we ought to look at an example like the Swiss, although perhaps not in terms of copying the precise provision. I was interested to hear the person who appeared before me, who suggested that we have to learn to become. But part of becoming is adjusting bit by bit to changing conditions. If we had a total revision now that included all these things that we think need to be in there, it would be out of date in 10 or 15 years' time. We would have to make further revisions. We should get used to the notion that they have to be carefully done, carefully discussed, but we cannot expect each revision to cope with everything and solve all our problems. Constitutions are not that sort. They do not solve all problems for all time. That was part of my end point, to emphasize that federations evolve and a constitutional document has to be flexible and adaptive over time.

**Mr. Allen:** Thank you. I will yield the floor to other questioners. I just want to thank you for striking a note which I think is often slighted in journalistic discussions of our Constitution; that is, it has indeed been a rather serviceable one. One often meets with rather flighty journalistic comments about mid-Victorian plumbing and this kind of thing, that just because it originated at a certain date and time somehow it is virtually a cast-off, along with so many other things we have put to one side in the past.

**Dr. Watts:** Could I be allowed to add just one comment on that? I think we have a lot to be proud of if one looks comparatively. The Americans had a civil war. Their original constitution did not solve all their problems. The Swiss had a civil war in 1848. With the current Swiss harmony, we forget that their federal system was adapted after a civil war in 1848 to cope with internal problems. The Australians had a secession movement in the 1930s, and one can catalogue the series of problems that Germany has had, from Bismarckian times through to the Weimar Republic and so on.

If you look at the length of time the Constitution Act of Canada, 1867, to give it its current official title, has lasted and has served

Canada, we have a whale of a lot to be proud of. I just want to endorse your point.

**Mr. Cordiano:** Let me just say from the outset I think that your presentation here today was very insightful and instructional for me, comparing various jurisdictions throughout the world to our own federalism, how they compare. I do not think we have had quite that kind of insight into other federal states. I think that is very important, because essentially, as you pointed out, perhaps members of this committee and indeed many Canadians do not really know much about other federal states and how they work. I do not think I am presumptuous when I say that.

If we really look at our own system of federalism, when critics of the accord say that this accord is decentralizing, destabilizing of the central government, the central powers, I think what they are really asking for is what you pointed out in your presentation: uniformity and a unitary system of government, those two things.

In fact, if you look at some of the criticisms that have been made here before us with respect to spending powers and having national programs with respect to social concerns, what most of the critics are really talking about is having a uniform program that says the same thing, that will have a delivery system that does the same thing throughout the country.

We know, in effect, the history of this country has been that most of these programs have evolved in various regions of the country, and in so doing they have become more effective and have met the local needs and at one point have evolved in other parts of the country and have been adopted by other parts of the country with their own hues and differentiations among provinces with respect to how they deliver those programs. But effectively, the objective is the same thing. I do not really think we can have uniformity in the way we deliver those programs, and if we did we would be less effective than we are now.

Stemming from that, one of the other criticisms about the accord is the fact that we have now constitutionalized a new level of government; that is federalism by executive power, or executive federalism. Do you think that poses problems for Canada in the next decade and into the next century with respect to executive federalism? How does that square with the parliamentary process, and how does that compare internationally? I have not heard anything about that.

**Dr. Watts:** I will be happy to talk about that. By the way, just in passing, I agree with what you said earlier about the unity, uniformity, diversity and so on. It so happens that in a couple of weeks' time I have to give a paper at a conference at York University on Executive Federalism: The Comparative Context.

**Mr. Cordiano:** Good timing here.

**Dr. Watts:** If you are ready for 50 minutes, I will happily send you a copy when the time comes.

Joking aside, I think the point to note here is that, of course, in all governments nowadays throughout the world, by comparison with, say, 100 years ago, the executive has become a more important aspect of government, just by the nature of policymaking and so on, but this is particularly so in those that have parliamentary institutions.

In my own writing in the past I have often differentiated between two broad categories of federal systems. Canada was the innovator in those which are parliamentary federations. Switzerland, and before that the United States, created a federal system in which an intrinsic principle of federalism was the separation of powers within each level of government; that is, you have the president, congress, the two houses of congress and so on, none of which has a concentration of power. There are checks and balances among them and so on.

The Swiss system is slightly different, and I will not go into the complexities of what might be called their collegial system, but it is based also on the separation of powers, a fixed term for the executive not responsible to the legislature, and so on. That creates a whole set of relationships, and it affects the character of relations between levels of government; that is, between the executive and the legislature, the executive and different levels, and so on.

Canada was the great innovator in combining a British-type parliamentary system with federal institutions. The Australians followed our example, and the Federal Republic of Germany, in the constitution it adopted in 1949, followed our example. So did a number of the federations in the developing world—India, Malaysia; and for a time Nigeria, but it has abandoned that now. There is a goodly number of examples in the international arena of those that have combined parliamentary institutions with federalism.

The distinctive thing about a parliamentary system, of course, is the fusion of the executive and the legislature. I do not need to tell you all this, but you will see in a moment why I



emphasize this. The executive is in the legislature, responsible to it, and of course if it does not have the support of the legislature it goes out of office, depending on what the party situation is in the House. We have had that experience in Ontario in different forms in the last couple of years, which illustrates just exactly that principle.

What is interesting is that in most—indeed, I would have to say all—of the parliamentary federations, the executive at each level has come to occupy a more dominant place within the federal system because of its prominent place within the legislature, because of the fusion of the executive and the legislature. So, by comparison with the United States or Switzerland, we find that in Canada, Australia and Germany, the executive at both levels plays a much more predominant role. This affects the character of intergovernmental relations.

It is typical of the parliamentary federations that you get the sort of situation we have in Canada where within each level of government, or within each government, there is, by some such label as ministry of intergovernmental relations, intergovernmental affairs, federal-provincial relations or what have you, a ministry as part of the government that deals with those affairs, whereas in the United States and Switzerland, with their diffused party discipline, there is a whole criss-crossing arrangement.

Indeed, for my students, I typify the difference between the American and Swiss patterns as one of marble-cake federalism in which the two levels interpenetrate each other in a criss-crossing set of relationships, and the parliamentary federation as one of layer-cake federalism in which intergovernmental relations tend to be funnelled through the executive at each level, often through a ministry of intergovernmental relations but particularly through the head of the executive.

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In Australia, which I visited some years back and where I spent some time researching its federal system, there is what they call the premiers' conference, which is the equivalent of our first ministers' conference. When I sat in on it and listened to it, I could have shut my eyes and it was just like our first ministers' conferences, including the nasty things they would say to each other and so on. In Germany, it is more institutionalized into a form of second chamber, the Bundesrat, but again there is this regular process of executive consultation.

I would say that as long as we have a parliamentary system, and I see no sign of Canadians wanting to abandon that, I think executive federalism is an inevitable outcome of the character of those institutions. For those who want to have the processes of the American congressional system while retaining a parliamentary system, you are trying to have your cake and eat it too. It is one or the other. The dynamics of these institutions are going to create those situations.

My response is that executive federalism in a parliamentary federal system is inevitable. Therefore, the task is not how you eliminate it, but how you control and harness it to ensure that the sorts of issues we were talking about are taken care of.

**Mr. Cordiano:** Right. That leads us to the next point about the role of legislatures.

**Dr. Watts:** That is right; to ensure that their role and public participation is provided for and so on. I see it as not getting rid of executive federalism but harnessing it and adapting it to those needs.

Here, interestingly enough, the Macdonald commission had some suggestions to offer. This was one of their concerns. Interestingly, the public has mainly picked up what they have had to say about free trade, but the whole third volume of the Macdonald commission report related to political institutions, and this was a point they particularly emphasized: the need to harness the processes of executive federalism to ensure a greater role for legislatures and for the public.

**Mr. Cordiano:** Very briefly, because I know we are running out of time, you noted that the major characteristic of Switzerland and of various other countries that have a similar federal system is a great deal of diversity, regional and perhaps cultural and linguistic. We have a similar situation in Canada. One of the interesting things that has come before us is the fact that we in this country now have a situation where we not only have a duality—we do in terms of official linguistic rights—but there is also another component, certainly another reality with respect to people of diverse backgrounds other than French and English.

I do not know if you were here earlier, but we had the Afro-Canadian group come before us, and we have had a whole plethora of people who have come before us expressing their concern about the stated policy of not only the present government but the previous governments to multiculturalism and just what that means. I am

wondering from your knowledge of these other federal states if these things have been made compatible; that is, that you have a diversity of groups within a federal state, and not only do you have regional distinctiveness but you also have cultural distinctiveness and variety. How did all these things come together in these other federal systems and how are they given expression within a constitution?

One of the other major criticisms of the accord is this whole theory that it is a seamless web, that if you take out one part the rest falls apart. I think you are saying that we have to approach it incrementally and that change is going to be an ongoing reality of constitution-making in the future. I think that is one of the points that has been made loud and clear in this committee's hearings process. We need to have an ongoing process. If we are going to have annual first ministers' conferences dealing with the Constitution, there has to be a process in place whereby we listen to the public and have input from them. Do you think it is possible to meld these things together in a federal state?

**Dr. Watts:** It is hard to answer this without sounding simplistic. The first thing I would say is that I think it is not just possible, but that it must be done; it is not just a matter of possibility. At the same time as I say that, I do not mean it is easy. It requires a whole of a lot of effort, even in a country such as Switzerland that for more than a century now has had a remarkable degree of success in that area.

Thinking back to the Pepin-Robarts commission, one of the things that struck us—we commissioned some surveys of opinion at the time and I used the quotation in my remarks—was that when you asked Canadians how they would like to typify the country in one way or another, we found that the one that far and away rang up the most support, including within Quebec, was “a homeland of many peoples.” I emphasize “of many peoples.”

Now the duality is important, but it is not the only element of this country. That is why I wanted to emphasize that the accord addresses one aspect, but we do not want to throw it out because it does not address every other aspect. That does not mean those other aspects are not important. I think they have to be addressed and there is no doubt about the importance of these various groups.

All right. How do we address them? That is really the heart of what you are getting at. I do not think there is a simple, easy solution. I think you have to take them one by one and work at them

and it is going to vary for different groups. The needs of multicultural groups in Toronto are very different from the needs of the Inuit in the Northwest Territories, for example, but both must be met.

How these are met is going to depend upon such things as geographical concentration, location and so on. One of the reasons Quebec is a distinct society, of course, is that there is such a large concentration of French Canadians there. It is harder to deal with the position of minority groups that are spread evenly across the whole country, because you can hardly say that is the task of just one particular provincial government to deal with and so on. I think one has to differentiate between those diversities that can be dealt with distinctively by regional units and those that have to be dealt with nationally because they are the sort of minorities that are spread very evenly and are a minority everywhere.

It seems to me that the charter attempted particularly to deal with that latter category; that is, with the rights of those groups that are not a majority in any regional unit or in any region of the country, but whose rights and whose equal treatment and so on we must, and properly, have a concern for as Canadian citizens.

**Mr. Cordiano:** I think the charter addressed the first step, and what we are hearing—

**Dr. Watts:** Oh, yes. I am not saying the charter is the be-all and end-all, but it is one attempt to address that particular area.

**Mr. Cordiano:** Yes.

**Dr. Watts:** I suppose that if there is anything I would conclude on, it would simply be to say that I do not think there are any simple, easy answers, but that does not mean we should not be working at them. We have to keep working at them and working at them. That is where I think the Swiss have been very good. They keep working at it. They do not assume that you write a document and all problems are then solved.

**Mr. Cordiano:** I think it is inevitable that we will have to work at it, given what we have heard in this committee and certainly what we are hearing right across the country on this issue.

**Mrs. Cunningham:** It is good to see you again. Once again, whenever one listens, one learns a lot, so thank you so much for making this presentation.

I suppose my questions follow along with the previous questions, and I would just like to ask a couple of specifics. One of the greatest weaknesses right now with the accord, in my opinion,



is the lack of support by the public, basically because they do not understand what is happening and they have not had the benefit of listening to people like yourself. I would ask you what your recommendations would be. How do we fix something? How do we get their support? How do we gain their trust in our institutions when we have lost so much? Even though you are recommending, I think very strongly, that we have a lot more to lose if we do not pass it, what do we do about that problem, in your opinion?

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**Dr. Watts:** Again, I worry about being oversimplistic. One of the steps will be the report of your committee. That will undoubtedly receive widespread attention from the media in this province. My impression—it is just an impression; I cannot give any statistical survey—is that probably the sort of concern you are referring to is stronger in Ontario, or at least is more vocally expressed in Ontario, than it is in many of the other provinces, and particularly in the Toronto region. Therefore, it seems to me that this is a particularly important function.

I suppose all of us have a duty—that is, those who believe it will be more harmful not to adopt it than to adopt it—to express our views. That is one of the reasons I am happy to be here or one of the reasons why just a couple of weeks ago I addressed the Canadian Club of Kingston on this subject. It is a real problem. One of the things that has distressed me is the degree of superficiality our media have displayed in analysing and looking at it. I am not out to clobber the media but I think that has been one of the disappointments to me of the public discussion that has occurred. Their tendency to pitch it all in terms of federal versus provincial, Quebec versus the rest, this sort of thing—I suppose it makes much better copy to put it in terms of antagonisms, to emphasize who has not been dealt with and so on.

I suppose there is a duty incumbent on all of us who at least see the danger of the failure to adopt it to do all each of us can. That does not help you terribly much, but I do not know that there is any other simple answer.

The only way we can do it is to try to inform the public. I think there is a duty on us, and that may be why so many of us in my profession at Queen's have been speaking out publicly on this. We have felt, not as partisans, that as scholars who have worked in this area, if in the light of that investigation we have come to conclusions, we owe it to the public to let people know what our conclusions are rather than to hide in our academic ivory towers commenting on the

sidelines. I am under no illusions that everybody pays a lot of attention to academics or listens to them, but I think it is our responsibility.

Here I think that the role of the special joint parliamentary committee in Ottawa was important. That is why I think it is important that the legislatures have hearings and I applaud Ontario. Not every province had hearings and I applaud Ontario for having hearings and raising the issues publicly. There is no doubt about how strong the feelings can be.

I learned that when I circulated the country with the Pepin-Robarts commission, as I have jokingly said on other occasions. I was one of the eight commissioners and after we had gone around and heard what had been said in every other province, John Robarts and I used to jokingly say to each other, as the two Ontario members of that commission, "It looks as if the country is held together by a common resentment of Ontario."

I think Ontario, as a province, has a special responsibility, and obviously you and the Legislature have a special responsibility. I am not saying you can solve it all and I was not intending just to turn it back to you. I think all of us have a responsibility.

**Mrs. Cunningham:** I have a final question. National reconciliation being our goal, part of the media attention around Meech Lake, I agree with you, has in fact caused more divisiveness. There are people out there, women, natives and members of some of our ethnic communities, and we heard from a group today, who are feeling very much alienated.

I am thinking right now that this committee should probably be making very specific recommendations on the previous question of how we address their concerns. Perhaps it would help if we took the time to make some very specific recommendations—perhaps you would call them amendments, I do not know—with a time frame. If we do not, there will be a specific resentment towards whatever we do if we do not deal with that.

**Dr. Watts:** Could I make a suggestion here which is really, again, drawing from experience elsewhere, as it were? It is to see what the United States did when it was adopting its original constitution. They created it behind closed doors in Philadelphia. Then they had to go out and sell it to the 13 states, as they then were, and campaign. There were the federalists, who supported it, and the antifederalists, as they were called, who opposed it, and criticisms were brought forward and so on.

Ultimately, they realized that the complicated set of institutions and compromises worked out at the convention could not be reopened without just destroying the whole thing. But what they did agree to do was to propose that the constitution should be adopted with the agreement that immediately a group of further amendments would be proceeded with, and those are your first 10 amendments of the American Constitution, including what was their Bill of Rights, and indeed, the protection in the 10th amendment of the position of the states.

I suggest that the part that would worry me is that if we go back to try to amend the accord, the whole thing gets unravelled and so on, but I think it would be very appropriate and desirable in the process of endorsing the accord to say, "We should proceed immediately, as soon as it is adopted, with addressing this, this and this issue." It would be very appropriate for your committee, Ontario and so on to propose that, if that is in the spirit of what you had in mind.

**Mrs. Cunningham:** Yes, it is.

**Dr. Watts:** You know, there are two forms of amendment. One is to amend the accord, which opens up a can of worms, as it were, in terms of what has already been agreed upon. The other is to address immediately the problems of those groups that the accord did not try to address, that it overtly was not attempting to address. It was not that they did not think they were important; it is just that it was focused on one particular area. These others are equally important and ought to get addressed and be given a high priority.

**Mrs. Cunningham:** You have been most helpful. Thank you.

**The Vice-Chairman:** Mr. Allen, one brief last question.

**Mr. Allen:** I really do not want a substantial response, because I have to be in another place instantly and I know other members do, too. But the whole question of the relationship of the

charter and such elements to the other, more substantive parts of the Constitution in terms of the division of powers, equality rights and legislation that might emerge through legislatures and so on has troubled us greatly. I wonder if you could tell us: is there anything that is instructive for us out of the experience of other federations about the relationship between the charter part, the rights part of the Constitution, and the rest of the Constitution and how the courts handle that which would be helpful to us? Is there a way you could convey that to us at some point other than at this instant, because I do not think we have time to do that.

**Dr. Watts:** All right. On that basis, can I reflect on it and perhaps send you a note or something like that?

**Mr. Allen:** We would love that.

**The Vice-Chairman:** That would be helpful.

**Dr. Watts:** This is the impact of the Charter of Rights on the other. I would have to reflect on it a bit. Certainly, there is a lot of American experience in this area. Some other federations, like Australia, have yet to adopt a charter; therefore, their experience may not be relevant. But Germany has the equivalent of one and so on, so perhaps I could send you a note on that, if that is appropriate in terms of timing.

**Mr. Allen:** I would like that. Thank you very much.

**The Vice-Chairman:** Thank you very much, Professor Watts. We do appreciate your coming here today and spending the time to answer our questions and be so frank with us with respect to your answers.

**Dr. Watts:** Thank you for the opportunity.

**The Vice-Chairman:** Before we recess today, I wish to advise the members of the committee that we will meet in this room at 4 p.m.

The committee recessed at 12:30 p.m.



## AFTERNOON SITTING

The committee resumed at 4:05 p.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** We can begin our afternoon session. Before calling our first witnesses, I would like to just note for the record and for the committee members two pieces of correspondence that I have had and that will be circulated by the clerk.

The first is from Pat Marshall at the Ad Hoc Committee of Women on the Constitution. They have sent in a letter, as well as letters from a number of other organizations who had appeared before us, with respect to the idea that was raised concerning companion resolutions. This will be circulated and form part of our record, and there will be some other letters coming in from other women's organizations which have been active with the ad hoc steering committee expressing their concerns about companion resolutions and the remedies they would like to see put forward.

The second document is a letter and attachments from the Ontario Metis and Aboriginal Association. You may recall that when they were before us, we asked them if they would provide us with their draft companion resolutions regarding a number of issues. They have done that, and that, too, will form a part of the record of our proceedings. Everyone should or will shortly have a copy of that.

I will now welcome our next witnesses from the Urban Alliance on Race Relations: Dr. Wilson Head, the president, and Benjamin Radford, who is the co-ordinator of the urban alliance. Gentlemen, we welcome you to the committee's hearing this afternoon. Our procedures are fairly informal. You may simply make your presentation and we will follow up with questions afterwards.

### URBAN ALLIANCE ON RACE RELATIONS

**Dr. Head:** Thank you. I just want to say that we are here focusing primarily on issues which relate to race relations. We have some other concerns which we touched upon very briefly in our presentation, but the major issues we are concerned about are, of course, in the area of race relations and, to some extent, multiculturalism.

Mr. Radford is going to read our report. We do not have it quite prepared in such a way that we

want to hand it to you now. We are having it typed up. It has a few mistakes in it, and we want to correct those. It will be sent to you later in the mail so that you have it. But Mr. Radford will read it now, if this is your pleasure.

**Mr. Radford:** Mr. Chairman, we come before you and your committee to express our misgivings regarding the Meech Lake accord put together by the Prime Minister and the 10 provincial premiers in 1987. The Urban Alliance on Race Relations is a volunteer organization of citizens of many races and cultural backgrounds organized in 1975 as a result of a wave of violence against blacks and South Asians at that time.

The major focus of the urban alliance is to work towards the development of an atmosphere and climate in which all Canadians will work together to build a multiracial society in which individuals of every conceivable background will live, work and play together in dignity and harmony.

The urban alliance seeks to achieve this objective through research, public education and consultation with school boards, the Metropolitan Toronto Police, labour unions and other community organizations. A three-pronged approach includes research; education, including the presentation of briefs; and advocacy on behalf of the human rights of various minority groups.

Our board of 24 directors includes members from the black, Anglo-Saxon, Chinese, South Asian, Filipino and Arab communities of Metropolitan Toronto. We hope to expand our membership to include native peoples, the Korean community and other minority groups.

The urban alliance has achieved a remarkable record of success on two fronts: first, the education approach, designed to increase knowledge and understanding of the various groups who constitute Canadian society; second, activities directed towards the elimination of prejudice and discrimination against the various visible minority individuals and groups. In this respect, the urban alliance has achieved a remarkable record on both fronts.

Many community organizations, including, in Metropolitan Toronto, the local boards of education, the Ontario Ministry of Education and the Metropolitan Police Force, have made significant changes in developing multicultural race relations policies. The urban alliance cannot

claim total credit for these developments, but the organization certainly played a significant part in moving previously reluctant groups in a positive direction.

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It is from this background that we speak to you of our concerns regarding the Meech Lake accord. First, we will merely mention our concerns regarding some aspects of the accord before moving on to more specific central concerns. We have great doubt that further constitutional reforms can be achieved when the Meech Lake accord requires that the federal government and all 10 provinces give unanimous consent to changes. The matter was difficult enough under the former formula.

We know of no other country in the world with this requirement of unanimity. For example, the American Constitution only requires three quarters of the states and two thirds votes of the House of Representatives and the Senate. It appears to us that the reform of the Senate, treaty rights for our native peoples and the possibility of admitting the two territories to provincial status are fairly well doomed for the foreseeable future under this formula. Our information is that Canada is already the most decentralized nation in the world.

The Meech Lake accord, it appears to us, reduces the power of the federal government to an unacceptable degree. It is no wonder to us that the accord received the agreement of all 10 premiers. The accord expands their powers while reducing that of the central government. It is also interesting that Jacques Parizeau, the newly elected leader of le Parti québécois, has publicly stated that Meech Lake makes it easier for Quebec to separate from the remainder of Canada, an eventuality which we strongly oppose.

But, as indicated above, our most important concern is related to the possible effects on section 15, the equality rights section of the 1982 Charter of Rights and Freedoms. We have heard various individuals and groups argue that the charter will not be affected. We have also heard and read the words of others who argue strongly that these rights will be severely undermined.

Those who are members of the visible minority groups have never had much confidence in the willingness of many provincial governments to protect our rights. In the United States it was state governments which passed the Jim Crow laws which ultimately destroyed the protections of the American constitutional guarantees. In Canada the provincial governments

have in most instances ignored our rights or have enacted weak measures to protect basic human rights.

The experience of other countries offers little evidence that local or provincial governments will protect the rights of our native people. Although the federal government has also been reluctant to honour the legal treaty rights of native peoples, it is our opinion that far more progress would have been made had provincial governments, and particularly the western provinces, not vetoed any deal which diminished their powers. Native land claims have been ignored in order to make their resources available to rich, local multinational corporations.

Our specific concerns relate to section 2, fundamental freedoms; section 15, equality rights; and section 27, multicultural heritage. It seems to us that a measure of ambiguity arises from these guarantees. If, for example, Quebec is a distinct society and decides to maintain Bill 101, does this mean that Bill 101 is a measure of a distinct society; and if so, what are the rights of English-speaking minorities and how will these rights be protected?

It seems to us that having apparently given away these protections and perhaps removed them from the courts, little is left except conjecture. The rigidity of the accord is worrying. Our own Premier (Mr. Peterson) and others have stated publicly that any changes will result in unravelling the agreement. Thus, apparently nothing can be done to make even minor modifications, a situation that makes us wonder why these hearings were ever set up if nothing can be changed. Are we to assume that this is an exercise in futility? We would agree with the Canadian Jewish Congress that if fundamental rights are not threatened, then this should be clearly spelled out in an amendment to the accord.

Our major concerns can be summarized as follows:

1. The question of the rigidity of the accord related to future amendments to the Constitution as these affect the rights of native people, and possibly reform of the Senate and other areas.
2. The apparent weakening of the powers of the federal government to protect the wellbeing of all Canadians through setting standards for federal cost-sharing agreements.
3. The apparent weakening of the federal responsibility for the protection of basic human rights, equality rights and the enhancement of multicultural heritage rights.



We are well aware of the provincial human rights codes and human rights commissions, but it is from the federal government through the charter that we expect protection from the occasional violation by its own or other levels of government.

We strongly urge that your committee, even against the wishes of the Premier, at least demand the type of clarification that will reassure us that these basic rights as enshrined in the 1982 charter remain untouched.

It is the federal government, not the provinces, that signed and pledged support for and enforcement of the United Nations Universal Declaration of Human Rights forbidding discrimination on the basis of race, culture and other arbitrary grounds.

Finally, we are in agreement with the objective of bringing Quebec into support of the Constitution but, in our view, the price may be too high; nor are we convinced that the price was necessary. After all, Quebec needs Canada as much as Canada needs Quebec.

The Constitution in Canada is too important to risk losing the protection of its charter for what, in our view, is a flawed accord.

**Mr. Chairman:** Thank you very much for your presentation. We will have that on the record but, if you want to send that in after, that is fine as well and we will circulate it.

The three main points that you set out concern the rigidity of the amendments, the apparent weakening of federal powers and the apparent weakening of the federal responsibility for human rights and multicultural heritage. Perhaps we might work through those.

With respect to the amendments, it does set out that for certain specific cases there needs to be unanimous consent, but for many others it is the formula that exists at present, the seven-50 rule. What would you prefer to have there? Do you want what exists now, as was set out in the 1982 constitutional agreement? Even that has some areas of unanimity where it deals with federal institutions. Where would you like to see us go with that?

**Dr. Head:** The 1982 formula was a realistic one. It was a formula which had been hammered out over the years, going about 40 or 50 years, when they looked at this. In 1971, as you recall, when Trudeau was in power, he tried to get this thing through. They called it the Victoria formula and it was agreed to by all 10 provinces. But when the Quebec Premier at that time, Bourassa, went back to Quebec City, he changed his mind

and the whole thing was undermined and destroyed. The Victoria formula was destroyed.

That formula required at least seven of the 10 provinces to approve, having at least 50 per cent of the population. In that sense, you are talking about a formula which had the majority of people supporting it. It seems that this formula requires that even Prince Edward Island, with 120,000 people, could subvert anything in the Constitution to which it applies.

It seems to us that some of these areas, particularly the reform of the Senate and the admission of new territories to the Constitution, etc., could be blocked indefinitely by just one province. That, it seems to us, is a rigidity. It is just simply inconceivable that we would have it. I am sure you recognize that in political situations people do differ and you very rarely get unanimity. If you can get 70 per cent you are doing very well. But here we talk about unanimous consent, which we think is almost impossible to maintain in those areas. I recognize, as you say, that there are some areas that are not affected but I am speaking of the ones that are.

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**Mr. Chairman:** I suppose the argument is that those are national institutions and that therefore, for that reason, there should have to be agreement among all of the players because you are changing institutions that affect all of the provinces. While I think one appreciates the argument in terms of size, is there not an argument to be made that where institutions of federalism are in question, all of the players need to be in agreement on that?

**Dr. Head:** I think that is true, if you do not want to do it. I would say that if you did that, you are saying in effect you are not likely to get agreement. I have never heard of political decisions made on which there was total agreement. If there are any, I would like to hear about them.

I am American born. I know the American situation very well and I have never heard of a constitutional agreement down there that had all the states on board. You may have a high percentage. It requires three fourths and today it takes 36 states out of the 50 to ratify a constitutional agreement. But in the House of Representatives and the Senate, it is only two thirds. Again, it is a majority but not unanimous.

**Mr. Chairman:** I guess that is why they feel the Meech Lake agreement is rather exceptional in that it is an instance of them all agreeing. But the way you would like to see it is essentially to

leave it as it was in the 1982 revisions and amendments?

**Dr. Head:** That is right, yes; or some close resemblance to that.

**Miss Roberts:** Your presentation today was very helpful in determining where your priorities lie. Our concern has been for a period of time the process by which we got here. As you are aware, our committee is, I believe, one of the first legislative select committees on constitutional reform as a result of this. Have you, as a group, considered how you would like to be involved in the making of the Constitution from now on? Because it is going to have to change whether Meech Lake goes through or not.

**Dr. Head:** We would like to be consulted before just as we were in the case of the 1981-82 Constitution. I recall so well that there were some situations there which the women did not like. The women's lobby went to bat and they were able to get changes. They got section 28, I believe it is, put in which said, in effect, that anything referring to men also referred to women in terms of equality.

That would not have been done had politicians met behind closed doors to do this. It was done as a result of the intervention of people who wanted to make some changes which recognized the status and the equality of women. I think we would like to have the same kind of opportunity to have that kind of discussion regarding racial and ethnic equality as well. That means before the thing is signed, not after.

**Miss Roberts:** Does your group itself meet on a regular basis and is it a lobby group to all levels of government? Just for my own information.

**Dr. Head:** I guess you could say we do both. Right now, we are lobbying the provincial government on the question of equal pay for work of equal value and on the question of employment equity. We did the same thing a year ago with the federal government. In that situation the bill was passed but it was a very weak bill with no teeth to it, except for reporting.

Now we are focusing upon the provincial government. We have been in contact with the human resources secretariat, Dr. Elaine Todres, who is the staff person there, and the deputy minister. We are also meeting regularly with the Minister of Citizenship (Mr. Phillips) and we have had meetings just recently with Raj Anand, the new human rights commissioner. We do have contact with all of those groups and others as well.

We do the same thing with the local communities, as well—the city of North York and the city of Toronto.

**Miss Roberts:** So you deal with all levels of government. I just wanted to be sure.

**Dr. Head:** Exactly.

**Miss Roberts:** It is my fault for not knowing this: are you a national organization or just in this area?

**Dr. Head:** At the moment we are in Metropolitan Toronto, but we have just established a provincial organization. We are the Urban Alliance on Race Relations, but just recently we established an Ontario Alliance on Race Relations, which has chapters right now in Ottawa, Toronto, Windsor and London. We have three other possible chapters that will be coming in, probably within the month of May or June, in Sudbury, Kingston and Kitchener-Waterloo. So we are becoming a provincial organization.

**Miss Roberts:** From my understanding of what you said, if I might ask just one more brief question, you think we should not scrap the accord completely but make some changes that would appropriately deal with the threat you feel is there for multiculturalism and other equality rights. Is that a fair assessment?

**Dr. Head:** That is a fair assessment, yes.

**Miss Roberts:** Is it fair to say that you would like to make sure that section 16 included somewhere in it, or somewhere in the accord, that the Charter of Rights and Freedoms was not superseded by anything that was in Meech Lake?

**Dr. Head:** That is right, exactly.

**Miss Roberts:** Is that what you are saying would satisfy you?

**Dr. Head:** That is right. We are not objecting to all of Meech Lake by any means. A statement which would say in effect that the rights guaranteed under section 2, section 15 and section 27 will not be superseded by Meech Lake will satisfy us.

**Miss Roberts:** So you would even limit it to those sections?

**Dr. Head:** Those, yes. As I said earlier in the lead, we have other concerns, but those are the ones we focus on.

**Mr. Allen:** I appreciate the Urban Alliance on Race Relations coming before us and giving us the benefit of its advice on the Meech Lake issue.

The answer to the last question moved into the area that I wanted to ask you about, namely, the question of the charter in relation to the accord and your perception of that. I am not sure



whether I heard you correctly. Did you say in effect in your brief that it was your impression that the charter has effectively been sidelined by the accord by not being mentioned in it?

**Dr. Head:** We are not sure of that. We cannot say specifically, but we say apparently, because it is not clear to us. When we listen to other people debate it, it is not clear to them either. We have heard both sides of this question. We have heard people say it has no effect whatsoever and we have heard people say there is a direct effect. We would like to see that clarified. We want to know that there is no effect. If we were sure there would be no effect on these rights we are speaking of here, then we would have no concerns.

But until that is clarified—and it should be clarified in the charter; it should not be left to some people saying that it is not there—we should not have to listen to the Minister of Justice or whoever say that, because the courts will not necessarily pay attention to what the Minister of Justice says; they will pay attention to what is written down in the accord as well as in the Constitution. Our concern then is to what extent this is not clarified and there is left what we call an ambiguity.

**Mr. Allen:** What would it mean to you to reaffirm the charter in the accord, which I gather is what your suggestion is? Is it your preference to see the charter reaffirmed in the context of the accord?

**Dr. Head:** Yes, I would like to see the charter reaffirmed, particularly those sections we mentioned, but certainly in a general sense the charter as a whole. I am very much concerned about section 2 and section 15, the fundamental freedoms section and the equality rights sections. I would not want to see, after the long battle to get those things installed in the Constitution, these being in any way at all diminished or undermined or whatever. It is not clear now as to whether they will be or not.

**Mr. Allen:** Would you expect to have them reaffirmed in the accord in a stronger fashion than they are in the charter, by separating them out?

**Dr. Head:** They are in the charter. No, I do not think we have any opposition to what is in the charter already; it is just a question of to what extent is that undermined or not undermined.

**Mr. Allen:** The reason I ask the question and the reason I ask it that way is that of course the charter itself does not provide an ironclad guarantee of the rights that are in it. Right?

**Dr. Head:** That is true. There is a section that has a “notwithstanding” clause.

**Mr. Allen:** It also has section 1, which says that no government is bound by the charter beyond what is reasonable in a free and democratic society. There is also the section which refers to affirmative action programs, and all of those do impact one way or another on the obligation on governments under the charter to deliver the rights in question.

The reason I ask that is I think many groups that come before us have the impression that if one reaffirms the charter, that really catches the governments and they have no way out, whereas the charter itself offers routes out. I was not sure how much of a guarantee you would be trying to get under the accord for the rights in question.

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**Dr. Head:** Actually, we would like to see the charter split in two, but we are not sure this is the time and place for that; we are trying to defend it right now.

Certainly there are areas in the charter which could be strengthened. I think there is no question about that. On the other hand, having been in this game as long as I have, I know very well that no charter provides absolute protection of anything. I cannot remember the name of the French philosopher who said that a charter is a piece of paper; unless the public out there wants the thing enforced, it will not be enforced.

Coming up, as I did, from the United States, I am very cognizant of the fact that the 13th, 14th and 15th amendments to the American Constitution provided rights, the freedom of voting and everything else to blacks in the states, but 10 or 12 years later they were all taken away by the states. Those 13th, 14th and 15th amendments were undermined because there was no will to enforce them.

In a sense there must be a public will, otherwise a constitution of any kind is nothing more than a piece of paper. But at least it is a tool, it is a tool to be used, and we are strongly in favour of that particular tool.

**Mr. Allen:** Thank you very much.

**Mr. Chairman:** I have just one question on follow-up with respect to the charter. Have you or your organization or perhaps someone else from another organization looked at cases that have arisen dealing with race relations and how those are being interpreted by the courts? Have you tried to track through what difference the charter has made in any particular area?

**Dr. Head:** We have had very few of those. Most of the charter cases so far have been nonracial-type cases; they have been basically cases of women's rights and rights of the disabled. As a result, there has been no real challenge. We are concerned about that. For example, as far as I can tell—you may know—I do not think a single case has gone before the courts with support from the fund that has been set up to provide support and prepare cases under the charter.

**Mr. Chairman:** I was not aware of any case. I know we have heard a lot about some of the others you have mentioned. I was just wondering if there was in the system, in your view, a critical case in terms of the charter, particularly with respect to race relations.

**Dr. Head:** I do not think there has been. The most famous case I can think of now is a women's case undertaken with the CNR. That one went under the charter; but it was a women's case, it was not a racial case.

We also have concerns about the fact that the Canadian Human Rights Commission has not done very much on race either. Again, most of its cases have involved disabled people, native people and women's groups.

**Mr. Chairman:** Are there certain things just with respect to the charter, because of that, that you think need to be strengthened? Are there specific places? Apart from getting rid of the "notwithstanding" clause and so on, is there some other wording you would like to see in some of the clauses? What would be the general thrust of changes you would like to see in the charter, which in your view would strengthen it?

**Dr. Head:** In answer to that, I think we would not be able to say that we have any specific case. I think the concern we have is the question of access to it: how to get into the cases, get them prepared, etc. Basically speaking, we talk about money when we talk about getting these cases, as you know. We tend to prefer to go to the Ontario Human Rights Commission because that does not cost us anything; we do not have to pay any legal fees.

Without the funding to do so, we have very little access. As I said a minute ago, the government has set up a program, which is administered by the Canadian Council on Social Development, which does make funds available to prepare cases, but we have not had the opportunity yet to do any of those. We would like to find a good case to take to the courts under the charter to sort of see what would happen. We just have not done that yet.

**Mr. Chairman:** Thank you very much for joining us this afternoon. We appreciate your coming in. I think the three points you have set out are very clear and fit in with a number of comments that other groups and organizations have made as well. We are moving towards the end of our public hearings and are directed to report back to the Legislature by the end of the spring session. We thank you very much for being here this afternoon.

**Dr. Head:** Thank you. We appreciated having the opportunity to come before you.

**Mr. Chairman:** If I could then call upon our next witness, Patrick Kutney, if he would be good enough to come forward. If you would like to proceed with your presentation, Mr. Kutney, we will follow up with questions; once you have had some water poured there.

#### PATRICK KUTNEY

**Mr. Kutney:** I am led to believe that I am giving the last presentation overall.

**Mr. Chairman:** No, not necessarily. There is a question mark there—someone who could not come in today might appear.

**Mr. Kutney:** You may find me the least prepared of anyone who has come before you, so we may have a little fun. I would like to thank you for having invited me, but I would like to apologize for not having a written brief to distribute.

**Mr. Chairman:** Excuse me. Just before you go on, I am wondering if there is a document there that—he has found it. OK, sorry.

**Mr. Kutney:** I am not blaming your clerk for this. I was originally led to believe I would appear one Monday in May and I was phoned about 10 days ago. To put it bluntly, I was in Manitoba fighting for the one leader who is unequivocal in being against the Meech Lake accord.

I have watched as much of the hearings as I could on TV, and I am going to try to address items that I have not seen touched on before.

I have noticed in your deliberations that there have been complaints about the process, initially by the members of the committee and then by witnesses. The process would not bother me if the first ministers had come up with constitutional amendments that moved the country forward or provided more unity or even kept us at a standstill rather than taking so many severely regressive steps. But where the Ontario government is at fault in the process, I feel, is in not having had public hearings in the time period



between Meech Lake and the Langevin Block. Quebec, to its credit did, although nothing substantial came out of it.

Another objection I have to the process is that while I as a private citizen or almost any other resident of this country can appear, just as before the joint committee in Ottawa, MPs were not invited or allowed to appear. I am sad to see that MPPs in this province have not been allowed to appear. Now it can be argued that MPPs have the possibility of speaking in the Legislature about Meech Lake, whether for or against, but here it is different from the Legislature and perhaps there can be more of a dialogue with questions and answers between an MPP and the committee.

Many of the witnesses who have come before you have tried to use these hearings as a forum for adding everything and anything, both sensible and absurd, that should be in our Constitution. Is it the mandate of this committee to add to the constitutional amendments of Meech Lake? Perhaps, but let us not cloud things. The issue is what is not good in Meech Lake and what should be taken out.

I regret to say that I can find nothing of worth in the accord. The intent is good, of getting Quebec's signature on the Constitution, but let us not mislead the public or the legislators. We are not "bringing Quebec into the constitutional family." Quebec has always been a part of it. The Supreme Court of Canada has ruled that Quebec receives all the benefits and rights accruing from the 1982 charter. The only instance where Quebec would lose out by not being a signatory is if Canada were in a state of emergency, such as a state of war and then Quebec would not have, as I understand it, as much of a say on something like conscription.

#### 1640

Let me just move on to one point in subsection 50(2), one of the very few things that is not ambiguous in this document:

"The conferences convened under subsection (1)"—referring to subsection 50(1)—"shall have included on their agenda the following matters:

"(a) Senate reform including the role and functions of the Senate, its powers, the method of selecting senators and representation in the Senate;

"(b) the roles and responsibilities in relation to fisheries; and"—I stress the following—

"(c) such other matters as are agreed upon."

If we have one of the provinces or the federal government saying, "I don't want to discuss such-and-such a subject; all we have to discuss is Senate reform and fisheries," that wording is

very clear: "such other matters as are agreed upon." If they all cannot agree to discuss some aspect of the Constitution—aboriginal rights or whatever—it does not have to be discussed.

Very few people, I think, have come before you that like nothing in the accord. I am sure most of you argue: "What about Senate reform? You can agree with that, can't you?" I do not agree with Senate reform except a very small part of it.

I think it is very good to have a level of government that is not elected. MPs, MLAs and MPPs try as they might, and some are successful, cannot divorce themselves from asking, "What do I need to do to get re-elected?" The Senate does not have that; it is appointed.

We look at their work on the two immigration bills. We have the entire Senate against those immigration bills because they are not worried—and I do not mean to offend you—about being re-elected. I have no problem with Liberal, Tory or NDP bagmen or whatever being appointed. But I would like to see all of the appointees work.

My simple thing in Senate reform is to make the attendance laws more rigid. Hopefully we can have a Prime Minister who is going to appoint people who are partisan Liberals, partisan Tories, whatever, but ones who are going to take that job seriously and work at it.

In regard to the Senate reform and so many other aspects of the Meech Lake accord, we say we will change things in the next round. Well, are the 10 provinces going to agree unanimously, "Yes, we will give you back some of those powers"? And what are they going to get in return? Now I am sure you, as legislators, believe, from your individual position, those who are on the government side, those who expect to be on the government side some day: "I will not hurt Canada. I will be a nation-builder. I will not be into a grab for the provinces." But is there one of you in this room who does not agree that at least one of our first ministers and his government is, to say the least, misguided? Are we going to be able to trust provincial premiers in perpetuity to be out for Canada's best interests?

If Meech Lake goes through, I do not want to hear the members of legislatures and the House of Commons complain about Supreme Court rulings on the Meech Lake accord. The Supreme Court is there to interpret it. It did not write it; that is not in its jurisdiction. The wording is so ambiguous and so open to a myriad of interpretations that those who want the best out of Meech Lake should not expect the Supreme Court to rule

what you, as individuals or as a government, think is a best-case scenario.

I think the last thing I would like to address is a free vote. I hope that you as a committee can recommend this to the three provincial parties. Some of us, depending on our religious persuasion, believe in the infallibility of the Pope. The same, I do not think, could apply to the infallibility of our federal leaders of the three parties or the infallibility of our provincial leaders. Perhaps treading on dangerous ground here, I would hope that you recommend that the members of the provincial Legislature vote according to what they think is right. Now, while I have great respect for Ian Scott on many matters, I do not look on him as a constitutional expert. Ian Scott said many months before the Meech Lake accord came out that he agreed with Bourassa's five points.

**1650**

So we come to the free vote and how one deals with it. I am sure there are many members say in the Liberal caucus, who worry, "If I vote against this accord, David won't put me in the cabinet," or "It is going to offend my federal leader." I cannot imagine anything in your legislative lifetimes that you will serve here that will be as important to vote upon as this. I will leave it at that.

**Mr. Chairman:** Thank you very much. You have touched upon a number of items. Presumably what you want to see is that the accord is essentially rejected and renegotiated. Is that fair enough?

**Mr. Kutney:** Yes. I mean, shall we say this constitution was done in a day, though it could have been spread over weeks, whatever, between Meech Lake and Langevin. But let us try again. I do not see the people in Quebec pulling their hair out because Quebec was not a signatory to the Charter of Rights in the Constitution of 1982. Those whom I do see objecting are the politicians, some of the media and a few academics. The mass public seem happy.

I am sorry, perhaps I am getting away from your question.

**Mr. Chairman:** Where do you see us going from here?

**Mr. Kutney:** Start over. It is not the end of the world. Try to get something. You know, it may take 20 years; it may take 40 years. We are not in bad shape now.

**Mr. Chairman:** On the five points that Quebec originally brought forward: do I take it, then, that you would not necessarily agree with

those five points? It is not just the way the accord was drafted but that those five points, in your view, would not constitute the basis for a negotiation of a new accord.

**Mr. Kutney:** No. I cannot recognize one province or one province's inhabitants as being more special than another province's. We have to go on an equal footing.

**Mr. Chairman:** I suppose one could argue, as some have, that those five points represent the most modest proposals that have come from Quebec in that one of the constants over the years, certainly since the 1960s, has been some recognition of Quebec as a distinct society in some way or other. How does one then deal with that? Clearly, that has come from governments, but it would appear—

**Mr. Kutney:** I may be able to accept putting that in a preamble but not in an actual constitution. While it can be said that those are modest demands, perhaps we wait until we finally get a government that does have more modest demands.

Now, I am not an expert on Quebec history, but I think a couple of the submissions skirted around the history of Quebec. The way I see it, Duplessis, and Taschereau before Duplessis, held Quebec back, kept it very insular and did not allow Quebec to have its rightful place in Canada; and the rise of the Parti québécois was as a result of something from a decade or two decades before. It was a sort of lag process in that Quebecers were happy with their state in Quebec, but they were thinking of how they were 10 or 15 years back. I believe certainly that in the last eight to 10 years Quebec has taken its rightful place in Canada and is not being kept insular by people like Duplessis, Taschereau, and in fact the Catholic church.

**Mr. Cordiano:** Just very briefly, I understand your concerns with respect to the accord. In fact, I am very familiar with some of the views that you have expressed. I just want to ask you: if we reject Meech Lake, what do you think might be put in place of what is there now? You have not really said, "Instead of doing this, let us do something else." What is that something else? Are you, in effect, saying let us leave things the way they are?

**Mr. Kutney:** I am not a constitutional drafter. If it were these people—

**Mr. Cordiano:** No, I mean conceptually.

**Mr. Kutney:** All right. Scrap Meech Lake, which takes us back to the 1982 Constitution, and try again. Work from there.



**Mr. Cordiano:** OK.

**Mr. Kutney:** If we are not successful, so be it, but what we have from 1982 is better than what we have from 1987.

**Mr. Cordiano:** In your opinion, who would speak for a province like Quebec? Would you think that the federal members of Parliament would have some more legitimacy in putting forth views of Quebecers, or would it be the members of provincial parliament or the National Assembly? Would they have an equal voice in expressing the view of all Quebecers, duly elected? Which one is it of those two sets of elected officials? I have heard various people say that the federal government should speak for all of Canada.

**Mr. Kutney:** Provincial governments can also speak for Canada.

**Mr. Cordiano:** OK. So when we are saying that, you are suggesting, in effect, by that statement, that provincial members would have an equal voice in expressing the views of their constituents, who perhaps are the same constituents who elect federal members.

**Mr. Kutney:** To be blunt, it is really what is coming out of their mouths—I mean, what is worth while. It is hard to say.

I think perhaps they should be put on an equal footing, but I think you probably know better than I that in 1982 we were not on an equal footing and it was the federal government that had more of a say. Perhaps then, to change my mind, the federal government should have more of a say. It may take a long time, but I think we just have to keep trying.

1700

**Mr. Cordiano:** What it says to me when we have Quebec's five demands on the table is that we ask the question: what does Quebec want as a province? Obviously, we have the same situation in Quebec as in any other province. You have the federal members elected to the House of Commons; you have provincial members elected to the legislatures. But we did not get Quebec in the Constitution, in the sense that the province did not sign on the dotted line for that 1982 Constitution.

Because we are a federation, provincial support for any constitutional design is essential if federation is to work the way our federation is set up. So we ask that question, and we say, "Does Quebec have a right to speak on behalf of Quebecers; duly elected members of that Legislature, having expressed the viewpoint during the 1985 provincial election in Quebec,

asking that there would be some move to constitutional reconciliation, if you will, with the rest of Canada?"

I think they have received a mandate from the people of Quebec to do just that. That was part of the platform they ran on. So we have to say to ourselves, when we are asking what Quebecers want, that this is certainly something to be taken into consideration. That is what people did in trying to put together this 1987 accord.

I hold the view that we do have a set of conditions, if you will, or a set of points put forth constitutionally by Quebec which now all 10 provinces agreed to in principle. It remains to be seen how many more will sign on the dotted line—perhaps Manitoba and New Brunswick—but certainly Quebec put forward a position and said, "Here is what we want."

**Mr. Kutney:** Oh, I certainly agree that Quebec should be listened to. What I do not agree with is anyone having special powers that another province does not have.

**Mr. Cordiano:** OK. So what you are telling me is that you do not agree with Quebec's demands.

**Mr. Kutney:** Yes.

**Mr. Cordiano:** OK. Thank you.

**Mr. Chairman:** I have Mr. Allen, Mr. Smith and Mrs. Fawcett.

**Mr. Allen:** I am not sure what you mean by "special powers" that one province might have that another one might not have.

**Mr. Kutney:** Immigration.

**Mr. Allen:** What about immigration?

**Mr. Kutney:** Well, do they not get a percentage above? Let us see where this is. It says in section 2:

"(b) guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by five per cent for demographic reasons, and

"(c) provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation."

That is just one; but I am sorry, please finish your question.

**Mr. Allen:** I really wondered whether you were referring to powers as we normally

understand them under the Constitution, such as the division of powers, or whether you were talking about conditions.

**Mr. Kutney:** OK, yes. You are better with the English language than me. I suppose I have used a misnomer. Some of these are probably powers and some are conditions. The mandate to promote and preserve rather than just preserve—I do not know if that is a condition or a power.

**Mr. Allen:** The reason I put it that way is that it is certainly true that under the Constitution we have lived under, the various provinces have not been on the same conditional relationship with each other or with Ottawa as all other provinces. Numerous provinces came into Confederation under different terms relative to the price that was paid to get them in, relative to languages in courts and legislatures. There is in that sense at present a special status that each province or many provinces have that others do not.

I wonder whether that is part of your concern, whether you want to eliminate those kinds of differences and just where you are headed with the concept of special status.

**Mr. Kutney:** To be honest, I vaguely knew they existed. May I ask you, do you think the terms Quebec gets under Meech Lake go appreciably beyond the individual terms that each of the provinces received in joining Confederation? I do not know. I am asking.

**Mr. Allen:** If I could say so, our context is not one where you ask questions of us. It is where we ask questions of you.

**Mr. Kutney:** I am not trying to bait you. I am only asking the question.

**Mr. Allen:** None the less, there is in the existing and was in the existing frame of reference to the Constitution a special status for Quebec. The Parliament of Canada was not permitted to make laws with respect to civil property, for example, for any other than the three provinces that came in, but not for Quebec. Quebec had a right to do those things for itself in that domain. It alone of all the provinces was given the right or the power to have French used in the courts and in the Legislature of Quebec.

What is done in the Meech Lake agreement is to allow a slightly more generalized version of the 1867 agreement with respect to the capacity of Quebec to preserve and to promote its own identity as a province, which might move in some other linguistic dimensions than perhaps are presently there, but which we have also been told require some attention to the historic

existence of an English minority which cannot be ignored in the equation.

It also provides for agreements with Quebec, that might also exist with other provinces and do exist with other provinces, around the immigration question. The Quebec agreement happens to be a bit more detailed than some others and pays attention to the fact that Quebec is the homeland or the foyer of the French language in Canada, a language which in international terms and in the context of North America is a minority language. Therefore, there is an element in there of affirmative action, if I can put it that way.

Otherwise, there is its historic place as a major province that might be attended to in amendment procedures regarding federal institutions impacting on it. In the area of the appointment of Supreme Court of Canada judges from the civil law panel there are factors that are now constitutionalized that were not before. All of those I find quite acceptable.

I am not surprised that in order to get some agreement around that, however, in a constitutional sense, that other provinces felt they needed to be recognized in some new ways too. I also do not find that too troubling because the federal government retains a whip hand in almost all of those regards—in the immigration section, for example, where federal standards must be maintained and where the charter principles and rights dominate any agreements and any behaviour by a province respecting immigration.

I find the balance is not too troubling. I do not see any real likelihood that a province will start marching vociferously and aggressively down some road to separation just on account of the accord. Some new wave of *indépendantiste* impulse that might seize the province might, of course, gain a political head of steam. I can understand that, but that can be dealt with in political terms.

1710

**Mr. Kutney:** Sorry. How will that be dealt with in political terms?

**Mr. Allen:** It would have to be worked out. I think it goes without saying that any province that simply came to the overwhelming conclusion that it no longer wanted to be part of Confederation would have to be negotiated with; that is all. Where that would go, I have no way of knowing, but that is a reality that does not exist at present and which is not especially, as far as I can tell, promoted by the Meech Lake accord.

In fact, it could just as easily be argued, and I think is argued in some quarters, that some of the points that are conceded in the accord may well



make it easier to live together in the federation with Quebec. I do not think the balance of argument tilts particularly heavily one way or the other, but none the less, the arguments are equally convincing, as far as I can see.

You asked me for a response to the question of political status, and I have given you my response.

**Mr. Kutney:** I thank you.

**Mr. Allen:** That is essentially why I was coming at the question of powers and conditions. There are those differentials out there that do exist, and I do not think they are extensively exaggerated in the Meech Lake report.

I wanted to ask you another question, and that had to do with an impression you left with me that the agenda that is set requires unanimity for future meetings. I see nowhere in the unanimity principle that Meech Lake proposes an indication that first ministers' conference agendas require unanimity.

**Mr. Kutney:** That is under the other formula.

**Mr. Allen:** Yes.

**Mr. Kutney:** I meant to change that. Forgive me.

**Mr. Allen:** OK. Thank you very much.

**Mr. Kutney:** Still, what is it? Seven provinces or—

**Mr. Allen:** And 50 per cent of the population.

**Mr. Kutney:** That still seems a bit much.

**Mr. Allen:** I do not think it is even clear, in terms of setting the agenda, that it even comes under the seven and 50. I do not think there is any part of the Constitution that says that first ministers' conference agendas do come under it. It really is a matter of consensus. You could get two provinces that wanted it on and wanted it on badly, and the others would say, "OK, we will discuss it," and it is on the agenda. There is no way of substantially blocking it and there are a lot of—

**Mr. Kutney:** I disagree with you on that. I am sorry, I was thinking of something else. It seems to be very clear "agreed upon" means unanimity. It does not say anything about consensus here, majority. It is strictly "agreed upon." I think one or more first ministers will argue that point if he does not want to discuss a subject, such as native self-government.

**Mr. Allen:** Well, good luck to him, but—Thank you.

**Mr. Smith:** As I have listened to your presentation and your comments, it seems to me

you are definitely opposed. There is really nowhere in between.

**Mr. Kutney:** No.

**Mr. Smith:** I wonder if you could give us some of your thoughts as to where you would see Canada and the provinces to be if the Meech Lake accord is approved the way it is presented. It comes in, I guess, in 1990. Have you any picture in your mind as to the major problem, say, by 1995 or the year 2000? Have you got something in your mind there so I can see where you think we are going to go, because maybe I do not understand all of this document either. I am just trying to wear away at your thoughts.

**Mr. Kutney:** I notice the Progressive Conservative members have left and I can now get away with this. I know they take umbrage at this. The New Democratic Party and the Liberals are basically opposed to free trade. I do not think of it as a scenario. I think it is inevitable. We will go lockstep into this.

Through Meech Lake, the federal negotiating powers and spending powers will be so weakened that we will go lockstep into a free trade agreement with the United States. Canada is already recognized as being the most decentralized of western democracies. It is going to be even more so through this, as I see it. A country that will be as weak as we would be on a federal level—federal meaning the government—is really going to have weak bargaining chips. That is just one.

**Mr. Smith:** Do you see the two having to go hand in hand, free trade and Meech Lake?

**Mr. Kutney:** I think free trade with the US inevitably follows. There are those who have argued that there is some kind of intentional link between the two. I do not know if I would agree with that. A federal government has powers—and excuse me if I am wheezing—in the wrong sense here willingly stripped away.

There are other scenarios.

**Mr. Smith:** It is just fracturing the country more. That is what you believe?

**Mr. Kutney:** I think fracturing the country more is another result of Meech Lake. Take the federal level of government being here, pre-Meech Lake, and the provincial being here. It does not show up well in Hansard, does it? With Meech Lake, provinces come up in strength and the federal is reduced. I think this is the result. Is that colourful enough?

**Mr. Smith:** In another comment, you said you did not think Mr. Scott was a good constitutional lawyer. Are you a lawyer yourself?

**Mr. Kutney:** I am a blue-collar worker. But the person who I think is the constitutional expert in the country is not a lawyer, and that is former Senator Forsey.

**Mr. Smith:** Thank you.

**Mrs. Fawcett:** Thank you for making the effort to come here. Just going back to something you alluded to, I am wondering if you think because of the focus that has been on Meech Lake, and it certainly has been in these last months and it is certainly revving up again—

**Mr. Kutney:** Days and hours, yes.

**Mrs. Fawcett:** —if we scrap it, are we not now saying to Quebec: “Sorry, you did not make it this time. You were not really important enough. You have to wait longer”? Are we not giving Mr. Parizeau an open door and allowing that to get revved up again? I am just wondering what your thoughts are on that, because I think you said something to the effect that maybe Quebecers are not aware. I wonder if they are not now more aware. If they are not brought into the Constitution, if we do not pass it, is that not a clear message to them and rather a negative one?

**Mr. Kutney:** As I said before, with the exception of those three small groups—granted, groups of influence, though I do not believe they are influencing Quebecers on it—I still believe Quebecers will not complain because Quebec is not a signatory to Meech Lake. Has Mr. Parizeau not said that he would use the signing of Meech Lake as an open door for pushing for an independent Quebec, rather than the reverse?

**Mrs. Fawcett:** It remains to be seen just how powerful he will get. I, too, am worried about the

free trade agreement. If Meech Lake is not signed, does that open the door now between Quebec and the US because they have the hydro power the US wants?

**Mr. Kutney:** Quebec has always sold massive amounts of hydro to the US.

**Mrs. Fawcett:** I realize that, but if the rest of Canada is saying no, sorry, I worry about that influence.

**Mr. Kutney:** Certainly, provinces should be encouraged to use their own initiative on exports. I cannot see that necessarily leading to free trade with the US.

**Mrs. Fawcett:** I just worry about separation if we do not bring them in.

**Mr. Kutney:** Remember, it is the “bring them in.” It is the name on the dotted line. I see more chances of separation by signing the Meech Lake agreement.

**Mrs. Fawcett:** OK. Thank you.

**Mr. Chairman:** Thank you very much, Mr. Kutney, for coming in this afternoon and sharing your thoughts with us and also for dealing with a number of questions. We appreciate your doing that today.

**Mr. Kutney:** Thank you very much for your time and your attention.

**Mr. Chairman:** We will go on in camera just to deal with a few business matters, if committee members could remain behind for a very few minutes.

The committee continued in camera at 5:22 p.m.



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No. C-26

# Hansard

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#### Select Committee on Constitutional Reform

1987 Constitutional Accord

**First Session, 34th Parliament**

Wednesday, May 4, 1988



Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, May 4, 1988

The committee met at 10:07 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

(continued)

**Mr. Chairman:** I am without my trusty gavel this morning, ladies and gentlemen. We will have to start without it.

Just before inviting our first witnesses to testify, I would like to bring something to the attention of committee members. Those of you who were in the Legislature yesterday will recall that a petition was presented regarding Meech Lake. The petitioners have also sent me a copy, which we will enter into the record of our proceedings.

I will identify for you Dennis Wyslobicky and Victor Butsky of the Ukrainian Professional and Business Club of Toronto. We welcome you both here this morning. We have a copy of your presentation. If you would like to proceed, we will follow up with questions after you have made your presentation.

### UKRAINIAN PROFESSIONAL AND BUSINESS CLUB OF TORONTO

**Mr. Butsky:** Thank you, Mr. Chairman and honourable members, for the opportunity you have given us today to speak before you on the Meech Lake accord. As mentioned, we are appearing on behalf of the Ukrainian Professional and Business Club of Toronto, which is an association of approximately 400 members of Ukrainian-Canadian descent. One of the goals of the club is to promote and support the cultural interests of Ukrainian-Canadians in terms of their interests in language and cultural goals.

Although the club is by and large Toronto-based, it does in many instances share common views with a number of other Ukrainian-Canadian associations which have similar views and are located in various communities across Canada.

The club does believe that Canada is, among other things, a cultural mosaic not only of French-speaking and English-speaking Canadians but also enjoys a mixture of people coming from various ethnic backgrounds. Approximately one third of Canadians have origins which are neither English nor French in terms of either cultural or language backgrounds. The Ukrainian

Professional and Business Club of Toronto believes that the equality of all Canadians should be reflected under the law of Canada; in particular, under the proposed amendments in the Meech Lake accord.

### 1010

The Constitution of Canada, which prescribes a mechanism for protecting the cultural interest of all Canadians, also prescribes the way in which the legislative, executive and judicial powers must be exercised in order to fulfil those goals. In our view, it is essential that the Constitution of Canada reflect and protect the cultural heritage of all Canadians, not just specific groups.

The club considers that the 1987 constitutional accord contains certain amendments to the Constitution of Canada which, unfortunately, do not reflect and protect Canada's multicultural heritage. We consider that some proposals in the accord single out two groups, French-speaking and English-speaking groups, for preferential treatment and protection, perhaps to the detriment of Canadians who do not share that common background. The club has certain concerns about these proposals and would like an opportunity to refer to those concerns.

First of all, if I may, I will refer to a question of interpretation of the Constitution of Canada. I think the honourable members will appreciate that the Constitution of Canada consists of a number of documents; approximately 30 pieces of legislation come together to form what is the Constitution of Canada. One of those pieces of legislation is the Canadian Charter of Rights and Freedoms. Section 27 of the charter provides that the charter—I must highlight this—is to be interpreted in a manner which is consistent with the preservation and enhancement of the multicultural heritage of Canadians.

By way of contrast, section 1 of the accord, on the other hand, proposes that the entire Constitution of Canada, including the charter, is to be interpreted in a manner which is consistent with the recognition of the existence of French-speaking and English-speaking Canadians throughout Canada and that they are to be recognized as constituting a fundamental characteristic of Canada and, among other things, that

Quebec constitutes a distinct society within Canada.

The relationship between the proposed amendments to the Constitution, as embodied within the accord, and the interaction with the charter can be best highlighted by a reference to section 16 of the accord, which provides that the proposed interpretative rules of the accord and the Constitution do not affect section 27 of the charter. In spite of section 16 of the accord, it is the submission of the club that the combined effect, with section 27 and the charter and the accord, is that only the charter is to be interpreted—I must highlight that—in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It leaves it open, in our respectful submission, that the rest of the Constitution of Canada, as mentioned, referring to a number of other pieces of legislation, will be subject to an interpretative rule which favours only French-speaking and English-speaking Canadians and Canadians in Quebec over Canadians of other cultural backgrounds.

The Ukrainian Professional and Business Club of Toronto considers that the proposed interpretative rule embodied in the accord is unacceptable and that the accord should be amended to provide a mechanism whereby the entire Constitution of Canada would be interpreted in a manner consistent with the recognition and preservation of the multicultural heritage of all Canadians of diverse ethnic backgrounds and that ought to constitute a fundamental characteristic of Canada.

Our second point, in our respectful submission, concerns the accord and the provision within the accord that the Constitution of Canada will affirm the role of the Parliament of Canada and the various provincial legislatures to preserve the stated fundamental characteristic of Canada relating to French-speaking and English-speaking Canadians only and, further, that the accord provides that the role of the Legislature and government of Quebec is to preserve and promote Quebec as a distinct identity.

In this regard, it is our respectful submission that the positive role of the various governments and legislatures to preserve, or preserve and promote, the language used within the accord—that is, to preserve and promote the stated fundamental characteristic of Canada and the distinct identity of Quebec—is again to be contrasted with the provision of the charter which deals with the question of multicultural heritage and interpreting the rest of the charter.

Section 27 of the charter is simply an interpretative tool which applies to the rest of the charter. The proposed amendments to the accord, on the other hand, referred to positive roles of various parts of government, that is, the legislatures of the various provinces as well as the Parliament of Canada. It is the respectful submission of the Ukrainian Professional and Business Club that the accord ought to be amended to confirm the role of the Parliament of Canada and the various provincial legislatures also to preserve and promote the multicultural heritage of Canada.

We would also appreciate the opportunity respectfully to submit a third point which the club considers to be an area of some concern. The Meech Lake accord contains a proposal that the Constitution of Canada is to be interpreted in a manner which is consistent in recognizing Quebec as constituting a distinct society within Canada and the role of the Legislature and government of Quebec to preserve and promote this distinct identity.

In our respectful submission, these proposals, however, do not expressly recognize the multicultural nature of Quebec and the fact that many Canadians of non-French or non-French-Canadian background are present in Quebec and that their interests in Quebec society ought also to be recognized as constituting an important part of that society.

The Ukrainian Professional and Business Club considers that the specifically stated role of the Legislature and government of Quebec—that is, to preserve and promote the distinct identity of Quebec—does not recognize Quebec's multicultural characteristics and that could adversely affect non-French-Canadians living in Quebec.

It is our respectful submission that the accord ought to be amended to expressly acknowledge that non-French-Canadians are an integral part of that society and help to make up Quebec as a distinct society within Canada.

Our fourth submission on behalf of the club centres on the accord and its affirmation of the role of the Legislature and government of Quebec in preserving and protecting its distinct identity. On the other hand, if again I may be allowed to contrast the accord with section 27 of the charter, section 27 of the charter provides only that the charter is to be interpreted in a manner which is consistent with the preservation and enhancement of the multicultural heritage of Canadians.



The Ukrainian Professional and Business Club considers that there exists the possibility of conflicts arising between this positive role of the Legislature and government of Quebec in discharging its duty to preserve and promote Quebec's distinct identity and these provisions of the charter which could be interpreted in the light of section 27.

If I may provide one or two examples of areas of potential concern, as one example it may at one time be a possibility that the Quebec Legislature passes a law which requires that the meetings of an organization, perhaps equivalent to the Ukrainian Professional and Business Club, meeting in Quebec ought to hold all of its meetings in the French language only.

Although such a provision may be seen as legislation furthering the interests of and preserving and promoting Quebec society in its distinct quality, that may be seen also as being an infringement on the right of free speech within the rights guaranteed by the Charter of Rights and Freedoms. Section 27 of the charter would only provide an interpretative rule, in our respectful submission, affecting the right of free speech and how that impinges upon the rights of certain members to conduct their meetings within a language of their choice.

Perhaps as a second example, legislation passed within Quebec which may restrict certain ethnic groups from conducting language classes to promote and preserve their own cultural background, or classes in their own private schools directed to matters affecting their cultural history, could be seen on the one hand in the view of the Quebec government, as legislation designed to promote the preservation of Quebec or French-Canadian ethnocultural interests, but on the other hand, in view of certain guarantees within the charter, as impinging upon the rights of associations to gather and speak as they choose.

The Ukrainian Professional and Business Club considers that there exists a number of different possibilities for conflicts arising between, on the one hand the positive role of the Quebec government discharging its duty to preserve and promote this distinct identity of Quebec, and on the other hand what is provided by section 27 of the charter, which is an interpretative rule which affects the rest of the charter. Although section 16 of the accord seems to exempt section 27 of the charter from operation, it is our respectful submission that there may be situations which arise under Quebec legislation which are not adequately foreseen within the rest of the

proposed amendments contained within the accord.

It is the possibility of conflict, and perhaps creating a fertile ground for cases of this kind coming before the courts, that the club is trying to avoid. It is our respectful submission that we are asking that a clear legislative framework be set up to avoid this area for potential misinterpretation of what is obviously the choice, in our view, of most governments to preserve the rights and interests of all Canadians.

In conclusion to our various submissions, the Ukrainian Professional and Business Club does support amendments to the Constitution of Canada which would assist in the interpretation of the Constitution, and would also affirm the roles of the Parliament and government of Canada and the provincial legislatures and governments to preserve and promote certain fundamental characteristics of Canada.

The Ukrainian Professional and Business Club of Toronto, however, considers that the accord does contain certain proposed amendments that do not adequately reflect or protect the interests or the goals of Canada's multicultural groups or the multicultural heritage of certain Canadians. Accordingly, the Ukrainian Professional and Business Club considers that the accord should be amended in these respects to satisfy the four concerns that we identified earlier.

**Mr. Chairman:** Thank you very much for your presentation. I think you have set out a number of concerns that have also been brought before us by a number of other multicultural organizations. I recall in particular the presentation that the German-Canadian Congress made. They also touched on a number of these same points. We will try to explore those a little more fully in our questions.

**Mr. Allen:** I appreciate very much the fact that the Ukrainian Professional and Business Club has come before us to present what I take to be a very thoughtful brief, attempting to relate various sections of the accord to the charter and to other elements of our Constitution.

May I also preface my remarks by saying that I have a Ukrainian wife and we enhance the multicultural dimensions of Canadian society as often as we can.

Could I ask you, first of all, is it your view that this is your only chance, if I can put it that way? I think sometimes I have a sense that some of the groups coming before us have the impression that we are sort of sealing the Constitution in this whole exercise, that it will be hermetically closed from here on and therefore there will be no option

to affect any of the elements, either of the accord, the charter or other aspects of the Constitution.

Do you have that sense? Or do you have a sense that we are into a long-term process of constitutional change, maybe not quite as extreme as the Swiss, who have had 88 different constitutional amendments, I understand, over the past 150 years, but none the less something of an ongoing process? What is your critical sense of the moment?

**Mr. Butsky:** If I may, my personal feeling is that constitutional change or reform is not a matter that takes place very often. One is very seldom given an opportunity to make submissions with respect to certain points that arise in the matter of interpreting constitutional questions and constitutional issues. Attempts at changing legislation in this area, I respectfully feel, are very seldom provided to individuals.

This perhaps is a rare opportunity that we do have to seize upon at the present time and make our feelings known before this committee. So if I may just point out that this opportunity may not again be presented to us within the near future, so we do feel that it is an opportunity we should take at the moment.

**Mr. Wyslobicky:** If I might answer that as well: I am familiar, and I guess most of you will be familiar, with the tax reform proposals that are going on at the federal level. I would want to remind everybody that the business transfer tax or value added tax proposals that are seen as the solution to our federal sales tax problems are not proposed to address an issue that has just come to light. The federal sales tax legislation has been known to most practitioners, accountants, and indeed the people in government, to be terribly flawed since its introduction in the 1930s.

The point I want to make is that if something as simple, in relative terms, as federal sales tax legislation can still be kicking around in a form that everybody acknowledges is undesirable after some 50 years, then my personal view would be that something that is so much more fundamental, so much more complicated and has so many different aspects to it as the Constitution could face even more difficulties in amendment and getting things right.

1030

**Mr. Allen:** I am not sure about the comparison of constitutional and nonconstitutional provisions and issues, none the less, we are all familiar with the resistance of government and legislation on constitutions.

Your point is well taken. We have had inordinate difficulty in the past with constitution-

al amendment, but it is interesting that in the last decade we have been pretty well preoccupied all through the decade with various aspects of the issue. We have had an aboriginal round of discussion, which unfortunately, in my view, did not work out satisfactorily and I hope it will be taken up again.

So my suspicion is that we are going to be into a long series of constitutional meetings that will take up one unaddressed aspect of the Constitution after another until we perhaps get it right. I doubt that will ever happen because I think life just goes on, perspectives change and needs alter the demands on the Constitution.

I ask you, without being too mischievous, did you make a representation in the course of the aboriginal round?

**Mr. Butsky:** No, we did not.

**Mr. Allen:** Was there a reason for that?

**Mr. Butsky:** No, there was not.

**Mr. Allen:** That perhaps highlights the point. I suspect there may well be another opportunity.

I understand the points that are made, but I am a little puzzled by the use of the language of equality, because we have at least determined in Canada, I understand, officially, that there are two official languages and therefore two official language groups in a broad sense, each of which tends to break down into multicultural subdepartments. How much of your concern is linguistic? Can you separate that out from your cultural concerns? The reason I ask that is I suspect you are not asking for linguistic equality as an official language.

**Mr. Butsky:** No, we are not.

**Mr. Allen:** How does that affect your arguments?

**Mr. Butsky:** Although we are not asking for linguistic equality in terms of being recognized as yet another official language, our submissions are directed to the ability of existing communities within Canada to maintain their rights to carry on in those instances where they choose to use their own language, be it in the form of meetings of their associations, or to use their language in terms of church meetings and so on, or in the home.

Language questions of that nature relate indirectly to the question of culture. Certain ethnic groups do consider the right to carry on with their language as an intricate part of their cultural background. The two are intertwined, if I may say. The question of culture is at times confused with a person's language background,



and the two should be separated for matters of argument and so on.

However, in terms of cultural background—getting back to this point of language being an intricate part of that—it is our feeling and our submission that our groups, in particular Canadians of Ukrainian-Canadian background, ought to be given an opportunity to preserve that cultural background, that mosaic they have developed by coming to Canada, well over 90 years ago in some instances. It is that ability to carry on with their meetings, their various cultural and ethnic activities, that should be permitted.

**Mr. Allen:** My sense of what you have said then is that there are two languages that have a special kind of status by virtue of being official. The provinces, as formal political entities, function in one or other or both of those. Likewise the courts and the official structures of government have various degrees of mandate to operate that way. I hear you conceding that sets up an initial and prevailing inequality. Inevitably, English-speaking groups, by mother tongue, and French-speaking groups, by mother tongue, are going to have a built-in advantage that will be almost impossible for any other cultural group to acquire. Is that right?

**Mr. Butsky:** Well, we are not here with the view to actually acquiring a recognized right to carry on official functions in the Ukrainian language, or for that matter in any languages other than French or English, but rather to preserve our opportunities to maintain those functions and those recognized activities which clubs like, for example the Ukrainian Professional and Business Club of Toronto, have typically carried on in the past and those recognized activities which further and promote the preservation of our cultural background.

So if I am understanding the honourable member in terms of his question, we are not seeking an opportunity for official status in terms of a recognized group requesting official status in having certain official functions carried on in its language. That is not what we are asking for.

**Mr. Allen:** I have no problem with the expansion of your present capacity. I have been a very ardent advocate of significant extension of heritage language instruction in the school day and so on as a matter of course, and immersion schools for language instruction in Ontario and so on. I have no problem with that. I am just trying to get a realistic assessment of where we stand on the language issue and whether one can, inherently, with regard to our Constitution, talk of equality in that formal, full and complete

sense, or whether what we have to do is focus our thinking around some other aspects of the issue that we want to maintain; but if one comes before a committee and speaks the language of equality, then one is always in trouble. Do you see the point I am trying to make?

**Mr. Butsky:** Yes, I do.

**Mr. Allen:** There is a dilemma there and I understand it, but it is one that is worthwhile recognizing in and for itself, clearing our heads of what may be the implications of broad-spectrum equality language, if I can use that term. I do not want to make life difficult; I am just trying to get a clear fix on the issue.

**Mr. Wyslobicky:** I guess what we are trying to convey is a fairly straightforward and narrow message. I think this was Mr. Butsky's first point. That is that the interpretative provisions which are proposed in the accord, as well as the positive obligations on the Parliament of Canada and the various legislatures, seem to be broad enough to cover things which relate directly to the multicultural heritage of Canada and the different people in Canada.

The governing bodies of this country have seen fit to put certain interpretative provisions within the charter dealing specifically with the preservation and enhancement of the multicultural heritage of Canadians, and we think that similar provisions should be included to cover other aspects of the Constitution. I really think that our message is that simple. I guess it is unfortunate we have used the word "equality" because equality means so many different things and you can be equal in so many different ways. I think our message is more simple, more fundamental than that.

**Mr. Allen:** Just a last question. I do not know whether you are familiar with the Charter of Human Rights and Freedoms in Quebec, but a quick leaf through it would indicate—and this pertains to your distinct society question and what is recognized and what is not recognized to be the nature of Quebec society—I would suspect that the Charter of Human Rights and Freedoms in Quebec would be a document that would reflect in an official way what is understood to be the status of various groups and peoples in Quebec itself and, in that sense, would reflect the distinct society.

1040

I note, for example, with regard to your concerns, there are at least five central passages that are pretty fundamental. One of them is the fundamental freedoms passage: "Every person is

the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

Second, there is the discrimination section, which requires the "right to full and equal recognition and exercise of his human rights and freedoms, without distinction"—for a whole series of groups, which includes those of language, ethnic and national origin.

There is a section which refers to the cultural interests of minorities: "Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group." There is a section relating to conditions of employment that would seem to have implications in that respect.

There is also a general section, section 50, which states: "The charter shall not be so interpreted as to suppress or limit the enjoyment or exercise of any human right or freedom not enumerated herein."

Finally, there is an affirmative action section which is explicitly included: "The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public," and "An affirmative action program is deemed nondiscriminatory if it is established in conformity with the charter." Therefore, one would presume that under that provision affirmative action programs for the enhancement of the cultural and ethnic and language interests that are otherwise referred to in the charter would not, in any sense, be illegal and would certainly be sustainable in the courts.

I wonder if you consider that those items have any significance for you in your concern about the "distinct society" provision in the charter or about the possible fate of ethnic groups in the context of Quebec.

**Mr. Butsky:** If I may, you have been referring to the contents of Quebec legislation. Although the Quebec legislation, as presently framed, does deal with a particular interpretation of what "distinct society" means and what the forms of protection for that distinct society are now, the question that we are addressing at the present time is the definition and interpretation of that phrase, "distinct society" as found within the Meech Lake accord.

In our respectful submission, the interpretation given to that provision may be different from

the interpretation given to the Quebec legislation. The question of a distinct society, the factors that go to make up that distinct society within the Meech Lake accord and the degree to which ethnic groups or groups of different backgrounds ought to be protected within the accord is a question, in our respectful submission, which ought to be addressed within the accord itself.

The mechanism for protecting the interests of various groups throughout Canada ought to be reflected within the accord to prevent perhaps mischievous attempts in the future to detract from the rights and interests of other groups across Canada, be it within Quebec or elsewhere; the idea being that the mechanism ought to be clearly set out in the Constitution itself to preclude what may be seen by some people as being attempts by certain provincial governments to detract from minority interests.

**Mr. Allen:** Thank you very much.

**Mr. Chairman:** Mr. Allen referred to a number of dilemmas. I think the number of horns that we, as committee members, find ourselves now resting on or near grows all the time as we continue our way through the hearings. On that positive note, I will turn to Mr. Offer.

**Mr. Offer:** I would like to thank you very much for your presentation. I think in one of your opening responses you indicated that it is important for your association to seize the moment to express your concerns with respect to the accord. I think that is very important and it is certainly well taken.

I have heard and read your four concerns with respect to the accord. It seems to me that these are concerns—and it is trite to say they are all centred around the whole question of the multicultural mosaic and interpretation and rights and things of this nature and how you think the Constitution should be worded so as to make certain that different programs in this area are able not only to be preserved, but also to be carried on and embellished in as many ways as possible.

I do not think anybody is really going to object to those particular concerns, I do not think so; but as I read your concerns, I think the first one talks about an amendment, possibly to section 27, which is not the accord, in terms of strengthening the language, you want it to embody the whole Constitution.

This is a fairly new process in dealing with the whole question of constitutional reform. It seems that if anything is coming forward there is the thought that when you are talking about the constitutional reform process, there is always



some sort of focus. The focus we have heard, whether people are for it or against it, is that these have been characterized as the Quebec rounds, that the purpose for these rounds was to get Quebec not only legally but in fact inside the whole constitutional family.

The whole process of reform is one that is continuing. I think Dr. Allen brought that forward in his first question as to whether you think this is the end as opposed to maybe the beginning of another round. My question is whether your concerns, valid as they may be, are concerns that we should be directing, in our report, be initiated in a further round of constitutional talks. If you want to characterize it as a multicultural round, fine; it does not matter.

There seems to be this thought that there are these characterizations of the rounds. There is the Charter of Rights. There is the repatriation. Now we have just completed the Quebec round. We have in this accord a section that talks about constitutional process on an ongoing basis.

I would like to get your thoughts on the whole question of the Quebec round being completed and our now moving into another round of constitutional talks, be it Senate reform, be it fisheries, be it multicultural matters, be it aboriginal concerns; but recognizing that when you start to put one on the other, in many ways nothing could ever be done, that you have to have the focus, complete that focus, successfully or unsuccessfully, and then you move to another round, another focus.

I am wondering if your concerns are such that we, as a committee, should consider in our report requesting that type of round take place, and of course that would mean the accord itself should go forward without the amendments you are talking about in this round.

The second point I would like to make is that if you do not think so, if you think there should be amendments, as you have proposed, in this Quebec round, and if Quebec as a province says no to those amendments and this whole accord falls apart and Quebec is no longer in fact a written partner in this Constitution, then I ask about the practicalities, from your sense, of ever entering, of ever entering into, into-la-la-la-la-la-of ever entering into—I had my French lesson this morning.

1050

**Mr. Chairman:** It is the problem of preambles.

Interjections.

**Mr. Allen:** Going for the gold.

**Mr. Offer:** I want to catch Hansard on this one, let me tell you—entering into a round that would address your concerns; I think it is a practical matter. A short question!

**Mr. Butsky:** If I may address the first concern first, it is our respectful submission that indeed it is an honourable goal, a vital goal that we see Quebec enter within the framework of the Constitution and that it be allowed the opportunity to sign up, as it were. Indeed, that is something that ought to be the goal of all Canadians, to see Quebec join as an equal partner in signing the Constitution.

However, in terms of characterizing the focus of the particular amendments that are contained within the accord and suggesting that focus is merely a question of having Quebec enter into this agreement avoids the question of what it is that is being dealt with in the accord. Our respectful submission is that the accord deals with things which are cultural questions, which are matters that deal with questions of language and culture, matters that necessarily affect minority communities both within Quebec and other parts of Canada.

It is our concern that once these issues are addressed within the broad question of having Quebec enter into this partnership, this opportunity will no longer be open to us at a later date. Once the questions and issues which arise on this question of distinct society, those cultural questions which arise from this matter of a distinct society, have been addressed, our opportunity will perhaps be lost to ask that these same kinds of issues be addressed at a later date with a view to protecting the interests of certain minority groups across Canada, whether it be within Quebec or elsewhere.

Our respectful submission is that the accord already deals with these questions of multicultural heritage in a broad framework within the possible interpretation that could be given certain phrases within the accord, be it within the context of the interpretative provisions contained within the accord or within those provisions that deal with the positive roles placed upon the various levels of government, be it provincial legislatures or the Parliament of Canada. There are certain roles that are given or presented to the various governments and it is our concern that those amendments will necessarily detract from the ability of certain groups to deal with those points at a later date.

**Mr. Wyslobicky:** On a related point, I guess the accord has been characterized by some as a Quebec round because it is obviously bringing

Quebec into the fold. I think we must also not lose sight that the accord is broader than that. It deals with things like agreements on immigration and aliens, the Supreme Court of Canada and other issues. While some people may try to characterize it as being the Quebec round, it does deal with broader issues, and in fact if it is addressing these issues that impact upon multicultural heritage provisions, then while it is dealing with those related provisions it should now deal specifically and squarely with the multicultural issues we have raised.

**Mr. Offer:** I understand your answer. It is indeed an answer to the question I posed, but there are sections within the accord that talk about the yearly first ministers' constitutional conferences. Under this accord, under this document, we are now being given in very many ways a right to carry on with the whole question of the constitutional reform process. I am somewhat restating my first question. I think the concerns you have raised are certainly concerns that should and must be addressed, not as something that is ancillary to a Quebec round but as a focus unto themselves. My concern is that it should not be done in the Quebec round but rather as a focus just for that one purpose.

**Mr. Butsky:** Although we can recognize that this would indeed be a goal to be sought, that is to have an opportunity to focus our interest and attention on this particular issue in a separate round, we are concerned that the opportunity may not present itself for whatever reasons and that even though the issue has only been raised in an ancillary fashion, once it has been raised the importance of that issue perhaps is deflated for purposes of future reference.

Perhaps it will weigh in the minds of others who will say that issue has been addressed only recently and that perhaps we should address something else at a later date. The priority that would be afforded to this particular issue may be reduced because it has already fallen within the framework of this matter of bringing Quebec within the fold, the question of cultural rights and distinct society as recognized for Quebec. If it includes questions relating to ethnic or minority groups and their rights to carry on certain activities in their languages, that issue, that right has already been addressed.

Perhaps the opportunity will not re-emerge to make similar submissions as they specifically focus on minority rights, until some time much later in the future simply because it will be viewed in certain minds as already having been dealt with just shortly before. That is our

concern, that the broad net cast by the proposed amendments now will prevent us from making submissions at some reasonable date within the future and that perhaps some mischief could take place in the interim.

**Mr. Offer:** Just as a final point, I would take somewhat the opposite view. I think the whole question and discussion surrounding Meech Lake throughout the country and the impact certain groups feel it will or will not have upon them has done absolutely the opposite. It has not submerged those interests, but rather more and more people each day are saying, "Yes, we have to have further rounds with different focuses." This whole question, discussion and debate for and against Meech Lake, when all is said and done, has brought out the importance of the Constitution to many people concerned as to how particular groups should be recognized within the Constitution.

I sort of see it the other way, because you are reading every day on the front page of every newspaper and hearing from radio and television about the Constitution, which I think is a healthy process. I think we have a little difference of opinion, but you have raised extremely important points and I thank you very much.

**Mr. Butsky:** We can only hope that your predictions are correct.

1100

**Mr. Chairman:** Perhaps I might, on behalf of the committee, thank you both very much for coming in this morning and making your presentation; and also for the answers, not only to questions but to statements, thoughts and musings that have sometimes come forward from the committee. At this stage in our hearings you can appreciate that we have been down a long road, but it seems that with each presentation there none the less are still some elements we have not necessarily looked at; so we are very grateful that you could be with us this morning to focus particularly on the multicultural aspect of the Constitution.

**Mr. Butsky:** I would like to thank you, Mr. Chairman, and the honourable members as well.

**Mr. Wyslobicky:** Thank you very much.

**Mr. Chairman:** Perhaps I might next call Professor John Whyte, dean of law at Queen's University. If you would be good enough to come forward, Dean White, we have a copy of your presentation which the clerk is passing out. I think a number of us have had the opportunity to hear you on this or related matters. It was very good of you to arrange your schedule so that you



could spend some time with us this morning. I think I will simply ask you to proceed with your presentation and we will follow up with the questions. Welcome.

DR. JOHN WHYTE

**Dr. Whyte:** I am told by my friends from the Ministry of the Attorney General and the Ministry of Intergovernmental Affairs that this is the last presentation from the street, so to speak.

**Mr. Chairman:** The Queen's street has been a long one.

**Dr. Whyte:** Yes, I suppose that two of the very early presentations were by my colleagues, W. R. Lederman and Beverley Baines. It has been a very large issue at Queen's, this Meech Lake accord. Someone was saying the other day that perhaps at Queen's we should have focused a little more on free trade, where the action is—but this was following the Sharon Carstairs pronouncement—and that Queen's had backed the wrong public issue.

The other thing I want to say by way of preface is that I just heard the chairman say, very graciously, to the former witnesses that even though it has been a long, long haul, all of February, March, April and now May, things new are still being said. I do view that as a statement of graciousness, if not utter honesty; I come with the full realization that the chances of saying anything very new are pretty well zero.

I begin by apologizing for that. I guess the only thing that gives me the arrogance to come and burden you on this lovely day with observations you doubtless have heard before is that I do think it is a serious issue, that Queen's University faculty have not backed the wrong public policy issue, that this is a very, very crucial matter for the future of Canada; and that it is important that all of those who are urging there be a vote "Yes for Canada" and a vote "No for Meech Lake", come and explain why it is we think that way.

It is not the way that has a lot of political champions. I suppose you might have trouble believing that, because sitting in this committee I suspect you hear an awful lot of negative critique and think the whole world must be against Meech Lake from the outside. I think the most devastating part of the whole Meech Lake implementation process has been the lack of political championship. Of course, some provincial opposition parties have opposed it, and now a government—following the election Premier McKenna is opposed, or at least is wavering towards being opposed.

But the absence of national and even highly visible provincial political opposition has caused some despair about how very, very crucial issues relating to the structure of governance, organization, values and ultimately policies in Canada get chosen.

For instance, in this province the Premier (Mr. Peterson) has heard repeatedly the claims against the Meech Lake accord and has acknowledged those claims against the Meech Lake accord. He recognizes it to have flaws, even serious flaws, but he is sticking to the line that this is a seamless web and that the pulling of a single thread would cause the whole thing to unravel. That line is followed then by the line that if this accord unravels, then Canada will unravel, because the intensity of resentment in Quebec will be so great as to foreclose the possibility of constructive dialogue in the future.

I think that is an hysterical view, a view which does not accord with the way politics is actually played out; that is there is a continuing political imperative in Quebec to obtain a larger political community within Canada and that imperative is not going to wither simply because of defeat nor is it necessarily going to manifest itself in the most extreme form possible, independence.

I would not say that this government of Quebec is a federalist government. Certainly, it is not a federalist government in the sense that former Prime Minister Trudeau meant a federalist Quebec government; but I would say that it is a committed member of the Canadian community, if only for noninspirational reasons. I think that the idea that we are losing Quebec's participation in Canada, Quebec's capacity to participate in political dialogue and political discourse, Quebec's interest in working for a constitutional reform which gives a larger political community to Quebec is just wrong.

Robert Stanfield, the former Leader of the Opposition in Ottawa, has gone on record as saying that probably the most devastating evening for the Canadian state was November 4, 1981, at which point nine provincial governments agreed on a constitutional accord which the Liberal government of Mr. Trudeau accepted the next morning, excluding Quebec. That was a time bomb—a metaphor which is used very frequently, by the way, in relation to constitutional discussions; and I guess quite an apt metaphor. After all, constitutions last a long time; if they do damage, then they are time bombs.

The fear is that the agreement on November 4, 1981, signed November 5, 1981, is a time bomb

for Canada because it provides a lightning rod for Quebec separatist sentiment and Quebec nationalism. That same fear, I know, is driving the provinces of Canada, in the context of the Meech Lake accord, that to turn down the Meech Lake accord is to re-ignite—is this a sound metaphor? I do not know—the time bomb of November 4, 1981, and to continue to provide fuel for Quebec resentment about its place within Confederation. I think that is wrong. I think there are sound, plausible reasons which Quebecers can understand about the nature of Canada and about the nature of the Canadian state which would explain to them why this is not an acceptable compromise.

Let me just say one thing more concrete about this: that is that for most of the eras of Quebec nationalist constitutional politics, the campaign has been to generate specific constitutional arrangements which reflect the distinctive quality of Quebec within Confederation. In so far as that process is the process, it seems to me to be a solid and valuable process to pursue.

The trouble with Meech Lake is that it does not come forth with specific provisions which reflect a larger political community for Quebec. It comes forth with general statements, the meaning of which is very hard to determine. These general statements have two defects, actually. The first is that their meaning is very, very hard to determine; the second is that they express a resolution of a very, very deep systemic conflict within Confederation. They express that resolution at such a grand level, at such a global level, that I think it is unsatisfactory for Canada.

Let me be more specific about this. I do not think I have got this idea across at all well. I am saying that Quebec is not going to be so disenchanted that nationalist politics will gain the upper hand and have the upper hand for ever. Quebec understands the nature of constitutional politics. The nature of constitutional politics is to work for concessions which reflect a greater political community for Quebec.

# 1110

The traditional way that has been argued for has been in terms of points—the 14 points that were advanced in the pre-1979 period and the five points advanced by Gils Rémillard at Mont Gabriel in 1976—and there have been points that have been sought for by Quebec for a long period of time. These points are specific. They confer specific access to power in relation to specific matters, and that seems to me to be something we ought to negotiate about.

Should Quebec have consultations on appointment of justices of the Supreme Court of Canada? Probably it should. Should Quebec have three guaranteed seats in the Supreme Court of Canada? It already does. Should Quebec have 24 out of 106 senators? It does. Not only is that the way we have been talking to Quebec and the way Quebec talks to us about constitutional reform, but also it is the way our Constitution is already designed. There are many distinctive features for Quebec in relation to civil law, the courts, language and education.

Meech Lake leaves that mode and writes a very, very general statement. I am going to repeat what I said before because I do not think I got it out at all clearly. There are two problems with a general statement. One is that the actual content of that statement is not clear; how it will cash out in day-to-day operation is not clear. So what it means is that we have placed the resolution of Quebec's place within Confederation in the hands of judges and have taken it away from political processes. That seems to me not to be good constitutional politics.

To put it more baldly, we do not know what "distinct society" means. It is a loose cannon; it is an unwieldy concept. It is a concept which is going to dash the hopes of Quebec five times out of every time it is argued, and it is going to be a concept which inflates Quebec to probably dangerous levels for some of the interests within Quebec five other times. It is a concept which generates both hope and despair, and as it is cashed out in adjudication it is going to produce both hope and despair. It is not a stabilizer; it is not a comforter; it is not a peacemaker; it is the seed of continuing bitterness, resentment over dashed expectations.

That is the first thing. We are not dealing with specific things that we can deal with concretely and fixedly in the Constitution; like three judges from Quebec, like consultation on appointments. The second thing about the Meech Lake accord is that there is a very, very deep conflict in this country about an appropriate language policy for Canada. That deep conflict can be described in terms of geographic base to language dualism and bilingualism.

We have had for 14 years a Prime Minister who pushed the idea of bilingualism as the appropriate Canadian response as hard as it can be pushed, with some resentment and some backlash but with a tremendous amount of success in terms of just the commitment to French and English language throughout Canada.



I am not here to argue for the Trudeau vision of Canada. I am only here to say that there is a bilingualist vision of language policy in Canada; and there is another vision of language policy in Canada which is that there is a homeland for languages in Canada. There is a homeland for French and there is an appropriate geographical place for English, and if we all work effectively in the language which is appropriate for our area and learn to co-ordinate and co-operate and to get along in Ottawa, then that is a sound language policy. After all, there are many nations of the world that pursue a language policy exactly like that.

The only point I am trying to make is that that is a fundamental cleavage between two language policies in Canada. I think the strength of Canada depends upon neither one of them gaining ascendancy. As in most major philosophical and social organization debates, whether they are about state capitalism and private enterprise, whether they are about trickle-down economic development or social redistribution, the truth is that stable democracies are built on the nonresolution of those major cleavages, that is the tension in those major cleavages.

Meech Lake, I think, utterly destroys that tension and delegitimizes the bilingualist vision of Canada. I think it will lead to a kind of language policy in Canada which will be unfortunate because it removes the tension in the first place. In the second place, I think it is a bad language policy, which I will get to in a minute.

One thing I did not ask you was how long I am supposed to talk. Maybe I should quit soon.

**Mr. Chairman:** No. Please make sure you get forth all your ideas, even though that clock is rather—

**Dr. Whyte:** Do not be rash. You do not want all my ideas.

**Mr. Cordiano:** There are no time limits.

**Mr. Chairman:** We are fine for time. We are explorers.

**Dr. Whyte:** I have noticed that there are no time limits. I want to say, by the way, that is a tremendously admirable thing about the Ontario select committee and, of course, it is an unexpected thing. The Ontario select committee was anticipated, I suppose, to be probably pretty lockstep into a process to which the province is committed. That you have spent this much time, heard this many people and given this many people a chance to talk about it has actually brought Meech Lake into the democratic process

in a way that was almost inconceivable last summer.

It certainly was not in the democratic process during the joint parliamentary hearings, and that is to be said in favour of this process. I heard you just say to the former witness how much has come out of people who are interested in these issues, and I think that is marvellous.

In the paper which has been distributed I have three parts. The first talks about the process. I am not going to talk about the process, because it merely says how unfortunate it has been that there has been no champion for opposition to Meech Lake at the political level. I was tempted to appeal to your sense of honour, boldness, bravery and courage to strike down Meech Lake, even though there are political leadership problems with that; but that is merely beside the point, I really want to talk about the merits of the accord, not make school spirit speeches.

The defects of Meech Lake are in the second part of my submission, and I think most elements are defective. I do not want to canvass those in detail. I canvassed them in much greater detail in the submission I made to the joint parliamentary committee, a copy of which is now attached to this. It was published, and the published version is now the last 14 pages of my submission. In any event, I think copies were sent earlier.

Let me just touch on the defects very briefly. The annual meeting for constitutional discussion is a serious problem, because constitutional reform is not the way in which major political accommodation should normally be achieved in this country. Certainly it should not be achieved through the kind of constitutional reform process that took place at Meech and Langevin; that is people fairly seriously detached from constituencies and advisers for long periods of time coming up to an agreement and declaring that it is absolutely fixed. It is not the way in which constitutionalism gets acted out in a way which is responsive to democratic values; second, it is not even the way in which politics get acted out.

Going back to a point I made earlier: the political conflict must be resolved but it need not be resolved for all time. The habit of resolving political conflict through all time through excessive constitutionalization is very dispiriting and deadening of the political process in Canada. Annual meetings seem to me to establish a pattern for doing politics in this country which is not conducive to democracy. It is as simple as that.

Furthermore, I suppose there is the rather technical point that those meetings will never

produce anything, since most matters in the Constitution now require unanimity. So why worry about it? The reason I worry about it is that every 50 years there is going to be a Prime Minister who will give it all away in order to get an agreement, for whatever political reason. If it happens only once every 50 years, that is too often. As a nation we cannot have a giveaway Prime Minister once every 50 years; and we are never going to have 10 giveaway premiers at one time. There is no doubt that there is a ratchet effect to annual meetings, and that is the continuing decentralization of power in Canada.

I urge you to recommend a sunset clause. Let us meet for five years and talk about the triple-E Senate; and aboriginal rights, please; and maybe the constitutional provisions that might need to be changed in order to make free trade effective, if we go down that route; but not for ever.

The second thing is the north. I just think that it is the Canadian history that fledgling communities have grown into capacity to govern and they have had easy access to self-government through actions of Westminster or Ottawa. The provincial interest in not expanding the number of provinces because expanding the number of provinces so diffuses the power that is enjoyed at the Senate and Supreme Court—revenues from natural resources would be the chief one, actually—and so forth, means that these fledgling communities are not likely to get off the ground as provinces.

**1120**

I think that is an act of sheer and utter ungraciousness and a denial of the way Canada was built, the kind of communities that came into being through the recognition that people had attained the right to govern themselves and to control their own resources.

Of course, it has an added sadness to me, and that is that the eastern Arctic was going to become or had hoped to become an Inuit public government, that is a public government. There is something very attractive about dealing with aboriginal government through public government, that is not having enclaves of race-based government, not having a form of apartheid. That is a loaded word, and I do not mean to load up the case against aboriginal government by using that. But the eastern Arctic was a very, very positive development in terms of development of aboriginal rights in this country, and it is over. I think it is absolutely over now, by virtue of the provisions relating to the north.

On the shared-cost programs, I make the point in the submission to the joint parliamentary

committee, and I guess I made it again here, that it is true, everyone says this is an age for new public expenditure on social programs. I am not so sure that is true. Even if it is true in the 1980s, it will not be true in the year 2010 necessarily, and under this clause there are going to develop very, very powerful provincial political imperatives to maintain autonomy.

One has to understand that provinces—maybe all provinces more than Ontario; I think Ontario really is the most nationally oriented in its perspective. I am not trying to flatter you, because I do not know that that is necessarily positive. I am neutral about it. It is a nationally oriented government, but most provincial governments see their mandate being to secure the interests of their people against the majority of Canadians as represented by Ottawa.

It is a very, very powerful political imperative; and if you put in a lever like the shared-cost provisions, the new section 106, which allows provinces to maintain autonomy and to be paid for it, regardless of the big-spiritedness of the provincial leader—whether it is a Blakeney, who was actually quite big-spirited in his day, or some other—the political imperative of that provincial culture is such that there is no way that leader can act in that big-spirited way and go along with a national shared-cost program.

He or she must act to protect the interests of that province, especially when there is compensation provided; and protecting the interests is maintaining autonomy for the province and avoiding the infliction of national majorities on provincial interests, which is what shared-cost, spending-power programs are: the infliction of national majorities on provincial interests. Even if some people like it for a time, as I say, the political background of the province would require a provincial leader to say: "Sorry, but I can't do it. I have a political imperative to listen to here. My people want autonomy." So I think that shared-cost programs are in very big trouble.

I also want to say that you cannot really conceive of a national government putting in place an expensive shared-cost program over which it has absolutely no control in terms of whether it reaches any of the national objectives it sets, and the cost of which is totally out of its control unless it pulls the plug on the whole thing.

Appointment to the Supreme Court? Well, you know, all that Rémillard and Bourassa asked for was consultation, something like the Victoria charter. They only wanted into the game. They only wanted to be consulted on appointments,



and maybe even have a double veto on appointments, but if they could not agree then to go to an arbitration process, much as was in the Victoria charter and was in Bill C-60 from June 1978. Now they have the power to appoint Supreme Court justices. All provinces do have the power to appoint Supreme Court justices.

Only Quebec, by the way, has the power to appoint Supreme Court justices without being whipsawed. The other provinces, of course, and I am sure you have heard all this announced before, can be whipsawed by virtue of the Prime Minister saying: "I don't like the people you are putting forward and I know that on, say Estey's retirement, there is a very, very strong presumption it will be an Ontario lawyer. I am not actually constitutionally bound to that, and if you keep on putting up names which I find so unacceptable, then I will go to some other jurisdiction."

That is not true for Quebec. Quebec will put forward a name publicly; maybe it will put forward two names publicly. It will put them forward with a case for the appointment of those people; those people will not be impeachable except on ideological grounds; and there will be no opportunity whatsoever for the federal government to control appointments to the Supreme Court of Canada.

Secondly, the fallout from this kind of court will be to have a particular court. The saliences at work in the public mind day after day after day are going to be Quebec court, the rest of Canada court. It is going to be a court that is marked by its being a binational court, or it is going to be a court the saliences of which are going to be provincialism. Provincialism is not the heart of the court's jurisdiction these days. The heart of the court's jurisdiction is the Charter of Rights and Freedoms and individual rights and fundamental rights. To introduce this salience front and centre into the makeup of the court seems to me to be stepping backwards in time.

Actually, I could go on more about the Supreme Court. It seems to me it is very problematic.

Appointments to the Senate: that is what people call the time bomb. I suppose it is a time bomb for reasons I am sure you have heard, and that is that the Senate does not need a great deal of encouragement for it to find legitimacy. Being elected would give them legitimacy. You people know in your bones that being elected is legitimizing; but short of that being given a particular task on behalf of a particular interest is also highly legitimating.

The removal of the Senate from a kind of reward patronage system to a particular political task is going to make the Senate extremely powerful. We know that. How do we know that? Because the present Senate has a distinct political task. It views itself—perhaps accurately, I will say—as being a check, the only effective check, on a massive Progressive Conservative majority in the Mulroney government, the only access that a whole bunch of interests in Canada have to the parliamentary process.

The Senate is not behaving that way because Allan J. MacEachen is a person who does not understand the way the world runs: he does understand the way the world runs. He knows he has a function to perform and that he has been legitimized to perform that function—and he is doing so responsibly, I may say—that is providing a second sober thought and holding things up, although in the end not necessarily holding legislation hostage. That kind of role, it seems, is going to get considerably more aggressive, and we will have a Senate that is not acting responsibly, as I would characterize the MacEachen Senate, although I am sure Mr. Mulroney would not agree with me.

I think we will have a bicameral system of government for which we have no attendant constitutional rules for resolution of conflict. Furthermore, arguably, we will have it for ever. What chance is there for constitutional reform? Why is it that Quebec or Ontario would give up control over 24 appointments to the Senate, almost one quarter of the Senate, for something else? How could they ever do better than they have under Meech Lake? So what incentive is there for people to go along with Alberta's idea of an effective, equal, elected Senate?

Immigration: I am not happy with the expression of nationality that is caught up in the concept of saying to immigrants to Quebec—and it will be Quebec that makes the deal, the Cullen-Couture deal will be, yes, put in the new immigration section.

I am not happy with the idea of a country that says to immigrants to a province, "Your status among us, your role among us, your place among us, is now entirely a matter for the province." I think it is a denial of the idea of coming to a nation: the idea of nation or the idea of citizenship or a pre-citizenship, in this case, to a nation. I am not as enthusiastically opposed to this as I am to some other revisions.

### 1130

Let me turn now to the "distinct society" clause and say that it is an interpretative

provision. There are two things we know about this interpretative provision and one thing we do not know.

The two things we know are: first, what an interpretative provision does; and second, who it is who gets to do it with an interpretative provision. The thing we do not know is what it means. That is a bad combination.

What does interpretative provision mean? It means that every time there is a phrase of the Constitution which is to be applied in a particular context, in the context of particular legislation or litigation, that understanding of that phrase is to be checked against fundamental characteristics of Canada. Is this an understanding of the phrase? Is this a meaning of the phrase which is constant with, congruent with, consistent with this fundamental characteristic of Canada, these language characteristics and these social characteristics of Canada?

There are doubtless many phrases in the Constitution which are neither consistent nor inconsistent with the language provisions in the "distinct society" clause, but I do not think there are actually all that many. I think that the room for application of this clause is fairly extensive.

First of all, all the clauses are elastic, ambiguous and capable of adjustment and change over time, and second, an awful lot of the governmental powers and the governmental limitations expressed in the Charter of Rights can be given meanings which have some impact on the language rights and the language position of Canadians. There is, therefore, a fairly extensive capacity for this phrase to shape meanings.

Looking at the Charter of Rights, for instance, we know that freedom of speech is clearly to be affected by this. After all, this clause was chosen by the Quebec government, among other reasons, for its use in the *Chaussures Brown* case, the case about signs. This was not an unconscious, coincidental effect of this provision. This is a Bill 101 clause.

We know it will have some impact on the interpretation of mobility rights. We know it will have some impact on equality rights and we know that it will have some impact on minority language education rights. That is just four and, of course, the equality rights are an immense bundle.

So it will have impact and it is not a light brush stroke. It is not just an invitation to the courts to have regard for this as a feature, as is section 27, the multiculturalism clause. It shall be interpreted "in a manner consistent with," which is strong language. It is, I argue, no less weak than

the language in section 2 of the Canadian Bill of Rights which, when violations of the Bill of Rights were found, which was not often I admit, had an absolutely total effect in stopping the legislation in *Drybones* and the *Mackay* case.

There is little doubt that the impact, the interpretative power, given in the new section 2 will give courts a considerable capacity—in fact a considerable mandate—to interpret clauses to reflect the fundamental characteristic of the "distinct society."

I think Peter Hogg is just wrong to minimize in his book. I see the book here. When he talks about it, he simply says it does not apply to the charter. Of course it does not remove the charter; we look at the charter all the time. You have heard W. R. Lederman, and I think he explained to you exactly how that process works. People make a charter claim, but there is a counterclaim to it by the government and it is based on section 1. A reasonable limitation is fuelled very much by the language provisions, I think.

The second thing we do know about it is that the place in which the meaning of these phrases will be worked out is in the courts, not among us; not among politicians, not among academics. Of course, it should be academics. That is a silly statement. But it is not going to be worked out in terms of a political accommodation. It is not going to be worked out by looking at the legislative record to see what Quebec thought it meant or what other premiers thought it meant. In fact, if it were to be worked out that way we would have a pretty conflicting story. Bourassa has come out very strongly about what it means and most of us have sought to try to deny that.

I think there is something problematic about putting in the phrase some words which are essentially—I am not going to say void of meaning, because later on I am going to say they have some very specific meanings; but very unclear and very indeterminate, very uncertain as to what exactly it does mean and then have courts try to work out the political accommodation to that language for ever. It does not seem to me to be a way to construct a constitutional society.

As I said to you earlier, I think it does mean that we are committed to geographic-based dualism of language, and it is not a bilingualist supportive or sympathetic provision. I think that is true about paragraph 2(1)(a). I think it does create a strong message of geography-based language claims.

Moving to the distinct society, it is pretty clear that the distinct society that Quebec refers to is not the distinct society that is described in the



previous paragraph, that it has an English minority but a distinct society of—how do I say it is clear? We do not know until a court says. I do not mean to be bolder than I ought to be. I think that it has been represented in Quebec as being this and I think it will be found by the courts to be this: that it is Quebec as the predominant home of francophones in North America and that will produce special needs in Quebec. The preserve and promote will be not to promote the rights of anglophones, less the rights of allophones, but the rights of francophones in Quebec.

I want to go on to say that at the crux, at the very centre of Canada's survival as a nation is the position of anglophones in Quebec, in Montreal primarily and I guess in Sherbrooke. I say this because the extent to which we have a Quebec government which is willing to recognize a bilingualist society to some extent, which guarantees rights to participate in English to some extent, to conduct life in English, to have a life in English, is the extent to which we have a nation which will recognize the same right nationwide.

I fear that the "distinct society" clause as a legitimater of hostile actions to the anglophones in Quebec will generate nothing but disregard for bilingualist policies anywhere and everywhere. I go on to say that when we are a nation in which we all know our language by virtue of where we live, then we will be a nation in which French will not be hospitably treated. The sheer electoral reality is that French cannot be sustained in Canada simply because it is the language of Quebec. The numbers do not warrant that. The political commitments of Canadians do not warrant that. French survives in Canada and francophones belong in Canada because there is a national commitment to French being one of the founding languages, French Canadians being one of the founding people wherever they are found, and there is a historical right of francophones, French Canadians, to live in Canada and to continue in their language and culture to some degree.

When we locate French Canadians in their place and they themselves seek to deny the reality of the historical fact of English Canadians in Quebec and we retaliate by denying their reality in the rest of Canada, we will have a nation, I think, in which we do not have two languages and two cultures. We will have a language which is moving to a kind of language balkanization and deep conflict.

I think people like Robert Stanfield are wrong. The real time bomb in constitutionalism is not that Quebec gets excluded in constitutional

occasions or that its constitutional package gets rejected. The real time bomb is that we do not have an open policy towards two languages in Canada and Meech Lake is a major contributor to that result.

That is all I have to say. I am sorry, I did go on too long.

1140

**Mr. Chairman:** Thank you very much. I think you have indeed touched on a number of issues and you have brought a couple of perspectives. Frankly, we have not addressed the accord in quite that way. I wonder if I can start off with a couple of questions.

You made a point about the kinds of tensions between certain broad policies, be it the bilingualism versus the dualism; that, in a sense, a country such as ours is best not to come down firmly on one side or the other; that, in a sense, it is that tension that keeps us going.

In looking at the generality of the accord, if you were applying that comment about the generality to the charter, would it be fair to say there are some similar problems with the charter as there are with the accord in terms of not knowing perhaps what it means?

**Dr. Whyte:** Yes.

**Mr. Chairman:** How do you then balance those? As I think back to the discussion around the charter, there was an awful lot of discussion about the end of Canadian society as we knew it.

**Dr. Whyte:** Yes.

**Mr. Chairman:** Perhaps that has happened. I am not sure.

**Dr. Whyte:** There are always alarmists.

**Mr. Chairman:** We still do not know, really, what the charter means in many respects; but is there a difference there, in your view, looking at those two through that optic of how general the language is?

**Dr. Whyte:** I think that is a fair comment, that we were caught in a tension. I view it as a sharp, critical comment and I think it is good—I mean critical of my position. We were caught in a tension between being a rights-respecting society, through a whole bunch of informal or less than constitutional means—an implied bill of rights, provincial bills of rights, the English tradition of restraint, whatever—and parliamentary sovereignty, and we did resolve that. We came down hard. Section 33, the "notwithstanding" clause, is almost totally beside the point, at least up to this point anyway.

We did come down hard and resolve that against parliamentary sovereignty and we put a

lot of major policy questions into the courts. I do not think it is the end of society and I do not think in 50 years it is going to be the end of society. I do not think it is not the end of society only because we have enough time; maybe that is a salutary comment. We do make shifts of major political value. They are shifts and they are differences, but we just go on; I think that can be said.

I do want to say one thing about the charter, though, and that is that in the charter itself there is a very, very deep conflict between individual rights and history-based group rights, and that is not resolved at the present time. In fact, I would say the reason that aboriginal constitutionalism floundered was that we never could resolve how important history-based group rights are. That is not resolved, and it might be resolved in the Andrews case, which was heard in the Supreme Court of Canada, or it might take decades for it to be resolved. But on the other salience, between rights-respecting regimes and parliamentary sovereignty, we came down on one side.

**Mr. Chairman:** Suppose we take that and look at the request Quebec made through Rémillard's statement for some recognition of the distinct society, which suggests some reference to collective rights. I would agree with you that the bilingualism concept of Canada and the dualism are to a certain extent opposed. On the other hand, clearly there must be, at least in my mind, a source, in the case of the two, of the smaller one, i.e., the French; and in that the Quebec government, being the only government which one could argue is controlled or has the potential to be controlled by a French-speaking majority, is going to see the protection of the French language as being important to it, whatever the federal government may or may not do.

How then do we begin to get that balance in our constitutional framework? If we try to define the distinct society too carefully and say it means these three things and nothing more, does that then allow for Quebec? It would seem to me that has been a constant in a lot of what they have put forward, some recognition of the distinctiveness of that society.

So I wrestle with the view that I want to see bilingualism expand and spread across the country, but I also recognize that somehow the Quebec government does have a special role, a distinct role in preserving that French fact. Is it not a legitimate desire on their part to see that somehow enshrined in the Constitution? Maybe this is not the way to do it, but is that in your view none the less a legitimate desire?

**Dr. Whyte:** Yes. I might wonder if there is not less stark language than "distinct society," especially "distinct society" as it was articulated by Premier Bourassa. There are a number of ways in which I think it could be ameliorated. For instance, there could be a clause added saying that all levels of government are committed to assisting minority-language speakers and providing opportunities for Canadians to learn both official languages.

I actually think that the "distinct society" clause perhaps ought to be altered to recognize that Quebec has, among other special characteristics, a majority that speaks French and a minority that speaks English and that constitutes a distinctive part of the Canadian federation. I think if we were to change it to make sure that part of the floor was the rights of anglophones in Quebec, then we would have a political morality or a political condition in which francophones throughout Canada would have strong and equal claims.

I do not think changing it that way would reduce the power which the Quebec government would get to promote francophonism, because what we are saying is that, as a distinctive quality, it has a majority that speaks French. That is distinctive, that is unique and it does place upon the Quebec provincial government special obligations to make sure that it is not swamped or lost.

Part of my idea for reform is to just take away the bald language of "distinct society"—"distinct" also carries an idea of "separate"—and replace it with a statement in favour of bilingualism, a statement about Quebec's special responsibilities vis-à-vis French and a statement about Quebec's English minority; because Quebec's English minority, as I said before, I think is the bellwether of bilingualism in Canada.

**Mr. Elliot:** I have a couple of points that I would like to ask you to comment on a bit further. Before I do that, I would like to thank you very much as a layperson for coming as a constitutional expert and talking to us this morning.

I think some of the other people probably share my view. When someone like yourself starts talking point by point through the accord, as you very capably did, it leaves us a bit breathless, particularly on this last day of testimony. Tomorrow we have to start making up our minds about what we are going to do about this package. It certainly focuses in a nice way at this point in the hearings. I thank you very much for that.



The first thing I would like to talk about is something that was not clear to me when we started the hearings or certainly when the Meech Lake accord came on the scene at first. I was one of those people who said that Quebec did not really belong to Canada because it had not signed the Constitution. Other constitutional experts have told us that really is not the case, that Quebec did not need to sign the accord back in 1981-82. The fact that the present accord is there and Quebec is willingly signing it, subject to some conditions, is the thing I would like to focus in on a little bit more.

For example, we have had a lot of representation from native peoples, everything from a single band leader to a regional band person to a person representing all of the Indian bands in Ontario, coming before the committee. The very definite feeling I got, either implicitly or implied by what they said, is that without Quebec being a willing member of a group sitting down to talk about its rights, which it wants negotiated on a continuous basis, they wonder whether the negotiation is going to be valid at all, and I wonder that too.

#### 1150

After your presentation this morning I wonder with respect to two other groups of people, namely the French-speaking peoples outside Quebec and the English-speaking peoples inside Quebec. There seems to me to be a forum where, attitudinally, all of the premiers and the Prime Minister and representatives thereof have to come together with the right attitude towards negotiating conflict areas of that type.

My specific question is: because they represent approximately 25 per cent of the Canadian people, if they do not willingly sign to be part of our country, will meaningful negotiation be possible from this point on?

**Dr. Whyte:** Not over some matters, of course, over which unanimity is required.

Let me back up and say that is right, Quebec did not sign and, as you say, witnesses have told you that they are bound by the Constitution. I think even more important is not only they are legally bound by the Constitution by virtue of the Quebec veto case. I do not have any access to attitudes within Quebec that is better than anybody else's, but the evidence does not seem to be strong that the failure of the Lévesque government to sign that accord produced a strong, widespread sense of dismembership.

After all, the three things that he went to the people saying were so galling about it were that he would not be able to get compensation for

constitutional amendments that did not involve culture and language, that is he would not be able to get money not to participate in national changes; that mobility rights might be a problem, and that minority-language education rights extended to all Canadian anglophones and not just Quebec anglophones.

My sense of that is that the population of Quebec did not say, "Wow, did they ever gore us." I think it has proved over the years to be a nought and the substance of exclusion not to be a point of grievance. The symbolism of the events, of course, is. I do think Quebec's not signing does get overplayed a little. But you have moved it to a much more functional level, which is that whether they are caught or whether their population has a grievance or not, the truth is that up to the present time, since 1982, Quebec government leaders will not sign constitutional amendments and that is a fact, so we are stymied in constitutional reform.

There are two things I would say about that. In relation to aboriginal governments, that has not been the problem. It is true that because Quebec will not sign then the coalition of the three most-western provinces has produced a problem. If Quebec would sign, then that coalition would not work.

I think that is not a way to deal with aboriginal rights in this country, to get the seven eastern provinces to gang up on the three western, anyway, especially since we are putting in place texts on the aboriginal government side which are only promissory about future processes. What is the point of ramming that kind of promise at the three western provinces with Quebec's participation? It is going to produce nothing anyway. Aboriginal government is going to come because there is a national appreciation of the rights of aboriginal people. I think Quebec is not irrelevant, but it is not devastating that it is not a participant.

In terms of the other kinds of things that you talk about, yes, there clearly are some important matters which Quebec's nonparticipation would hurt. I will repeat what I said earlier. I am all in favour of going back to Meech Lake. I am not saying, "Don't accommodate Quebec and don't have a Meech Lake accord." I am saying, "Let's get rid of the parts of the Meech Lake accord which seem to—" I know when I gave my list that seemed to be every part, but I am a half-a-loaf person. Make some improvements and I will be happy and a lot of people will be happy.

I think what the opponents of Meech Lake say is that surely four o'clock in the morning at

Langevin cannot be as refined as we get about these things, especially when we see such obvious problems. Why do we not deal with the obvious problems? Why do we not realize that constitutions are not perfect? There will be some problems, but constitutions are at least perfectible; not to perfection but just improvable. That is my answer, really. If Quebec's nonparticipation is a problem, let us deal with Quebec. It has rights for constitutional reform, but I think these ones are very costly.

**Mr. Elliot:** My supplementary has to do with the same kind of idea, only with respect to process and where we go from here. It seems to me that your comments with respect to the openness of this committee and how people giving testimony were received by the committee were significant, and again I thank you for that kind of comment. A number of people have communicated that same kind of idea to us. There is a very definite feeling that the committee is listening and would like to take positive action based on the comment that is given to us by way of testimony.

The kinds of things that might frame up after these hearings are fairly obvious, because in Ontario, where we represent approximately one third of the population, what happens in the country very much has to be a reflection of what Ontarians feel or there are going to be some problems with it. If the kinds of hearings we have had with respect to this committee were held in advance of a meeting like the Meech Lake meeting, they would be very beneficial.

Do you have any comments on what sort of format might be used on a continuous basis by the government of Ontario to make sure that the people are heard so that the process is more meaningful?

**Dr. Whyte:** I think there is no single process for putting constitutions in place. The one that is in the Constitution Act, 1982, of provinces just passing resolutions without a prior meeting probably will not work. There have been some started, such as the property rights amendment from British Columbia. I suppose it has now run out. I do think we will get constitutional amendments without the Meech Lake and Langevin Block type of first ministers' meetings.

I know I was being hostile about that and I want to say that I have a complicated sense about it. It needs a whole bunch of kinds of inputs, and I think political leaders meeting and talking about where they want to go and even putting out a draft text like this is probably the way constitutional amendments should be made. I do think there

ought to have been an awful lot longer period between Meech Lake and Langevin and there ought to have been more officials' meetings and more meetings of politicians with people to get their concerns.

People knock the 1980-82 process as being antidemocratic. I never bought that. That stuff was played out pretty publicly, and what the Charter of Rights was going to look like was put out all during the summer of 1980. You never went back from a meeting, whether it was in Vancouver, Montreal, Toronto or wherever, without having a whole horde of people into the legislative building to talk to you about what they heard through the paper and to get the story.

I worked for the government of Saskatchewan. There was nothing formal like this but there was an awful lot of sitting around the table trying to explain, trying to get views. That went on in Ottawa following October 4, 1980. It went on following the Supreme Court reference. It was not a bad process. Obviously, we are not going back to that. That was an unstructured, confrontational, ugly process too, so we do not quite want to clone that one; but the idea of first ministers meeting, getting ideas, getting draft texts, getting public participation and meeting again, I think it makes sense.

In fact, Meech Lake may turn out to be the perfect process in the end. I think Langevin was too soon after Meech. We had Meech Lake. We had Langevin. We have hearings. We are getting a sense of problems. Political opposition to it is being expressed. It may be that the combined effect of the Manitoba election and the New Brunswick election will force people to go back. I think there is fair amount of goodwill about it.

If Quebec is not too resentful about being brought back to the table, which I do not think it can logically be—in its own self-interest, it cannot refuse to negotiate—five years from now I could be sitting around saying, "This was a great process." You put out something and you make it seem pretty serious and pretty formal so that people will take it seriously, and then you shoot at it and try to refine it. Maybe we are in the middle of a very healthy process.

**1200**

**Mr. Elliot:** The final comment I have to make with respect to that leads from what you just said. I felt very uncomfortable about the unanimity part of the whole process at the beginning, but the more we have talked and heard people talk to us, the more I feel that there are a lot of things with respect to constitution-building that require unanimity, because if somebody walks away



mad about any particular item, he is not going to do anything about it anyway.

In fact, the attitude towards negotiating that type of thing is really an important attitude, in my view, at this point in time. I do not think the kind of formula for constitutional amendment that was there can be really used effectively any more because of that. So I am feeling very comfortable about that. That is what I read into your comment too, that in some things unanimity very definitely is required and it should be there.

**Dr. Whyte:** Yes, in some things it is, and I think it is required. One of the things about unanimity is that it actually cashes out to be a subtle form of consent. It never is one for one. It is always OK for Ontario and Quebec to use their veto, but I think it is true that McKenna could not have held off Meech Lake by himself. Unanimity actually has different weights in different parts of the country, and maybe that reflects a real sociopolitical reality and that is why it is not as dangerous as all that. It is not as if we are held to ransom by Prince Edward Island.

I just want to say, though, that because I do not want to be a hypocrite and appear to agree with you when I do not entirely, in the appendix to the submission to the joint parliamentary committee I do make a run at unanimity as a general rule and talk about the nature of national self-definition in a federal state proceeding by way of majoritarian votes, and to reflect federalism a majority or more of the provinces.

I think that there is some possibility for national realization, self-realization, redefinition or whatever we say, which does catch groups of people, just as in democracy minorities are minorities—groups of people, even a province on the wrong side—and that you live with that.

**Mr. Allen:** Members of the committee will be happy to know that I have an engagement at 12 o'clock. But I want to get in one little inning, because I thought when you were describing the visions of language policy and the tensions and preserving the conflict and so on between various elements that are fundamental to our national existence, you were coming out exactly where I was coming out with regard to the Meech Lake accord; namely, that it did manage to preserve the tension between the bilingual model on the one hand and the distinct society concept or the necessity of a homeland language territory, if you like, which of course creates the issue in the first place, and that Meech Lake preserved it. Then I thought you said it destroyed the tension.

**Dr. Whyte:** Yes.

**Mr. Allen:** When I take Meech Lake and put it alongside the charter and the language elements of the British North America Act, 1867, I do not quite follow you on all that, because the charter, sections 16 through 23, affirms distinct language rights of particular groups. The official bilingual designation in federal terrain has marked off exactly what constitutes, who has what rights with regard to the provision of language services. Ontario has followed that model in Ontario recently in Bill 8, and Meech Lake itself talks about a dualism and the necessity to preserve the dualism, which means some obligation to have a functioning public structure which responds to two languages in all parts of Canada.

I do not myself have a sense that the weight of the "distinct society" language weighs in that heavily against that, that it somehow overturns all of that drift of recent policy and pronouncement. Much of the bilingualism that happens in the country, of course, is informal decision among individuals who have recognized, families which have recognized that in order to function in our country these days, it is just important for their kids to have two languages. That is a reflection of the discrete realities of those language groups in their separateness, but the necessity of living together in a community—I sort of lost you there. I am not sure that—

**Dr. Whyte:** Sorry. Yes, I do think there is a tension between these two, dualism and bilingualism. I admit people make the claim about Meech Lake that it does not resolve the tension, does not come down on one side or the other, but I am clearly of the view that it does and that it is a potential weapon against bilingualist policies; and so that—

**Mr. Allen:** How?

**Dr. Whyte:** That is right. It is a matter of interpreting how it is going to get worked out. The first thing I want to say is that the first clause, relating to English and French centred in some provinces and not centred in others does identify there being two language populations in each province.

The argument is that it identifies dominant languages and goes to great lengths to describe language as a geographic phenomenon. Then the argument is that because the Meech Lake accord expresses so much concern about the geographic placement of language, it conveys the message there is an appropriate language or a dominant language in one area and another dominant language in the other area, and that there then is an obligation on provinces to preserve this, to preserve these dominant languages.

I read the first clause as identifying it to mean two languages, but doing it in a way that creates geographical dominances for languages. The next clause, relating to this idea of promoting, seems to be a suggestion that provinces are mandated to push for that language, the appropriate language. I want to admit that this is not the only logical reading. I do not even think it is actually the reading the courts will give it. I think what is bad about Meech Lake—that is about the first clause, not the “distinct society” clause, putting that aside for a moment—is the amount of room it gives at the political level for arguing for the idea of appropriate language or the idea of the legitimacy it gives for political decisions in favour of promoting unilingualism.

It also, by the way, I think gives legitimacy for promoting bilingualism if a province wishes to. My argument about Meech Lake is not that it attacks bilingualism when it is chosen by a province, but that it promotes unilingualism, or language dualism. It legitimates unilingualism and language dualism when politicians choose to do that. Furthermore, it could even lead judges, if they are called to assess whether this is a reasonable policy, to support those policies of unilingualism or language dualism.

The problem with Meech Lake is that it seems to lend comfort to those people who are arguing strenuously in favour of dominant languages and appropriate languages and geographically based languages.

The “distinct society” clause, I think, is different, because I think the “distinct society” clause is a clause about francophonism. This is a different point I make. I did not in fact elaborate the first subclause before. The “distinct society” clause, I think, is particularly sinister because it is a clause that compels courts to interpret powers and limitations in a way that reflects the distinct identity or the distinct quality of Quebec as the centre of francophonism in Canada and in North America. I see it having significant unilingualist thrust in its application.

**Mr. Morin:** Would you say that of Saskatchewan?

**Dr. Whyte:** Yes. I would make the same quip others have, that the great thing about Devine is that he has caught the spirit of Meech Lake. I know it is a quip. To be more thoughtful on your question than to say, “He caught the spirit of Meech Lake,” what I really am saying to you is that it is not clear what the spirit of Meech Lake is in that distinctive characteristic clause, that first subclause, but it has the real possibility of supporting those or legitimating those who say,

“We have an idea here of language domination, language geography and language appropriateness, and in so far as we are reflecting that we have the Constitution on our side.” They are saying that at a political level.

Devine maybe has not caught the spirit of Meech Lake but he used Meech Lake.

**1210**

**Mr. Chairman:** Can one not also say that what he did he did apart from Meech Lake, and that had there been Meech Lake it might have been much harder, if not impossible, for him to do what he did? I realize there are a lot of unknowns there, but in fairness to the concept of preserving, if the accord were in effect at least in terms of that clause, would that have enabled him to do what he did?

I think your point about the spirit is a valid one in the sense that one says, “What does this mean if Devine and Bourassa sort of agreed, ‘You kick your minority and I will kick mine.’” In looking at the specific action, could Devine in fact have done that had the clause been in the Constitution?

**Dr. Whyte:** I suppose he could have in the sense that what he was doing was repealing section 16 of the Northwest Territories Act of 1891, or something, and the Supreme Court found that did not get constitutionalized, that it was just part of the business of internal self-management of a province.

It may be one of those instances where the clause of Meech Lake does not actually have enough power. I said earlier it has a lot of power, but maybe it does not have enough power to begin to limit the self-management powers of provinces over their official languages. Had Meech Lake been in place, would there have been a better hue and cry about it or a better claim on behalf of francophones?

I think there is a good case to be made that he is acting in accordance with Meech Lake, that francophonism gets located in Meech Lake and is no longer quite his responsibility. The thing about that is what was said by Stan Graham or whoever of the Dinosaurs, whatever that club is called—Is this rude?

**Mr. Chairman:** You are free to say whatever you wish within these four walls. There are no dinosaurs in this room.

**Dr. Whyte:** I can see that. That is why I felt—

**Mr. Chairman:** Maybe other animal species, but—

**Dr. Whyte:** The one who said that they could speak English “as good as me.”



The point about that is how much it misses what is going on in terms of language policy in Canada. This is not a functional claim, a claim being made because francophones in Saskatchewan, the Fransaskois, have to function. It is that French Canadians are a founding people and have a right to have their culture continue in this nation. The centre of the French Canadian population is in Quebec and they have the right to Canadian membership, which means some elements, some expressions of hospitability throughout the nation; not total elements, but some elements. An inhospitable element would be Alberta's rejection of the French language—an inhospitable message. I think that is the kind of constitutional current that flows through bilingualism.

Following Mr. Allen's question, I could be wrong on Meech Lake, but it seems to me that it undercuts that. It seems to remove the responsibility from provincial leaders to remember that fact about Canada. It is not functional. It is founding peoples. It is the special place of French Canadian people throughout Canada.

**Mr. Chairman:** I want to thank you very much for joining us this morning. As we head into our last testimony this afternoon with the Attorney General (Mr. Scott), we have received a great deal of thought and opinion. I think all the committee members would say that virtually everyone who has been before us has obviously put a great deal of himself or herself, as well as academic or intellectual interest into this. I think we have to realize that constitutions and constitution-making are real, are alive and are vital endeavours, and that somehow, out of all of this, we will have to try to reflect that in our own deliberations.

I thank you for the submission you made this morning as well as the copy of your submission in Ottawa. We appreciate you coming this morning.

**Dr. Whyte:** Thank you. I care about Meech Lake. I wanted an opportunity to speak to you. I know you have stayed on months longer than you meant to, not just for me, but I am grateful you have done that, for me and for others.

The committee recessed at 12:15 p.m.

## AFTERNOON SITTING

The committee resumed at 3:35 p.m. in room 151.

**Mr. Chairman:** Good afternoon, ladies and gentlemen, if we can begin this afternoon's session, we welcome the Attorney General of Ontario, the Honourable Ian Scott, and we want to thank him for coming.

This is a historic moment for the committee. It is the end of its public hearings, which have now gone on for some time. We have received a copy of your brief and I wonder if I could ask you to introduce your colleagues at the table. Then if you want to take us through the brief in whatever fashion, we will follow up with questions.

HONOURABLE IAN G. SCOTT

**Hon. Mr. Scott:** With me today are, on my right, Larry Taman who is the assistant deputy Attorney General for constitutional law and policy in the Ministry of the Attorney General. On my left is Professor Patrick Monahan who is on my own staff.

I want to thank the committee very much for inviting me to be here because I believe that the committee has undertaken a historic act, an act of statecraft during the course of which, I believe, the committee will speak to the whole country about our vision of Canada.

The brief I have filed I have provided to each of you. I regret that it was not filed earlier than today because I know you would want to have examined it and it would therefore have been possible to shorten my remarks. But it is before you. I think it is logically organized and I will be delighted today or on any other occasion to respond to any questions you have about it.

I would like to take you through parts of it that I regard as critically important. In the brief, what I attempt to do is to articulate the constitutional vision which underlies the Meech Lake accord. We attempt in the brief to situate the accord within Canada's unique constitutional tradition and we attempt to explain how the accord maintains that tradition and is consistent with the current practice of Canadian federalism.

The brief attempts to analyse the concerns which the committee will seek to address and measures those concerns against that unique Canadian vision of constitutionalism.

May I note first that the first section of the brief is, in one sense in my opinion, the most important part because in the first section beginning really on page 1 or page 2, we attempt

to set out our vision and our placement of the accord in the Canadian constitutional tradition. Then later on in the brief, of course, we begin a detailed examination of the individual clauses and an analysis of some of the key issues which I know, having read much of the evidence before you, have been presented to you by our citizens or which you have raised in the course of questioning.

First of all, any attempt to identify the constitutional vision underlying the Meech Lake accord must be informed by a sense of constitutional history and grounded in an appreciation of the current practice and reality of Canadian federalism. The accord represents a set of changes which builds upon the Canadian political tradition.

It has been claimed that the document is radical or revolutionary. The committee will wish to assess the impact of the accord on the power of the federal government to formulate and implement national policy. Is there a devolution of power to the provinces? Does the accord confer unspecified but important new powers on Quebec? Does the Charter of Rights and Freedoms still apply in Quebec after the accord?

In addressing these concerns, it is important, I believe, to begin with the historical context, and in particular with the efforts over the past 30 years to update and revise the original Canadian Constitution, as defined in the British North America Act of 1867.

As you know, until 1982 our Constitution was an act of the British Parliament. Since the mid-1960s, there has been consensus on the need to modernize the Canadian Constitution. It was generally agreed that there had to be some sort of readjustment in the division of powers so as to provide greater scope for provincial autonomy and distinctiveness, particularly the distinctiveness of the province of Quebec. Limits on the federal spending power, the provincial role in the appointment of Supreme Court judges and senators, and opting out of shared-cost programs were all the subject of detailed constitutional proposals by both the federal and provincial governments in the 1970s, if not earlier. Most of these proposals, including those advanced by the federal government prior to 1981, would have established a far greater role for provincial governments than is provided for in the Meech Lake accord itself.



By 1981, agreement on wide-ranging constitutional reform had proved impossible, notwithstanding almost a generation of effort. Attention was, therefore, in 1981, focused on the need to bring the Constitution home to Canada and to give Canadians a Charter of Rights and Freedoms.

While these matters were successfully dealt with in the constitutional amendments of 1982, there was at that time little progress on dealing with the agenda of Quebec and of the other provinces in calling for renewal and revision of the federal-provincial division of powers.

The Meech Lake accord deals successfully with some of what was not achieved in 1982. It deals with the agenda of Quebec. For the first time, Ontario and the rest of the country have an answer to the question: "What does Quebec want?" What is striking about the answer, in my opinion, is its limited focus and modest character. The answer of Quebec eschews radical change in favour of incremental adjustments to current constitutional practice.

First, the Meech Lake accord does not require any changes in the division of powers between the federal government and the provinces. The federal Parliament retains all of its legislative powers. In fact, the "distinct society" clause, which has been the focus of a great deal of criticism, explicitly provides that it does not limit the powers of Parliament or the provincial legislatures.

Indeed, far from representing a radical innovation, the Meech Lake accord largely affirms existing practice or formally writes into the Constitution provisions on which there has been widespread agreement. It has long been accepted, for example, that there should be some provincial role in the appointment of Supreme Court judges and senators. In terms of the amending formula, until 1982 it was widely believed that unanimity was required for any amendment affecting provincial powers. Opting out of shared-cost programs and provincial variations in their delivery have been central features of the exercise of the federal spending power at least since the 1960s.

Finally, the recognition of the distinctiveness of Quebec has been a cornerstone of both our political practice and our constitutional law since the Quebec Act of 1774. One need only look to the special provisions dealing with the province of Quebec in the British North America Act of 1867 to grasp the fundamental way in which the distinctiveness of Quebec has, for all our history, shaped our constitutional tradition.

The novelty of Meech Lake and its likely impact on Canadian politics could therefore easily be exaggerated. Predictions of dire consequences, in my opinion, would lack a sense of balance and of proportion, and they would fail to situate these proposals within the larger history of constitutional reform over the past 25 years.

I believe the accord represents a set of changes which have been the subject of widespread debate and examination in this country for two decades. The likely impact of the changes is circumscribed and measurable, and in large part the accord constitutionalizes existing practices or builds on previous constitutional proposals for which there has historically been widespread support.

I think the next point is an important one to make in the light of the submissions you have heard and your own inquiries of witnesses.

We must remember that constitutions differ in a fundamental way from ordinary legislation. Constitutions are not intended to settle, once and for all, the outcomes of political disputes. Rather, constitutions are designed to establish a general framework within which the art of politics can be practised and fostered within a community. This committee, I am sure, is mindful of the reality that once constitutions are settled, politics continues.

Similarly—and this is very important in my view—constitutions are not intended to freeze into place any single vision of the nature of the country. Instead, constitutions give expression to competing visions as to the nature of the country and establish the conditions for future conflict resolution. Constitutions historically, across the world, to be successful and enduring in a nation such as ours, must be pluralistic. They must be capable of accommodating the differences of geography, custom, language, ethnicity and belief which exist in any political community, and certainly in a diverse country like our own.

Look, for example, at the British North America Act. Some see in the document a vision of Canada as a unitary state. It is perhaps possible that Sir John A. Macdonald saw the BNA Act in that way. Others, perhaps Etienne Cartier, saw the BNA Act as built upon the ideal of Canada as a truly federal state with provincial governments standing on an equal footing with the central government.

The reality is that the BNA Act expressed both of these competing conceptions of the nature of the country. This indeed was the very genius of the document. Its longevity and success was a function of the fact that it was sufficiently

flexible to allow for conflicts over the nature of the country to be worked out over time and according to the circumstances and demands of the day. It did not seek to freeze a particular ideal of the country into the Constitution and impose it for all time on those who held to a different vision.

This constitutional vision of pluralism and accommodation is, I believe, the vision of Meech Lake. The accord does not purport to settle for future generations the ongoing debates about the nature of the country. Rather than seeking a futile once-and-for-all settlement of fundamental questions, the accord provides a space within which politics can continue with civility and mutual respect. It sees politics as a continuing exercise in finding compromise and building trust. It rejects polarization and tests of strength.

The accord's treatment of the language issue exemplifies this attempt to accommodate competing ideals. The language issue in this country over the past three decades, if not longer, has involved conflict between two fundamentally different views of the nature of the country. One view has emphasized linguistic equality and the guarantee of minority language rights across the country. The contrasting view has focused on the distinctiveness of Quebec and the need for the French-speaking majority in that province to protect and express its linguistic and cultural identity.

### 1550

Meech Lake recognizes the distinctiveness of Quebec society and the role of the government of Quebec in promoting that distinctiveness. But the accord—and this is critical—also recognizes the presence of the English-language minority in Quebec and the French-language minorities in the other provinces, and affirms the constitutional obligation of all governments, including the government of Quebec, to preserve those minorities. The accord also gives expression to the fundamental equality of all the provinces by ensuring that the distinct identity of Quebec does not alter the division of powers. Moreover, the signing of the Meech Lake accord by the government of Quebec affirms the legitimacy within that province of the minority language guarantees contained in the Charter of Rights.

These provisions exemplify the constitutional vision of Meech Lake. It is an approach which seeks to avoid confrontation and polarization and places a premium on accommodation and mutual respect. It affirms the desirability of each side in a dispute gaining half a loaf as opposed to one side going home empty-handed.

A second illustration of this spirit of pluralism and compromise is the way in which Meech Lake deals with the struggle between central and provincial interests in the country. As with the language issue, this struggle has revolved around two competing ideals of the nature of the country. On the one hand are those who see Canada as a single national community comprising individual citizens requiring universal, uniform and efficient services. On the other are those who tend to see provincial communities as basic points of reference, and want national policy to respect and balance regional interests.

Meech Lake refuses to exclude either of these possibilities. Instead, what it seeks are processes through which the ongoing debate between these two contrasting ideals, both of which are Canadian, can be carried on.

The accord provides provinces with the right to nominate Supreme Court judges and senators, but in each case provides the federal government with the final say in any such appointments.

The accord provides for the possibility of immigration agreements between the federal government and individual provinces, but reserves the final say on immigration policy to the federal government.

The accord expands the class of amendments requiring unanimous consent, but in no case can either government unilaterally force the hand of the other. A balance of power is established in which agreement and compromise are required before action can be taken.

The accord establishes a framework in which future differences between the federal and provincial governments can be resolved. No specific outcome is dictated by the Constitution. No single man's vision is imposed on any other. Instead, the outcomes will depend on the political will of the parties and the particular circumstances and pressures of the period in which they arise.

Reading your debates, one of the frequent complaints about these proposals is that they do not foreclose the possibility that provincial governments might some day abuse their powers. For example, a separatist government of Quebec, it is said, might try to use its role in the appointment of Supreme Court justices to appoint a separatist to the Supreme Court.

It is, of course, true that any government, either federal or provincial, might some day try to abuse its constitutional powers. There are no words that can be written into the Constitution to preclude conclusively the possibility of such abuses, nor have there been in the 125 years of



our history. The outcomes of such struggles will not turn on the wording of particular provisions in the Constitution. They will instead depend, as they always have in this country, on the political will of the respective governments and the support which they can muster for their proposals in the community.

This point can be brought home most vividly by a comparison of the Canadian and American constitutions. A straightforward reading of the two documents might suggest that Canada ought to be more centralized than the United States, if you just looked at the documents. The fact that the opposite is in fact the case illustrates the limited role of constitutional wording in pre-determining long-term political outcomes.

Meech Lake's attempt to balance and accommodate different legitimate visions of the country may prove troubling to those who look to the Constitution for a once-and-for-all and wholly favourable resolution of their particular concern. But the Constitution cannot and should not enshrine a single vision of the country to the exclusion of all others. I believe that when we get historic perspective on this we will see that Meech Lake stands in the tradition of Laurier, Mackenzie King and Lester Pearson in striking a reasonable balance among contradictory ideals or visions. It refuses to identify unity with uniformity.

The Meech Lake accord provides a way of purging the Canadian Constitution of what Stefan Dupre, in his testimony before this committee, termed a "symbolic monstrosity." This symbolic monstrosity is the fact that the Constitution Act of 1982 was imposed on Quebec without its consent.

During the referendum campaign, the people of Quebec were promised that in return for a no vote, Canadian federalism would be renewed. But the constitutional settlement of 1982 addressed none of Quebec's historic concerns. Equality rights, multiculturalism, aboriginal rights and minority-language education were then given constitutional recognition. Only Quebec's concerns in 1982 were left out.

Most important of all, for the first time in Canadian history, through the limiting effect of the Charter of Rights and Freedoms, the powers of a province had been reduced without its consent. Of course, the Constitution of 1982 was legally binding in Quebec, and this was precisely the problem. The circumstances surrounding the patriation of the Constitution in 1982 made it a national imperative to secure Quebec's voluntary adherence to our Canadian Constitution.

Meech Lake secures Quebec's adherence on the basis of proposals that are moderate and modest compared to most advanced by a Quebec government in the past 30 years. The Meech Lake accord, I believe, represents the very minimum that would be acceptable to any conceivable Quebec government in return for its acceptance of the Constitution.

I believe that one basic and simple question which confronts this committee and the people of Ontario is: Are we now prepared to say yes to Quebec? Are we prepared to accept the fact that a francophone space exists within Canada and that it is a permanent and essential feature of our constitutional fabric?

Some may say that they welcome Quebec's adherence to the Constitution but they merely want better terms. But in order for this answer to be credible at the end of the day, it must be accompanied by an explanation of what those better terms are and whether they would adequately accommodate Quebec's concerns. Moreover, it must explain how these better terms are to be arrived at without disturbing the fragile consensus which has already been achieved.

I understand, and I have had the advantage of reading much of what has been said before you, many of the concerns which have been raised. Yet the accord represents a complex, very delicate series of tradeoffs among a number of governments after more than 20 years of negotiation. It permits us to take a modest step forward in the job of nation-building. I am not persuaded that the changes proposed can be made without disturbing that fragile agreement.

I am well aware of the fact that reservations about the accord have been expressed in other provinces. What I ask, respectfully, is that this committee approach its task on the merits and without regard to the fate of the accord elsewhere. I ask the committee to consider any faults it might find in the accord within the context of the overriding objective of national reconciliation and the constitutional morality which underlies it. I remind the committee that the accord is not the end of Canadian constitution-making, any more than 1982 was the end of Canadian constitution-making. But it is a key middle part, without which, in my view, there is little reason to be optimistic about further progress on the constitutional agenda.

#### 1600

As briefly as I can, I would like to turn now, at page 14, to the first clause of the accord, which is the "distinct society" clause.

The first element of significance in this clause is clause 2(1)(a), which refers to the presence of "French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec." It is this that is said to be a "fundamental characteristic of Canada."

This clause should be compared with the original Meech Lake language which referred to the existence of French-speaking Canada and English-speaking Canada as being a fundamental characteristic of Canada. The language of the original Meech Lake agreement suggested that Canada consisted of two separate collectivities, one French-speaking, the other English-speaking. The implication perhaps was that Canada consisted of two founding nations, the English and the French. This language constituted a potential threat to Canadians whose origins are neither French nor English, as well as to the aboriginal peoples of Canada, who also consider themselves to be a founding people.

In the Langevin text, on the other hand, the reference to two Canadas was dropped and replaced by a reference to the existence of English-speaking and French-speaking Canadians. This negates the implication that we can be fully described in terms of two founding collectivities, while at the same time affirming the importance for constitutional interpretation of the presence of French and English speakers.

The two-nations implication, if any, of the original Meech Lake wording was further negated by the addition of section 16 of the accord. This provides that section 2 does not affect the aboriginal peoples sections of the Constitution Act, 1982; section 91, class 24, of the Constitution Act, 1867; or the multicultural heritage clause of the charter.

Section 16 is extremely significant and has figured in a major way in the submissions before you. It suggests that the recognition of the distinct society of Quebec should not be taken to suggest that there is only one collectivity in Quebec or that Quebec society should be defined as francophone. Section 16 emphasizes that the interpretation of the Constitution and of Quebec's role in Canada should be guided by the idea of cultural and ethnic diversity that is already recognized in the Constitution.

Clause 2(1)(b) of the proposed amendment states that "Quebec constitutes within Canada a distinct society." It is important to emphasize that clause 2(1)(b) states that the "distinct society" of Quebec exists "within Canada." This

means that the "distinct identity of Quebec" must include the presence of the anglophone minority. Indeed, the presence of English-speaking Canadians within Quebec, as I have pointed out, is declared to be a "fundamental characteristic of Canada."

Subsections 2(2) and 2(3) refer to the role of Parliament and the legislatures with respect to the "fundamental characteristic of Canada" and the "distinct identity of Quebec." It has been noted that the Parliament of Canada and the provinces are stated to have a role of preserving the "fundamental characteristic of Canada," while the government of Quebec has the responsibility to "preserve and promote the distinct identity of Quebec." But the duty "to preserve the fundamental characteristic of Canada" should not be taken to suggest that governments are instructed to adopt a passive stance with respect to protecting linguistic minorities.

At the present time, the federal government is officially bilingual and has a long-standing policy of encouraging public officials to become bilingual. The federal government has also undertaken extensive programs of promoting second-language education across Canada. The Parliament has aggressively promoted the rights of the French minority across Canada. The role of the Parliament of Canada in preserving the "fundamental characteristic of Canada" will include continuation and development of the policies already undertaken at the federal level.

Now if I can take you to page 35, I would like to deal very briefly with shared-cost programs.

The proposed section 106A will create new constitutional norms for the creation and operation of shared-cost programs. Its application, it is important to note, is limited to new programs within the area of exclusive provincial jurisdiction.

Shared-cost programs between the provincial and federal governments have been in existence since 1907. These programs represent one of the three ways in which the federal government exercises its spending power. The first is unconditional federal payments or grants to the provinces, generally in the form of equalization payments. The second is direct federal payments to persons or institutions—for example, universities—which bypass the provincial governments. Neither of these spending power techniques is affected one whit by section 106A. The third is conditional federal grants in areas of exclusive provincial jurisdiction, where the transfer of funds is made on condition that the provinces use the funds in accordance with



specific stipulations imposed by the federal government.

A full and fair description of the present state of shared-cost programs, in their constitutional and administrative context, is provided by Professor Hogg in his textbook, and I understand he gave evidence to the same effect before you.

In the text, he says: "Shared-cost programs have assured all Canadians a high minimum level of some important social services. Without the federal initiative, and the federal sharing of the costs, it is certain that some at least of these services would have come later, at standards which varied from province to province, and not at all in some provinces. But the programs have effected a substantial shift in the distribution of power within Confederation. Since the provinces bear half the cost of most programs, each province is now committed to substantial expenditures for purposes which have been selected not by the province which raised the money but by the federal government. Indeed, cost sharing locks more than one third of provincial budgets outside the normal provincial processes of priority-setting and budgetary control. Thus," Professor Hogg says, "shared-cost programs are pursued at the expense of provincial functions for which no federal assistance is available."

Section 106A gives express constitutional recognition to the federal government's capacity to impose conditions on the provinces when it spends in areas of exclusive provincial jurisdiction. The federal government will, when establishing such programs, set national objectives. At the same time, a province's entitlement to compensation, if it establishes a compatible program, has been constitutionalized. In this way, the provinces will be able to ensure that such programs are sensitive to local and provincial needs.

I have set out elsewhere in the brief an analysis, sometimes at more length than I would normally want to do, of other sections of the accord to which I will ask you to refer in the course of your reading.

#### 1610

I would just like to make one or two observations to sum up before your questions. When this resolution came before the Legislature for debate on the motion to establish this committee, I suggested three criteria which the committee might find useful in assessing possible flaws in the accord. Permit me just to repeat those three questions.

1. How serious is the alleged flaw?

2. Must the flaw be corrected immediately, or is it possible that the problem can be corrected at some future time, possibly by including it on the agenda for immediate attention by first ministers at the 1988 first ministers' conference?

3. Is the harm identified so significant that it would justify putting at risk the broad consensus we have achieved in pursuit of the overriding objective of national reconciliation?

I have reviewed very carefully the testimony before the select committee in light of these criteria and in light of the overriding objective of national reconciliation. It is my best judgement as Attorney General that the concerns which have been raised do not justify reopening the accord for amendment.

I believe history will record the Meech Lake accord to be a fundamentally sound constitutional document. It represents a modest and limited set of reforms which does not alter in any fundamental way the balance of power between provinces and the federal government. The accord resolves, in a reasonable and balanced fashion, issues that have been widely debated and exhaustively analysed over a 20-year period. It reflects a constitutional ethic of pluralism and mutual respect, while rejecting the values of confrontation and polarization which characterized so many of the constitutional discussions of the past generation.

This does not mean that the accord is perfect. But I am not satisfied that any shortcomings are so serious as to require immediate amendment of the accord. Indeed, many of the concerns which have been raised before the committee have less to do with the Meech Lake accord and more with the shortcomings of the 1982 package of constitutional amendments.

Some witnesses, for example, argued that the "notwithstanding" clause should be removed from the charter. Others complained that there had been inadequate protection for the rights of multicultural groups in the Constitution. Still others argued that there is a need for a constitutional amendment dealing with the concerns of aboriginal people. All of these concerns are important and certainly merit full and open discussion. But in my respectful opinion, they do not constitute a reason to postpone ratification of the accord in its present form.

I am mindful, and I deal with it in the brief, of the fact that a good deal of the concern surrounding the accord is related to concern about the process which preceded it. I believe your committee can play an important role in helping to improve that process in the future.

Your suggestions as to how members of the public can be involved at an earlier stage in the formulation of constitutional proposals will be of great service, not only to this government but to all citizens of the province and all future governments.

Constitutions, like the societies which produce them, are fluid and evolutionary. The Meech Lake accord is not the final word on nation-building in this country, but by approving it, Ontario will be signalling its willingness to continue the journey rather than prematurely end it.

In 1927, one Canadian leader, not regarded everywhere as a hero but regarded as a hero by me, Mackenzie King, a man who held this country together for periods of time over 50 years when it was stressed more aggressively than it has ever been stressed in terms of national unity, described the delicate balance between unity and diversity in Canada in these words: "Today we are a united people, seeking first and foremost an enduring unity; not a unity which aims at uniformity, but a unity which delights in diversity."

Canada remains united, and this unity endures in 1988, some 61 years after those words were spoken, precisely because of the tradition of pluralism, generosity and accommodation practised by enlightened Canadian political leaders such as Mackenzie King, Laurier, Pearson and their opposite numbers in other political parties. It is a tradition which cherishes unity while at the same time welcoming diversity.

I invite this committee to play its part in the historic task of nation-building—there will probably not in a generation be a more historic vote than the one you take—by endorsing the Meech Lake accord and welcoming our brothers and sisters in Quebec back into the Canadian Constitution with honour and enthusiasm.

That was a little long, but I feel strongly about this issue. I wanted to give you, for what it is worth, the advantage of my views and I would be delighted to respond to any questions or observations you might want to make.

**Mr. Chairman:** Thank you very much, Mr. Scott, and thank you for the brief. As you noted, it does touch on all aspects of the accord, and we will have occasion to read that. I think we probably have enough material now to read to keep us going for some time.

I was tempted, when you mentioned Mackenzie King, to ask if you might put some questions to him the next time you are talking with him. That might be of—

**Hon. Mr. Scott:** I would be delighted to but I do not think I have the power that he apparently had.

**Mr. Chairman:** We will turn then to questions and begin with Mr. Allen.

**Mr. Allen:** We have indeed been seized by the importance of the issue that has been before the committee, as you will realize, and I think it has been evidenced in the willingness of the committee to listen at great length and not to cut off any person who has come before us unduly or before he said his piece. I think the Ontario committee in that respect has played a very significant role in the national debate on this question.

At the same time, you will be aware that although you have indicated that there is no rejection of any man's vision and no precedence given to any other man's vision with respect to the Meech Lake accord, none the less there have been those who have come before us who have insisted that indeed there is a vision accepted and a vision rejected in this document. As late as this morning, the dean of law from Queen's University felt that there was indeed an explicit two-Canada vision that was still very prominent in the document.

I noted also that you referred to the tradition of Laurier, Mackenzie King and Pearson. At the same time, that clearly excluded Macdonald and a few other players on the national scene, including one of our more recent prime ministers, Mr. Trudeau.

I ask you the question about the vision a little bit further because I would like your further comments. It was clear when we went through the great crisis of the 1930s that we had to retrieve a vision that had been lost at one point in our past, namely, the Macdonald vision, in order to somehow gear up the nation for some major new nation-building undertakings that the Depression obviously placed before the country, and it had been true that vision had got lost in time in significant measure. The people, of course, who have been most critical of the Meech Lake accord have been those who have said it is precisely that more central view of the nation that in these perilous times also needs to be maintained.

I wonder if you could comment on how the Meech Lake accord, in your sense of not endorsing any single vision, somehow manages to include sufficient central power to cope with more than just national emergency—because that was the old interpretation of peace, order and good government, just in national emergencies—but at the same time meets the conditions of what



I guess I would view as the more traditional Liberal understanding of the Constitution in a more decentralized fashion.

**Hon. Mr. Scott:** First of all, there have always been in this country two visions at least of the way in which the country should develop. There were two views in 1867. There was the unitary view of Sir John Macdonald and there was the strict, almost American federalist, view of Etienne Cartier and his colleagues. If either of them had sought to impose a constitutional vision on the other, you only have to read the debates to know that there would never have been a Canada; there would have been no British North America Act.

The process of creating that Constitution was one that expressed the sense of the nation and allowed those competing views of its political future to be shaped within the context of the Constitution by the political process, and there have been times traditionally when one view has been regarded as more important than another. You pointed to such a time in the 1930s when it might be that one view took pre-eminence over the other.

1620

The first point I make is that any Constitution in a country which has two or more views about its nationhood will fail if it excludes only the vision of one of those groups, because it will not take accord of national needs. Now, is there sufficient federal power? I think the point we try to make in our brief is that there is. There is no significant diminution of federal power.

What we have with respect to shared-cost programs is a constitutional reference to the reality of at least the last generation and we will be in the same position in constitutional terms as we have been in practical terms at least since the 1960s, if not earlier. So I do not see a significant prospect that any court will find the authority of the federal government to be reduced. Indeed, it can be said—I do not put too much stress on it—that this accord incorporates for the first time in the Constitution a recognition of the capacity of the federal government to spend money on shared-cost programs in areas of provincial jurisdiction.

It is an issue that, as you know well, is already the subject of a court case which would have been decided pre-accord, in which it is argued by the Canadian Medical Association, I believe, that the existing Constitution of the country does not permit the federal government to spend dollars on programs in the way it now does by imposing conditions on provinces. I do not know that there

was necessarily much to fear about that case perhaps, but certainly the accord enshrines for the first time the federal capacity to do that. So I do not have the reservation that Professor Whyte, whose evidence of course I have not yet read, seems to advance.

**Mr. Allen:** Could I turn to a somewhat more specific question? In your own presentation, you slipped over several sections and we will go back and look at those in some detail. But I think for the purposes of our discussion this afternoon it would be helpful to have you respond to the gender equality question for the committee.

You have indicated that it was important in the light of the "distinct society" statement to make it quite clear that aboriginal groups and multicultural groups were not precluded in the interpretation of that clause and that the distinct society was not simply a society of French-speaking people whose interests were to be promoted.

We have, of course, had a good deal of testimony which has stated that, just as those items were put in for good measure and for greater certainty on that point, it would also have been not just useful but even necessary to include section 28 on gender equality, to make it quite clear that there would not be any repercussions for women in the interpretation of the "distinct society" clause and the affirmation of the French traditions in Quebec in terms of programs, resources and so on that would be devoted to that cause which might otherwise be diverted from programs on behalf of women and so on. You are familiar, I am sure, with the argument.

In connection with that, perhaps you would reflect for us, because it is a related issue, on whether section 16 does not indeed set up a hierarchy of rights and whether, if one is going to go that route, it would not be better to simply reaffirm the charter as a whole at that point in the accord in relationship to the entire accord, rather than to isolate some part of the rights that are in the accord in the charter itself.

**Hon. Mr. Scott:** Let me begin by saying, and it is not special pleading, that in 1982 I did not hesitate to promptly support the women of Canada when they complained that gender equality had been left out of the negotiations that were then proceeding. I would not hesitate to say so now if I thought there was any risk to gender equality in what is proposed in the Meech Lake accord.

I understand very much the concerns. Women have worked enormously hard in Canada to achieve under our Constitution what exists in almost no constitution in the world, certainly not

in the Constitution of the United States: a recognition of gender equality. We have to assess very carefully whether the concerns are warranted in constitutional terms.

The first thing to observe is this: what connection is there between the distinctiveness of Quebec society and gender equality? Because if there is no nexus between them the principles will not compete, and it has to be the competition of those principles that will lead, if anything will, to the reduction of the equality principle. So to what extent is there a nexus between the distinctiveness of Quebec and gender equality? In terms of that, what was the purpose of section 16?

First, the reading of the whole document makes perfectly plain, if there was any doubt about it, that the distinctiveness of Quebec is a linguistic or a cultural phenomenon. In gender terms, there is nothing distinctive about Quebec. The distinctiveness of Quebec—it is recited and is historical fact—is linguistic and cultural.

In that context, one asks, "Well, now, are there other cultural or linguistic groups who may feel that the distinct society provides a nexus with their concern?" And there obviously are: aboriginal groups and multicultural groups for whom language and cultural sense is a value. That is why section 16 exists.

How is the accord going to work in fact? It seems to me that the issue about which women are concerned will arise, first, when Quebec enacts a law that discriminates against women for the purposes of the sections in the charter, because if there is no discrimination in the act the charter does not come into play at all. So the first requirement of this notional Quebec law will be that it discriminates on a gender basis. If it does not, the charter does not apply now.

If it discriminates on a gender basis, it will fall unless it is saved by section 1 and the "distinct society" provision, and the courts are grappling with the kinds of collective decisions that may be justified even though they may involve discrimination of one kind or another.

The test of section 1 is: "What is justifiable in a free and democratic society?" When the courts find a law discriminatory on its face coming from Quebec, they will ask if, notwithstanding the discrimination, it is justifiable in a free and democratic society. What do they do now? They say there are, in a free and democratic society, a wide number of considerations which they may take into account in sustaining a collective law even though it discriminates.

Last week, the Supreme Court of Canada decided that the desirability of road safety under section 1 of the charter was sufficient to justify, to permit, a discriminatory act. So, under section 1, a wide variety of things can be taken into account in justifying an enactment. I presume that in the case of a law in Quebec, efforts will be made, as under the present regime before Meech Lake, to advance that the law is necessary on the ground of public safety, road safety or what have you.

### 1630

There are two more steps in this process. The first step is that the courts have already been taking into account the distinctiveness of Quebec in that very process. The language case in the Quebec Court of Appeal and I think one other case said that in a free and democratic society, in determining whether a discriminatory law can be justified by section 1, by the test of what is appropriate in a free and democratic society, we will take into account the distinctiveness of Quebec, its linguistic and cultural distinctiveness. That is all Meech Lake does. In effect, it incorporates what at least the Quebec Court of Appeal, which is a federally appointed court by the way, has been doing, historically, since the charter was passed.

How does that play with respect to the very legitimate concerns of women? First, if we are going to grapple with this in intellectual terms, you have to predicate a Quebec law that will discriminate on a gender basis against women. You then have to ask, "Would that law be sustained as reasonable and justified in a free and democratic society under section 1?" That is the process we now undergo. In looking at that, you shall consider, among all the other factors including road safety and public health and so on, the distinctiveness of Quebec.

The difficulty I have, even having read Ms. Eberts's submission, is that I have never yet seen an argument which is founded even on a hypothetical case that makes that point. The single example that Ms. Eberts gave, and she gave it very tentatively for reasons I understand and respect, it seems to me does not present a charter issue at all. The difficulty I have, and I must be candid about it, is that while I understand the concerns and I think we must grapple with them, I do not believe there is any nexus between the distinct society and gender. There is nothing, as far as I can see, and I cannot imagine a court concluding that the distinctiveness of Quebec was connected in any way with gender, any more than it is connected in any way with whether you



are handicapped, or black or white—black or white may be a stronger case.

Then, of course, many people say: "If you are so certain, why don't you just include it in section 16? Why not just put it beyond doubt and add a reference to the gender equality provisions?" It seems to me that if you do that, you create the sense that the distinctiveness of Quebec may extend beyond linguistic and cultural concerns, because you have implied, by adding gender, that the distinctiveness of Quebec is in some fashion connected with gender; otherwise, that would not be necessary. If you start on that route, why do you not add in the handicapped and a wide variety of other groups?

Frankly, I must say that I have the same difficulty in making a nexus between the distinctiveness in Quebec society and gender as I have between making the connection or nexus between the distinct society and the handicapped. It is the same issue, and I believe at the end of the day that there is no risk to gender equality in this accord. I am dependent, really, on the analysis of Professor Lederman and Professor Hogg and others for that view.

**Mr. Allen:** Towards the end of your answer, you really began to get into the other dimension of the argument, which has been supported by no less a person than Raj Anand, Ontario human rights commissioner, that apart from the "distinct society" question—and I certainly follow you on that line of argument—on the nexus issue, one would have to predicate a Quebec that somehow became somewhat distinctively antifemale, or distinctively antihandicapped, or distinctively anti-seniors, in order to sort of make those connections. That is a problem; it is something that I do not anticipate, even though equality in Quebec is not totally accomplished, any more than it is in Ontario, for women.

With respect to having isolated two groups that frequently can be subject to discrimination—namely, the ethnic community and the aboriginal community—in section 16, it is argued that in constitutional terms one does elevate those discriminatory items from a whole series of items that are in section 15 of the charter in particular and elsewhere in our Constitution and therefore say that somehow those specific groups merit more attention than the others in any of our discriminatory lists. That, by implication of course, again excludes women.

That raises the question of the appropriateness, in your view, of the argument of hierarchy of rights and whether that is established by section 16; and secondly, the question of

whether, as your final remarks seem to indicate, if one were going to take the "for greater certainty" approach, there could be some wisdom in simply writing in a reaffirmation of the charter at that point in the accord rather than getting into singling out any groups in particular.

**Hon. Mr. Scott:** Let me deal with the second point first. The purpose of the "distinct society" clause is to entitle our courts to take into account, and indeed to require them, where appropriate, at least to examine the distinct nature of Quebec society as a ground. Let us get one point out of the way. The court is not going to say, "It's a distinct society; therefore, a law we would have knocked out is sustained." The courts have made perfectly clear—and there is no reason it should change; certainly nothing in the courts will require to be changed—that when you have a discriminatory law, before you can justify it under section 1 or section 1 plus the "distinct society," they are going to impose a very strict reading of that vindicating language. In other words, it is not every law that is going to be saved under section 1, with or without "distinct society."

The courts have been very clear that a discriminatory law can only be validated when the limitation is very strictly applied. They have required that the law, to be vindicated when it discriminates, must meet an important public objective—not any old law: an important public objective. They go on to say that before you can vindicate a law that has an important public objective, the burden is on the government to demonstrate that the law is reasonable, that it impairs the right of the citizen in the most modest and proportional way possible and that it is carefully designed to respond to a social problem.

We begin with the proposition that when a Legislature passes a discriminatory law, the burden on a government to sustain it under section 1 is a very, very heavy burden, in which a wide variety of factors may be considered. One of them in respect of Quebec laws, if the accord is passed, will be the distinctness of Quebec society. That is a ground that the Quebec Court of Appeal has already used. The proof of the relevance of that to sustain the law will require it to meet the same very stringent and complex tests that the court has used in all the charter cases. Therefore, I think the context in which this is taking place has to be clearly understood. We are not here giving some kind of *laissez-faire* to any Quebec law. We are simply saying that this factor, in addition to road safety, public health

and a variety of other matters, is relevant if its relevance is proved and demonstrated and if indeed the impairment of a right is required by the problem and the response to the problem is proportionate.

**1640**

To turn to the first question: the hierarchy of rights is an American constitutional principle. There is nothing wrong with that, but as far as I am aware, it has never been a principle applied in Canada. That is not to say it will not be; that is simply to say that it has to be carefully examined before we start asserting that hierarchy of rights has come to Canada.

I tried to deal with that at page 27 of the brief. Let me just read that, because in my view what I say is quite critical.

We do not believe that section 16 creates a hierarchy of rights. I think the difficulty is a misconception about what the charter provisions, sections 25 and 27, in fact do. The two charter provisions that are referred to by, I think Professor MacKinnon in the hierarchy of rights case argument, are sections 25 and 27. They do not guarantee substantive rights. They are provisions which are intended to aid in the interpretation of those rights which are guaranteed by the charter.

Section 25 of the charter does not grant aboriginal rights. It is not a grant of power. Rather, it guarantees that the rest of the charter will not be construed so as to abrogate or derogate from any aboriginal or treaty rights.

Section 16 of the accord ensures that this constitutional position, now in place, remains unaffected by anything done at Meech Lake. Aboriginal and treaty rights are recognized and affirmed in section 35 of the Constitution Act, which is not part of the charter.

Frankly, I have some difficulty understanding how the hierarchy of rights theory will be constructed, bearing in mind the way rights are created with respect to our people and the meaning of that section.

**Mr. Allen:** OK. I will stand down my other question for the moment. Thank you, Mr. Chairman, for your indulgence.

**Mr. Chairman:** You will get a chance to get back later. Mr. Eves and then Mr. Cordiano.

**Mr. Eves:** I want to thank the Attorney General for appearing here today. I think a lot of the viewpoints put forward in his brief are going to be very helpful to the committee in its deliberations.

I must say that I understand where you are coming from with respect to section 16. I wanted to deal with section 16. My colleague Dr. Allen has dealt with many of the points that I wanted to raise.

We have had witnesses, as I am sure you are aware, appearing before this committee, suggesting everything from eliminating section 16 in its entirety to amending section 16 to protect all rights under the charter. We have had people appearing before the committee suggesting that in their opinion indeed it does create a hierarchy of rights. You have just addressed that point.

I understand your argument with respect to the purpose of section 16 and what it does and the difference between interpretative rights and substantive rights.

I guess the only point I want to express is that there is a significant and fairly well informed body of opinion on the other side of the issue. That includes such well-recognized and notable individuals as Morris Manning and Professor Beverley Baines. I guess their point to the committee is that in their opinion there is at least some ambiguity as to how section 16 can be interpreted and whether these are in fact substantive rights or interpretative rights, and there is at least some ambiguity as to whether or not in fact it creates a hierarchy of rights.

Their very simple question to this committee—and I put it to you—is, having regard to all the above, why not try to clarify that ambiguity either through amendment, or if that is not possible through a court reference with respect to section 16?

**Hon. Mr. Scott:** First of all, you do not have to take my judgement and weigh it against the judgement of others. I do not say how you are going to do that. I simply say that a judgement has to be made.

It is very attractive to say, "Well, why don't we clarify it?" But clarifying it presumes there is a problem that can be identified, the sting or impact of which you want to remove. If there is no problem, of what should clarification consist?

You may say: "That is very simple. We will just clarify that nothing affects gender equality." If you were to say, for example, that nothing in "distinct society" affected gender equality, you would, I think, be beginning to give a larger concept to "distinct society" than it is entitled to have, because you would have written into your Constitution an exclusion.

It seems to me the judges would say: "We thought we knew what 'distinct society' meant. It meant linguistic and cultural values that are



represented in Canada. The governments of Canada obviously thought it meant something broader, bigger and more important than that, because they told us it did not affect gender rights." Then you are building in an expansion of the "distinct society" provision by inviting the court to say, "Look, the governments must have intended that this phrase meant more, standing alone, than anybody ever thought."

So there is a risk—and I think it is a significant risk—to responding in the very attractive way you suggest. Are you then going to build in an exclusion for the handicapped? Are you then going to build in an exclusion for a wide variety of other groups who may be, at one time or another, the victims of discrimination? When you start building in where there is no impact, you are creating a sense that the notion is larger than I believe it to be and you are engaged in an exercise which almost knows no limit. That, it seems to me, is the danger implicit in what looks like a very simple solution.

The second question you asked me is, "Why do we not refer it to the court?" The problem is, what would you refer to the court? The issue that is going to be presented is going to be an issue that is presented when a Quebec law is passed which discriminates against women for the purposes of section 15 and then has to be justified under section 1, add on "distinct society." The court, in the balancing act between a discriminatory act against women and the collective interests of the community which will justify discriminatory laws under section 1, has to have something before it.

We just had a test of the Reduce Impaired Driving Everywhere program law, which is discriminatory but which was justified under section 1. The court had before it the very law, had the public policy that gave support to the law and had examples of how that law discriminated, and made the balancing act.

How would you do that now when we do not have any such law and indeed only one—and I believe an essentially incorrect—example of such a possible law has ever been given, of which I am aware at least, in this committee? The court would immediately say, "You are asking us whether gender equality will be damaged by a Quebec law, but you are not telling us what that law is, you are not telling us what the social purpose of that law is, you are not giving us any detail on which we can act."

I am not opposed to court references, but I simply say that this is not one that is likely to be productive of any result.

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**Mr. Eves:** I suppose Professor Baines would respond to that—and I hope I am not taking her words out of context, or more important out of their intent—by saying that she firmly believes that all rights under the Charter of Rights should not be derogated or abrogated by the "distinct society" clause, period, no matter whose they are. I know you have pointed out cases in your brief where that has not been the case. I understand what you are saying. How would you respond to that?

**Hon. Mr. Scott:** The way I would respond is this. All of us understand that legislatures and parliaments are going to pass laws that discriminate against Canadians. The Reduce Impaired Driving Everywhere program is a law that discriminates against Canadians. Almost every law we pass discriminates in the sense that it prefers one group over another. An affirmative action law would be, on its face, a discriminatory law, except it is protecting. Almost all laws have that characteristic of discrimination. If all discrimination were absolutely prohibited, there would be almost no lawmaking.

Section 1 contemplates that laws which are discriminatory on their face can be saved if they are laws that are demonstrated to be reasonable and justifiable in a free and democratic society, with all the restrictions that the court has built into the proof of that notion. That is why the RIDE program law is saved.

What we know is that the courts already permit the interests of road safety to justify a discriminatory law, permit the interests of public health to justify a discriminatory law and may permit—it has not been decided yet in the Supreme Court of Canada—the interests of public employment of young people to justify a law that makes retirement mandatory. There is an unexhausted catalogue of considerations that may justify a discriminatory act.

With all those things in the mix, why should one of those things not be the distinctiveness of Quebec, which is one of the fundamental facts of our life as Canadians? If we are going to put road safety in there, and it is in there, why should we not put the distinctiveness of Quebec in there? In a way, it can be said it is already in there, because the Quebec Court of Appeal, federally appointed judges, has already been considering it.

Frankly, I am not troubled by that difficulty, because I do not see the distinctiveness of Quebec society as having any gender nexus or connection at all.

**Mr. Eves:** I will leave that subject of section 16. Suffice it to say that people such as the two individuals I have mentioned, among others, feel—especially Mr. Manning, I suppose, does feel strongly—that section 16 could very well be perceived by a court as creating a hierarchy of rights. You and Mr. Manning have not always agreed on all subjects, as we know, and from time to time have entered into some very interesting legal discussions, shall we say, in the Supreme Court of Canada.

**Hon. Mr. Scott:** I do not recall that.

**Mr. Eves:** You do not recall the Morgentaler decision in the Supreme Court.

**Hon. Mr. Scott:** I did not argue that case.

**Mr. Chairman:** Can I throw in a supplementary before we get away from the charter? I just want to be clear on one of the points you are making.

In the testimony that the chief commissioner for the Ontario Human Rights Commission gave, he argued that there should be, in effect, an override for the charter in terms of the accord.

If I understand correctly what you are saying and what appears in your brief at pages 33 and 34 when you talk about the Bill 30 case, is that you see that when the court is looking at whatever the issue is, it will have in front of it a number of things, one of which is the “distinct society” clause, one of which is the charter, and that one really cannot say or one ought not to say that the charter automatically overrides the “distinct society.” Is that a fair statement, that one has to look at those as they are there as part of the Constitution?

In referring to the Bill 30 case, you note that the Bill 30 case establishes that the charter cannot invalidate the “distinct society” clause. Do you see a problem then, that if one had said or if one did say that the charter, in whatever fashion, cannot be limited by the “distinct society” clause, that other things might get lost through that?

**Hon. Mr. Scott:** I must confess that I do not see the argument that is made there at all. The reality is that the Constitution of Canada contains many provisions that might be judged to be discriminatory. The provision that gives Prince Edward Island more representation per population than Ontario is a discriminatory provision which under the American Constitution might be at risk. There are a number of other provisions of the same type, such as the provision that gives more senators to certain provinces than others. The provision that judges of a superior court retire at 75 is a discriminatory provision.

All that the Bill 30 case says, as I read it—and that is a case where I did rather better than Mr. Manning, if we are looking for an example where we actually confronted each other—is that it focuses on the fact that there was a specific power in the Constitution, section 93, that said that a province hereafter can establish a dissentient school system. I am summarizing. Mr. Allen has memorized it. But that is essentially what it said.

What the courts had to say is, “Can we use the charter to strike out a part of our Constitution?” The answer to that, if I may respectfully say so, was obvious. You cannot use the charter to strike down the representation-by-population rights of Prince Edward Island or to strike down the division of powers or to strike down an explicit grant of power in the Constitution which may be discriminatory. In that sense, the charter has never been available to strike out parts of the Constitution. That is point one. That is all the Bill 30 case said, that the explicit power in the Constitution that allowed a province to create a dissentient school system could not be written out of the Constitution by virtue of the charter.

The court did not have to say, but I think clearly would have said, that the way you exercise that power certainly can be examined in light of the charter. If the Roman Catholics of Ontario, in encouraging the government to establish a dissentient school system, to use the sort of exotic language of the Constitution, said, “We want it for boys only,” then the charter comes in to determine whether that power granted by the Constitution to discriminate, to create a dissentient school system, is used otherwise in an appropriate way in light of the charter. That is all Bill 30 said. There was nothing else to be decided in the Bill 30 case but that question, and it was decided.

Now you come to the situation in front of us. You begin with the proposition that the charter cannot be used to write out parts of our Constitution. If what is meant by the so-called charter override is that the charter should be used to write out parts of our Constitution, I simply say that it is a provision of such extraordinary novelty that it boggles the mind. We are not surely going to write out the rights of Prince Edward Island by reference to the charter because they are discriminatory when that was the constitutional compromise that was made. If that is what “override” means, it seems to me that it is a proposition of extraordinary complexity and difficulty and very radical.



Apart from that, what are we left with? We are left simply with the direction under the accord that when you are confronted by a discriminatory law coming from the province of Quebec and the courts have to judge whether it can be saved under section 1, together with all the things you can consider under section 1 in deciding whether the collective will is to have play over the discriminatory law, you must also add, for what it is worth—in some cases it may be worth nothing—the distinctive nature of Quebec society. That is the way I see it.

**Mr. Allen:** The other troubling case that has been put before us has been the question of aboriginal rights and the status of Indian women who have married outside the reserve who do not retain the same rights as males who have married outside the reserve. Is that in fact a case where aboriginal treaty rights established and recognized under the Constitution are in conflict in a serious and flagrant way with the gender equality provisions of the charter?

What is the nature of that encounter between those two elements? It would seem to follow from the argument that the gender question is inherent in the aboriginal culture and treaty rights embedded there that at some point the charter—at the point of the gender equality question—is going to come into conflict. How would that get resolved?

**Hon. Mr. Scott:** I think that problem was resolved in 1982 because subsection 35(4), which preserves existing aboriginal and treaty rights—

**Mr. Allen:** This is in the charter?

**Hon. Mr. Scott:** It is in the charter, subsection 35(4). I am sorry. If you have the binder, it is in the Constitution Act, 1982, and it provides, "Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

To respond to your problem, you have to try to envisage a Quebec law of the type that might discriminate. The example given by one of the commentators is: Let us take a law to advance the interests of immigrants which provided that male immigrants should get an advantage or female immigrants should suffer from some disadvantage; let us assume a Quebec law on that ground.

It seems to me that law would be a discriminatory law now and would fail or might fail to survive by virtue of section 1. I do not see how the presence of "distinct society" would save that kind of law, which was otherwise going to be defeated, because there is nothing in the distinct-

ness. How would you argue that the distinctness of Quebec society permitted or required some discrimination between the sexes? There simply would be no nexus between those two points.

**Mr. Allen:** I guess if the very future of Quebec society were threatened by, let us say, massive failure of reproduction—and of course the birth rate in Quebec is very low—there might be some legislation passed that would try to give to some women who adopted one kind of lifestyle, namely, family and reproductive lifestyle, a greater precedence in some respect and some affirmation as against others who did not. That could be argued to be a means of preserving, protecting and promoting the distinctiveness of Quebec society by virtue of the fact that the existence of the society itself was a precondition of the distinctiveness.

**Hon. Mr. Scott:** But let us actually follow that through. The classic kind of law, I presume, would be a provincial law that gave a benefit to women who had children which was denied to women who did not have children, a family allowance law.

I am not saying that the family allowance law may not be attacked on the basis of gender equality, although I have a hard time believing that such an attack would succeed. I simply say that it could hardly be saved by the distinctiveness of Quebec society. The distinctiveness of Quebec society is not founded on an inequality between the sexes. The distinctiveness of Quebec society is founded by the advancement of a common language and perhaps certain cultural characteristics, law predominantly: the Napoleonic Code is essentially the distinct feature of Quebec society, apart from language.

So I do not see how that law would be dealt with any differently after the accord than it would be dealt with before the accord. That is the problem. If there is a problem here, and we have spent a lot of time on this, we have to be able to identify what the problem is before we attempt to solve it. To solve a problem that you have not identified, for reasons I tried to give earlier, may create more problems than were there in the first place, because it will expand the concept of a distinct society.

**Mr. Eves:** There are a couple of other issues I would like to pursue. One is the agenda items for the next constitutional round. Several aboriginal groups have appeared before us, quite incensed I might say, that issues such as Senate reform and fisheries appear, anyway on the face of the next agenda for the next round, to have been given more prominence by the 11 first ministers than

aboriginal rights and their pursuit of self-government.

First, would you agree with that? Second, they came up with a rather novel suggestion, at least we thought it was at the time, of introducing a companion resolution or amendment, as they called it, which would ensure that aboriginal rights would be put on the agenda for the next round but, at the same time, would not alter the wording of the current accord. Could I have your comments on both of those matters?

**Hon. Mr. Scott:** Let me say, as one who participated in the aboriginal constitutional conferences after we came in, in 1985, and who was very disappointed that it was not possible to make an amendment, notwithstanding I think pretty good effort on the part of the governments of Canada, Ontario, Manitoba and Nova Scotia, the failure of the western provinces apart from Manitoba to respond made that series of conferences a failure.

There was another reason that, in my opinion, may have contributed to its failure, and that was that Quebec was not there. The presence of Quebec supporting Manitoba, Nova Scotia and Ontario would not have made the difference numerically, but I cannot comfortably say that it might not have created a psychological difference that would have given greater priority to the exercise than it had. I would say to my aboriginal friends that I think at the moment the prospect of an aboriginal constitutional amendment is unhappily remote, because I have not yet seen any change in the attitude of the western provinces from the position they took last year. Without such a change, it is clear there can be no such amendment.

Second, I would say to them that the adhesion of Quebec, which has a large native population and which has some demonstrated record under the James Bay agreement of acknowledging self-government and beginning to grapple with those important issues, is the critical precondition to looking at the aboriginal question again. It would be pointless to look at the aboriginal question, I regret to say, without Quebec being an active participant in Constitution-making.

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I think what you have to say when you look at it realistically is that until there is a significant change in the constitutional view of the three most westerly provinces, an aboriginal amendment of the type our native associates want is unlikely, and that has not happened yet. Second, it cannot occur without the passage of the Meech Lake accord or something like it, because the

absence of Quebec will make it extremely difficult.

To deal with the second point you make, the companion resolution, if by companion resolution I understand a resolution expressing the sense of the committee about future constitutional initiatives, that is not designed to and will not impact on the Meech Lake proposals and will not be a fetter on Meech Lake in the sense that the approval of Meech Lake will occur but there will be a companion resolution.

**Mr. Eves:** Right.

**Hon. Mr. Scott:** If that is what companion resolution means, I leave that very much to the view of the committee to decide what it thinks its temper is and what the temper of the House is.

I take it that you would want to consider very carefully a companion resolution, on the other hand, that involves a constitutional amendment itself, because I know you are concerned about process. If you passed a constitutional resolution, you would in effect be imposing your process on the nine other provinces and the federal government, because until your resolution was considered and accepted or rejected by the other places, it would have no effect. It seems to me you would be uncomfortable, as we discuss process, in saying to the other provinces, "Well, it's this or nothing."

The first kind of companion resolution I understand, and I understand the committee's concern, but as far as our aboriginal people are concerned, getting a constitutional meeting is not the issue here. What is at issue is getting a change in political attitudes I referred to that will make it a meaningful meeting. The first change we need is—I will get in trouble if I say this—we need Quebec there. The second thing we need is some reflection in other provinces about the desirability of this process.

**Mr. Allen:** Or the federal government.

**Hon. Mr. Scott:** Well, to its credit, the government of Canada made some very progressive overtures, not sufficient to meet the native people's needs, but going some distance—

**Mr. Allen:** I was referring only to federal governments.

**Hon. Mr. Scott:** I think Manitoba, Nova Scotia, Ontario and the federal government showed movement on this question, but there were not enough of us.

Getting a meeting for the aboriginal people is not the exercise, it seems to me. The exercise is doing what we can to change the attitude of governments on that critical question.



**Mr. Eves:** I appreciate the points you have made and I thank the Attorney General for his comments on the same. I might just leave that point by saying that several aboriginal leaders I have talked to have indicated they can hardly expect to make progress if they are not even at the bargaining table.

With respect to the territories, we have had many delegations and witnesses who appeared before the committee with respect to everything from admission of new provinces to rights of individuals—or opportunity is a better way of putting it, I suppose—to serve in the Canadian Senate or on the Supreme Court of Canada.

Are you satisfied that the Meech Lake accord, the way it is currently drafted, provides sufficient opportunity for qualified individuals to serve either in the Senate or on the Supreme Court of Canada, comparing them to the opportunities of residents in provinces of Canada?

**Hon. Mr. Scott:** The nomination requirement with respect to the Supreme Court is that you be a member of the bar of a province for, I think, 10 years and that you be nominated by the province.

In my experience, it is not universal—though I may be wrong—that those who practise law in the territories are members of one or other of the provincial bars. The reason for that is that the Court of Appeal for the Northwest Territories is in fact the Court of Appeal of Alberta, and the Court of Appeal for the Yukon is in fact the Court of Appeal of British Columbia. So I believe the members of the bars of the two territories are treated as members of the bar of those provinces and could be nominated in that sense. If they were nominated, even if they were not members of the bar, I cannot imagine the Prime Minister and his cabinet taking that technical objection.

With respect to the concern that the territories have made about their admission as provinces, I think their concern here is really less about the Meech Lake accord than it is about the amendments of 1982. Until 1982, the federal government had the unrestricted right to create provinces on its own, without asking anybody's permission, and that, I believe, is how Alberta and Saskatchewan came into Confederation. No other provinces were asked if we wanted Saskatchewan and Alberta to be created; the federal government had that exclusive power. It gave up that power in 1982, and it fell under the seven-out-of-10 rule that was then in place. What has happened is that that part of the rule now requires unanimity.

But the real complaint of the territories, it seems to me—and it may be a very legitimate

one—does not focus on Meech Lake; it focuses on the 1982 amendments. If it is their proposition that the 1982 amendments were wrong and that provinces should be created exclusively by the federal government or by some other mechanism, that is a matter that can be dealt with in the constitutional rejuvenation process. But that, if I may put it this way, while no doubt very pressing for my friends in the territories, is Meech Lake by a side wind. It is really 1982 that created the difficulty for them.

**Mr. Eves:** With respect to that point, as I heard the delegations that attended from the Yukon and the Northwest Territories before the committee, although you are quite accurate in saying that they were not at all pleased with the 1982 constitutional amendment, they said at least that was far superior to what was being proposed with unanimous agreement in the Meech Lake accord. I believe that is their position.

**Hon. Mr. Scott:** I think a realistic examination of who would be likely to support the adhesion of new provinces in the Northwest Territories and the Yukon and who would be likely to oppose those will reveal that, in terms of being admitted as provinces, there is no practical difference between 1982—there is obviously a numerical difference, but for those who are likely to stand in the way of provincial status being given to those territories, there is no practical difference in the two situations. I am not going to name names, but—

**Mr. Eves:** I am not so sure I agree, especially with respect to one of the territories, namely the Yukon.

**Hon. Mr. Scott:** I know something of the views of the provinces and the federal government on those questions, or their historic views, and I can count, so I am not sure the result of 1982 is any different. But their concern is a legitimate one, and it seems to me that, like a whole lot of legitimate constitutional concerns that we have had and that we will have for generations, it should take its place in the process.

The thing that concerns me—and the aboriginal conference made this perfectly plain—is that you cannot carry on a process that is meaningful in this country without Quebec.

**Mr. Eves:** The comment you made near the summation of your remarks about the importance of the vote that members of the Legislature will be taking on the Meech Lake accord I quite agree with. I and several others on the committee and elsewhere have stated, and several witnesses

have appeared before the committee have said, that they view amending one's Constitution as a very nonpartisan issue. We all have valid concerns and, I am convinced, sincere concerns, and we may differ as to what different legalities are or probabilities are of certain events; but the issue we are dealing with is a very fundamental issue to the future of Canada, not just Ontario.

Would you be in favour of a free vote on such an issue? That is, a vote not whipped, not according to party lines, but each individual member of the Legislature of Ontario voting according to his or her own conscience on this.

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**Hon. Mr. Scott:** That is up to the Premier to decide. I cannot give you any views about that at all. It seems to me that if we value political parties in the process, one of the things about political parties is that they should stand for things. It is very difficult to know how you are going to cast your vote if parties have free votes all the time. A party has to stand for something.

**Mr. Breagh:** Oh, the minister is on dangerous ground here.

**Hon. Mr. Scott:** Let me be perfectly clear. I do not know how other members feel, but when I was elected in 1987, Meech Lake was on the national agenda. It was being discussed. It perhaps did not attract as much attention as some other issues, but certainly in my riding there were a lot of people who were concerned about it, who asked questions about it, and they all knew where I stood. I told them. I hope some of them liked it, but I am quite content to understand that some did not. But a significant majority of the people voted for me, notwithstanding my views.

So I do not feel that I am in any difficulty about voting on this issue. Now, whether we should have a free vote is up to the Premier. I do not think free votes are part of the tradition around here except on major moral questions, and I do not regard this as a moral question. This is a question of how we, as politicians in the best sense, see the shaping and development of our country. If we are opposed to its developing in this way, then the party that has that view should say so.

It is a bad week to spring to the defence of John Turner—or maybe it is exactly the right week—

**Mr. Breagh:** It is a good week. There is a short lineup there.

**Hon. Mr. Scott:** —but I think John Turner, whatever else may be said about him, has stood for something on this issue. Now, it has cost, and that is all right. Politicians should be expected to

pay a cost if they do things that their constituents do not like, and we do pay a cost. But I hope it is the policy of our party to support the Meech Lake accord, and if it is the policy of our party, then the party votes for it.

**Mr. Eves:** Well, OK. I disagree.

**Hon. Mr. Scott:** And I believe the other parties will form a policy, if they have not already, with respect to Meech Lake and support that policy.

**Mr. Eves:** I disagree that the issue of amending one's Constitution should be an issue of partisan politics. It is not only politicians at stake here. More important, there are individual Canadians out there, actual constituents, who maybe have a viewpoint.

**Hon. Mr. Scott:** If I can give you some examples. The great Canadian politicians who faced issues of constitutionalism and unity, like Macdonald, Laurier, Mackenzie King and Pearson, all made these questions of party policy. You can see example after example. They stood for something. The country was to be constitutionally governed in a certain way, and they stood for it. You can make whatever criticisms you want about Mackenzie King, but on issues of national unity and issues of constitutionalism the party, for better or for worse, closed ranks, and people left it if they were not prepared to accept the essential distinctiveness of Canadian society, when there were very tough times to deal with, like the Second World War, conscription and issues of that type.

**Mr. Eves:** I think this whole discussion that we have just had brings us to the last point I want to cover, which is the point of process and future constitutional amendment and process. What advice or direction would you have, or suggestion may you have, to the committee with respect to future process in constitutional reform?

**Hon. Mr. Scott:** I think we are all searching for a process that is better in this area or in any other area. I do not know what the solution is. I am certain the committee, by its very process today, is making some contribution to this and, by its report, will be able to make another one.

It seems to me that there are a number of things we have to contemplate. We have to contemplate, first of all, that governments will be authorized to act in terms of constitutional amendments. Constitutional amendments are not going to be made by inchoate groups sort of wandering around and coalescing. Governments have to take a lead and, at some stage in the process, governments which are to negotiate



with other governments have to make choices. So that is the first thing.

The second thing is that legislatures, it seems to me, should play a part in that exercise—before the event if it is possible, after the event certainly—and the public should be engaged in the exercise. Now, how you run those three things together when you end up meeting with 10 other governments I am not quite certain. I just do not know the answer to that question. I think the three values are the ones that I have described, but, on the other hand, we do not want to create a process that will immobilize us, because the particular genius of our country is that we have been able to respond to the necessity for change.

Does anybody remember—and I do not say this to you, Mr. Eves—the enormous resentment that some political parties had to the repatriation of the Canadian Constitution in the form which it took? I am not criticizing that. I am simply saying that if consensus-making was the order of the day, Mr. Trudeau might not have had some of the achievements that he has now had. Executive federalism was very large in 1981 and 1982.

But I would be glad of your views. You are the experts. You have been through this part of the process. You can tell us how we can make the whole thing better.

**Mr. Eves:** I think if there is anything that everybody on this committee has learned, it is that nobody is an expert with respect to this particular process.

**Hon. Mr. Scott:** I thought I would just flatter you.

**Mr. Eves:** It did not work.

With respect to process, I can safely say, I think, that for the overwhelming majority of witnesses who have had a criticism of the process up to now, it has been that the public has not had a meaningful way of having any input before the fact. We have had several witnesses indicate to us that, in their opinion, the only province that really had an opportunity for input, for example between the end of the Meech Lake draft and the Langevin document, was Quebec. The other provinces could have but chose not to avail themselves of that opportunity.

Now, I appreciate that the time frame was very short, but with respect to future constitutional process, I can just tell you that the witnesses who have appeared before this committee feel very frustrated and they feel as if they are dealing with this matter after the fact.

**Hon. Mr. Scott:** It is a world of flux. All our views are changing about the process and,

indeed, about the accord. Professor Whyte, who was here this morning—I do not know whether he owned up to it—between Langevin and Meech Lake wrote a newspaper article that said the Meech Lake accord was the most modest assertion of Quebec's position in several generations and should promptly be accepted.

Upon reflection, he has changed his view, and I understand that. There is nothing wrong with that. If I may say so, I have become more committed to the accord than I think I probably was at an earlier stage, because of my sense of where we are in this country. All our views on process are going to change, but the key thing is that we should not develop a process that will immobilize us. On the other hand, we should not develop a process that will exclude the public and the legislators. How that is going to be done, I do not know.

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**Mr. Eves:** Thank you.

**Mr. Chairman:** Mr. Cordiano, you have been very patient. The floor is yours.

**Mr. Cordiano:** I just want to thank the Attorney General and his staff for coming here today and presenting this very interesting brief, which I am sure will help each and every one of the members on the committee reach some conclusions about the testimony we have heard. Certainly I, for one, will read it very soon and probably delight in reading it. After the last three months of a lot of testimony and a lot of reading to do on this, it will put things in some perspective.

Let me touch on one theme, because there are some of my colleagues who do want to ask other questions and you have touched on a number of other matters in the accord. I want to concentrate on what I think is possibly a very difficult area, and perhaps we do not have a clear view on this committee of how to proceed with that. But certainly we heard from many different cultural and ethnic groups who came before the committee. You have read some of the testimony and you have seen what some of their views and points are leading to.

The various groups that have come before the committee have pointedly made remarks that section 16 was included in the accord as perhaps an afterthought. Perhaps it was just thrown in to placate, if you will, or to satisfy those people and various groups that would see the accord as a difficult area for them. It is my view that section 16 is essential to the accord, and given the fact that we are talking about culture and the distinct nature or character of Quebec, that makes it

essential to have section 16 in the accord. But, of course, these groups are very frustrated and have come before us. I think the source of their frustration lies with the 1982 Constitution. Would you agree with me on that?

**Hon. Mr. Scott:** Yes. I have read some people who have given evidence before the committee who have said we do not need section 16; it is sort of an afterthought and we could do without it. I do not think we could do without it. I think it is critical, because there is a nexus between cultural interests and the distinct society, as there is a nexus between language and the distinct society. As I tried to show, there is not a nexus between gender or the handicapped and the distinct society. That is why you need section 16 and why I think it is wrong to refer to it as an afterthought.

What does section 16 preserve? It preserves—

**Mr. Cordiano:** Section 27 of the charter.

**Hon. Mr. Scott:**—section 27 of the charter. Section 27 is simply an interpretation section. Some multicultural groups may say: "It gives us no rights. It simply requires other matters to be interpreted in the light of our heritage." In that sense, I think what many of them are saying to us is: "Look, we want firmer charter rights than we have. We want a better section 27 than we have."

Without passing on whether that is likely or not, it again seems to me to reflect the fact that many people who are analysing the accord are looking at it and saying, "Look, this may be fine for Quebec, but it does not do what I want it to do." The territories are really complaining about the 1982 changes when they say they cannot become provinces. I think multicultural groups are complaining about the 1982 determination and are sad and disappointed that it was not resolved at Meech Lake. But this is a process.

Let me tell you, having been through the aboriginal exercise, there is no point in trying to amend anything if you do not have Quebec at the table. I exaggerate, but the prospect of achieving the percentages that are required under the old Constitution is gone if you do not have Quebec in the process. That is why I think everybody decided, not that this was to be the last constitutional round ever held—it was contemplated that it was to be the first of a series—but that the first had to be one that brought a critical player on to the scene or we would never get any other constitutional changes.

So I say to my aboriginal friends who confronted me with this, and it is the same answer you can make to other groups: "Look, this is the precondition, the essential precondition, to beginning to analyse the changes in the

charter or the Constitution that you people think are appropriate."

**Mr. Cordiano:** I think it is important to point out that culture is a very essential aspect of any society, but certainly in Canada. When various ethnic groups point to a frustration and try to articulate that frustration in terms of what their aspirations are, they can only point to culture as one of the main features of Canadian identity for them.

Having said that, we all recognize that multiculturalism is something all Canadians adhere to in the positive sense of culture and that diversity is essential; in fact, we like to have a country which is pluralistic in many ways. But where language is concerned, we do have two linguistic realities. Everyone accepts that, and it works very well; it has worked very well to this point.

Do you think that some of the frustration, some of the difficulties that perhaps various groups feel about culture and about just what multiculturalism means to each and every one of us, because it encompasses all Canadians, can be brought to the constitutional bargaining table for them to put forward their assertions about what should be constitutionalized? Then, with all due respect to most people who have come before this committee, we get into a very difficult area, because it is not clear what we mean by that, and I think we have to clarify it.

**Hon. Mr. Scott:** It is a very difficult area, and I have nothing to say about it except that I think the prospect of any constitutional amendments, and I guess I am affected by the aboriginal experience, without the adhesion of Quebec is so remote as to be written off. This is the essential precondition. I am frankly disheartened when people say, "Look, we have an agenda that follows 1982, too, and you should have put it in this round."

I understand their anxiety to do it, but it seemed to me that this was the orderly way. It may not be the end, but until the adhesion of Quebec and its presence at constitutional conferences is achieved, we are not going to get any other constitutional revision in the country. I would hope that if the Meech Lake accord is adopted, we can then move on to other agendas.

The thing that frightens me more than anything else is not the assertion that this amendment is imperfect, but that if we cannot do it now—it is a unique historical event—what is before us? What is before us is probably another generation of constitutional preoccupation at the very time in our national life when we are going to be the most



stressed from international competition, that, whether we like it or not, we seem to be going into a free trade world, when we have to be fully occupied with other items on the agenda, and we will begin this internal constitutionalism that occupied us for so long over the last two decades, preoccupied with these issues, to no avail.

I do not know what the historians have told you, but I cannot think of any historian's evidence I read where any historian failed to concede, even Ramsay Cook, that this was the most modest proposal ever made. He does not like it, but he does not deny it is the most modest proposal ever made. So if we reject it, and maybe it will be rejected, where does it leave us? It leaves us inviting Quebec to make a more modest proposal still, or a different proposal which may be judged to be more modest, especially if it deals with distinct society or shared-cost programs, and it leaves us with the business of trying to obtain consensus, not only among people but among governments; and I envisage a decade just as before.

**1740**

The last constitutional amendment we obtained in the country we obtained by excluding a government and saying, "We're not going to deal with your items now," and that government was Quebec.

They went away and then came back and asked: "Will you deal with them now? You put in gender equality in 1982, you put in aboriginal rights in 1982, you put in multicultural rights. You dealt with all these other concerns. You said you weren't going to deal with us and our concerns and you sent us away. Now it is 1988. Will you deal with us now? And here are the things, not new things, things we have historically always been concerned about and things which in their present formulation have been advanced by federal governments and provincial governments over the last 20 years. Will you do it now?"

I think if the answer is, "No, we will not do it now," because it is not perfect or because we want to do something else for some other concerned group, we expose ourselves to—and it may be right to do it—a national preoccupation over the next decade or so that will distract our attention from a lot of matters that are very important.

**Mr. Cordiano:** This is my final point. One of the things that this committee will probably do, looking forward, is recommend a number of items for the agenda at future constitutional meetings, so responding to your point, I think it is crucial for us to look at those things. All of us

have pondered and posed those things to each other, and I think we will probably be writing that into our report.

**Mr. Breagh:** I have just a couple of things that I would like to pursue with you a bit. It is pretty apparent for those of us who sat through the hearings that a proposal to say, "We'll get you next time," or "We will resolve this problem of yours the next time," does not sit well with people who are unsure of what that means. What is the next time? What is the process? I think, in part, the committee does have to respond to that. It has to establish to people: "You do not just have to take anybody's word for it. Here is the process. Here is how your concerns will be met."

I had a quick look through your brief and I did not see much in the way of outlining what that might be. I appreciate your response that none of us really knows what that process is going to be, but somehow I feel an obligation, as a member of the committee, to solve a problem that probably was created by the joint committee.

The joint committee responded to a lot of these groups by simply saying, "You're wrong." They did not like that a whole lot, and the joint committee, I suppose, in hindsight probably would prefer at this point in time not to say that. The Senate committee certainly did not say that and went out of its way to try to accommodate them.

Is it your view that we proceed no matter what? I want to caution you that I feel this obligation, that in some way whether we choose to move amendments or not is not the critical question; the question is people have raised really legitimate concerns with us. If I were to generalize them, I would say that it really comes to a focal point around the Charter of Rights and what is the impact between this agreement and the previous agreement. Somebody has to address that.

What is your view on the committee's responsibilities to respond to all of these concerns that have been brought forward? I did not hear anybody say, "We don't care about Quebec." Most of the people who appeared before us went out of their way to say, "The inclusion of Quebec into this agreement is important. They must be at the table and we accept that." So there were countless numbers of groups who were mad as hell about this agreement, but they were not angry against Quebec. How do we respond to that?

**Hon. Mr. Scott:** The women's interest, as I understand it, is slightly different, but I think the interest of the groups that you are talking about basically is, "Look, you are amending this

Constitution, and we have a problem with the 1982 Constitution that you have not dealt with yet."

**Mr. Breaugh:** Yes.

**Hon. Mr. Scott:** That is the aboriginal case, the multicultural case. I believe it is the territories case, apart from the Supreme Court—well, even with the Supreme Court. They are complaining that they did not get in 1982 what they thought they should get. That is a legitimate concern, and the committee has every right to respond and will respond to it by analysing it or assigning to it whatever priority it thinks it should have. Certainly the government, and undoubtedly the Legislature, is anxious to hear what you have to say on that subject.

I think the taxing question for me is, with respect to the groups who feel very vigorously that 1982 did not get them what they needed or what was appropriate for their problems whether the failure to get it now should impede this; that is the issue, it seems to me.

All right, there are a number of people who did not get what they wanted out of 1982. The aboriginal people are one group, the multicultural community is another group and Quebec is another group. Is the fact that all those problems were not wrapped up at the same time fatal to this accord? I would have thought that the answer to that is no. One of the problems outstanding from 1982 can now be put to rest. It is interesting that the solution of this particular problem, I believe, will make the solution of other outstanding problems easier.

I must tell you frankly—as I was saying, I think, before you came in; perhaps after—that I understand the desire of aboriginal people to return to the constitutional table again, even with all the angst and preoccupation that it involved for them. I understand their anxiety to do that, and I hope it all works out. To do it without this being done, it seems to me, is idle. It seems to me you do not say: "Well, we did not serve all the people. Therefore we should reject this accord until we do," particularly when this very accord is going to make it easier, I believe, in the long run, not harder, to serve other interests.

I cannot predict, but Quebec would have been at the aboriginal constitutional table and Quebec's tradition in dealing with aboriginal people—the James Bay agreement, the first major self-government project in Canadian history for aboriginal people—I think would have fortified the interests that want to support the aboriginal constitutional claim.

So I expect the committee to say what it thinks of the future.

**Mr. Breaugh:** Let me ask just one other question then. In many ways, this committee is positioned rather nicely to respond to groups who have raised concerns, to address itself to what might be the most vexing problems, to exercise, or propose that it exercise, some of the solutions that others have drafted and put before it.

The accord was essentially put together on the premise that there was an ability to deliver, on the part of the 10 premiers and the Prime Minister, an agreement. In other words, at the heart of the argument around Meech Lake is that these folks got together and said: "Well, this is the deal. I can go back home and deliver the deal. My Legislature will agree with this. There will be those who will dissent, there are those who are offside, obviously, but the vote will carry."

It is now apparent that at least two of the provinces cannot deliver, or at least the delivery is in question. What concerns me somewhat is what do we do. I suppose one option is for Ontario to simply say, "We agreed to the deal initially." It seems to be having trouble these days, but it is conceivable that this government could actually get a vote put and win the vote upstairs in the chamber. It has not had great success on that lately, but it is possible that it would carry.

**1750**

**Hon. Mr. Scott:** No; we have been very effective.

**Mr. Breaugh:** But even if we did, there are now two other provinces where that seems to be a very real political question. For example, can New Brunswick and Manitoba scuttle this arrangement by simply not dealing with the matter over the period of the agreement? It seems to me that that is possible. In the Manitoba situation, where there is a minority government, those who are less than courageous may be choosing that path: "If we do not want to fight on this, or if we are not clear which way the vote will go, we will use the time-honoured tradition of not putting it on the agenda." So we now have two players who, if they are not offside are sure straddling the blue line here.

What is your recommendation to the committee? Do we seize the opportunity to try to resolve the differences? And I am mindful that, for example, what Frank McKenna has said are his concerns are surely not unique. In a nutshell, that is—

**Hon. Mr. Scott:** Fish is not high on your list, I gather.



**Mr. Breaugh:** Well, no. But, you know, his version of the things he is concerned about reflects, I think, a kind of a one-page analysis of what the committee has heard over a rather lengthy period of time. It is not as clear what are the concerns of the Manitoba political parties around the accord, and whether you could address yourselves to them. Should we seize the opportunity now and try to put together a package that would, in fact, bring both of those provinces on side and would not take any of the current players in agreement with the accord offside; or should we just simply do what the Premier (Mr. Peterson) wants us to do and let somebody else take the heat for it?

**Hon. Mr. Scott:** I think it would be very dangerous for this committee to begin the brokerage exercise, because I presume if you are going to broker one way—that is, broker Manitoba and New Brunswick into the deal—you are also going to broker Quebec into the new deal that you have brokered to get Manitoba and New Brunswick on board. It seems to me that, for a legislative committee that is sort of an unwieldy exercise. It may provide a lot of travel, undoubtedly, but—

**Mr. Breaugh:** Be careful now. You and I have put together deals that were totally unprecedented and did cause some disruption to the normal flow of political power in one province.

**Hon. Mr. Scott:** Sure; yes, we did; but I think the last time we did that we agreed never to try to do it again.

**Mr. Breaugh:** That is what it says on the back of my watch.

**Hon. Mr. Scott:** You have still got the watch, have you?

**Mr. Breaugh:** I have it nailed to my wrist. I have been in your company too often.

**Hon. Mr. Scott:** First of all let me say that I think you misconceive what the government did when it made this deal. We did not promise that the Legislature of Ontario would vote for it. We did not control the Legislature of Ontario. We were in a minority government and this exercise was not mentioned in the agreement that you drafted for us to sign in 1985.

**Mr. Breaugh:** We could have had an opener.

**Hon. Mr. Scott:** So when the Premier signed and indicated his effort to support the accord, we did not control the Legislature of Ontario in a political sense. I was dispatched to come here and meet with the leader of the New Democratic Party and with the then leader of the Conservative Party, both of whom indicated their support

for this document. I mean, the document was not something we promised we would pass. We obtained support for it from the then leaders of both parties, in general terms and without any commitment to any detail, because we were between the Meech Lake exercise and the Langevin block exercise when these briefings took place. But we knew perfectly well, having got a draft agreement at Meech Lake, that we could not even say what the Legislature would do until we had spoken to the other two parties, which we did.

So the Premier's commitment was to do his best. Now as to what our roles should be, bearing in mind what is happening out there in the other provinces, I think our role should be to do what we think is in the interests of Canada right here. Let us let Albertans look after themselves on this issue and Manitobans look after themselves. Let us in Ontario do what we think is good for Canada, and let the chips fall where they may.

The brokerage exercise, it seems to me, is next to impossible to engage in through a legislative committee. I do not even know how you would begin; you might have some ideas. It is very dangerous, because once you broker one side then you have got to be able to broker the other or the whole thing falls apart, because part of your brokerage exercise is, of course, the implicit promise about what you are going to do if this brokering associate will do that. So if you get Manitoba on board, you only get Manitoba on board. If you imply to Manitoba that if it does this Ontario will do that, then when you go to Quebec and say if it does this you will do that, you may find you have promised to do two different things. It is a difficult exercise and I would not do it.

I think this is a critical moment for the Legislature and for Canada. When you look at the history of this country, almost from its beginning the worst moments in our national history in terms of unity have been when Quebec and Ontario were not able to stand side by side on a national issue. We have had those moments. We had them under Laurier and we had them under Mackenzie King. The moments in our history where the fracture of the country was most likely was when Ontario and Quebec, no doubt for perfectly sound reasons, took different positions on major issues of national policy.

My attitude to this, and I speak personally, is that if other provinces elect not to pass the resolution and it is therefore doomed to defeat in a constitutional sense, I hope Ontario none the less will pass it, so it can never be said at the end

of the day that when the country was about to be made whole, Ontario withheld its support and plunged us into a generation of constitutional difficulty. That is the way I would look at it personally.

**Mr. Breagh:** I appreciate your response. It struck me as somewhat ironic that most of the groups that appeared in front of this committee made that exact same argument. They argued that the Meech Lake accord in fact was a brokerage exercise and that this was its main flaw. People did not sit down and do what was best for the country: they did a deal. I think most of us on this committee now have no taste for a repeat performance of that.

**Hon. Mr. Scott:** I do not think that is true.

**Mr. Breagh:** That is certainly the perception.

**Hon. Mr. Scott:** The process may be a brokerage process, as inevitably any process is. It is brokerage. You sit down to discuss issues and try to find an accommodation. "Finding an accommodation" is another way to describe "a brokerage process." One is pejorative; the other is positive. They both describe the same process. "Finding an accommodation" is what we were doing here if you like it; "brokering the Constitution" is what we were doing if you do not like the result.

I think much more useful than looking at that is the question of whether this is in the national interest for the country. I am not slavish about it. I will not say it is a perfect document. I will not say that if I was made king for a day—

**Mr. Breagh:** God forbid.

**Hon. Mr. Scott:** God forbid, and rightly said.

**Mr. Breagh:** I am a little queasy about you being Attorney General for a day.

**Hon. Mr. Scott:** I concede that if my own particular vision were to be imposed on the rest of my subjects, I would be stating this in a completely different form. But I say if we are going to try to accommodate a series of competing visions, this, for our time, it seems to me is a sound document.

I met with a group of young people in my party who started talking to me about the vision they had for the country. To be frank, the vision they had they did not see in the Meech Lake arrangement. I said: "You are all at college or university. Have you ever talked to your opposite numbers in Quebec about their vision for the country? You're going to find you have two fundamentally different visions. One is highly centralist; the other is regional."

If it is going to be whose vision wins, we are not going to have the constitutional renewal we promised at the time of the referendum. If the question, on the other hand, is going to be not whose vision wins but how we can construct a constitutional space in which we allow politics to continue so we can solve our mutual problems, if that is going to be the question, I think you will come to something very like this accord. That is why I support it.

1800

**Mrs. Cunningham:** I have a brief question for the Attorney General. I very much appreciated listening to your talk this afternoon.

If, according to what you stated today, in fact we did not in 1982 deal with four or five other areas of concern—as a couple of examples aboriginal rights and gender equality rights—if we did not do it and it is still outstanding, if we are to deal now with Quebec in this particular form, would you then be saying to us—because you are recommending we do it and I understand all the problems with it and I share your concern about preoccupation—would we be saying as a committee that we feel the rights that were not dealt with, i.e. Quebec, are therefore more important than the rights of the aboriginal people or of women, of gender?

**Hon. Mr. Scott:** No.

**Mrs. Cunningham:** How do you answer the question?

**Hon. Mr. Scott:** I think the first thing is that we did deal with most of those things in 1982. We dealt with gender equality. Now, the women of Canada are perfectly entitled to say that the Canadian politicians of the day dealt with it at the end of the game and almost as a side issue, under very great pressure from the women of Canada. The women of Canada made the politicians deal with it in 1982. That is very much to the credit of the women of Canada, and a number of us here supported them. So gender equality is established as part of our Charter.

The aboriginal people got a process that is a constitutional renewal process which has been extinguished by time. That is what they got, and certainly the recognition of existing aboriginal and treaty rights; so they were served, though not fully served. The multicultural groups got, in section 27, an interpretative provision designed to allow other rights to be examined in light of their cultural interests.

I think the point to be made is that almost everybody at the constitutional amendment table got served in 1982, some not as well as they



would like to be and some not quite in the way they wanted to be, but they were all served except Quebec. Therefore, this so-called round was inevitable.

I think the answer you make to those people is that one group's rights are only more important than others if you have a vision of constitutionalism that you seek to impose on others. If you are a unitary government type, a centralist who believes, as some Americans did, that the federal system is bad, then obviously the rights of collectivities or associations may be less important than central government rights.

All these rights are equally important. What is critical about this round is that we are now in a position to serve one legitimate claimant that was not served in 1982. I believe that following that we will be able to provide service to other groups, like aboriginal groups, in the medium term, who were inadequately served, as they judge it, in 1982; and perhaps the territories.

**Mr. Chairman:** Thank you very much. You have been very good with your time. I think while we could probably go on, and we have said this with many of the witnesses—

**Hon. Mr. Scott:** You mean you do not mean it.

**Mr. Chairman:** We reach a point where we all perhaps become a bit brain dead.

As we conclude the public hearings part of our proceedings, and to pick up perhaps a bit on what Mr. Breaugh said, I would like to note that I think one of the things that has become very clear to the committee as we have gone through the last three or four months is how important this kind of process we have been involved in is, and that the kind of discussion that ensures that individuals and groups, in some way or other, are able to come forward and talk about what is good and what is bad, whatever their views might be in terms of the acceptance, ultimately, of whatever the constitutional change is, is very important.

It is not to say this was not important in 1982 or in the early 1970s or back in the 1960s, but I think we have become extremely aware of a consciousness out there about the importance of the Constitution, and I guess it would be fair to say in particular about the charter.

In some cases maybe there are too many expectations that are linked with the charter. Maybe no charter can do what everyone expects. None the less, as we have gone through these hearings we have realized that there is a community of interest out there that felt it had been cut off from the process. Hindsight is always easy, but I think we have moved into a

new era in constitution-making where we are most definitely going to have to grapple with finding some new ways of dealing with people's views and concerns.

In this committee's report, whatever its final recommendations are, it is going to be very critical that those who came before us can see in our report that we heard them and listened to them. It would be impossible for the committee to respond to every concern that has been raised, and I would hope not everyone is expecting that. None the less, having agreed to have the hearings, it is absolutely essential that our report be able to deal with concerns that were raised, while at the same time having to make, at times, some tough decisions in terms of whether we go this way or that way. I think your comments in that regard are most valid.

At the end, in speaking to the broader audience, for all of us this has been an incredible learning experience. As part of future processes that we will use for constitution-making, we need to have this kind of give and take and discussion. In that regard, we thank you very much for being here this afternoon and sharing your thoughts so frankly.

**Hon. Mr. Scott:** Just before you adjourn, Mr. Chairman, and without prolonging the matter, I would like to observe one thing. This matter came on the national and provincial agenda very shortly after we came into office in 1985. Since that time, there have been a number of people working in my ministry and in the Ministry of Intergovernmental Affairs, only two of whom are at the table but others are sitting in the room—you know who they are because they stayed so late—who have devoted untold hours and enormous effort to this exercise.

When I take them out for a beer they will tell me that I made the wrong answer to X and that I could have dealt with Breaugh a little better if I had said thus and so. I understand that; as a mouthpiece I had to give shape to the views of the government, which they, as public servants, may not always accept in detail.

I have been stunned by the enormous effort that these people, mostly young—I guess you do not live long in constitutional law—have put into this effort. To me, the really moving thing about it, and this to me is part of being an Ontarian, is that invariably the question they asked was, "What is good for Canada?" I enjoyed the experience.

**Mr. Chairman:** I think we have also got to know all of them over this period and enjoyed having them with us. They have been very helpful to members of the committee as well.

The committee adjourned at 6:09 p.m.

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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Offer, Steven (Mississauga North L)

**Also taking part:**

Cunningham, Dianne E. (London North PC)

**Clerk:** Deller, Deborah**Clerk pro tem:** Mellor, Lynn**Staff:**

Bedford, David, Research Officer, Legislative Research Service

**Witnesses:****From the Ukrainian Professional and Business Club of Toronto:**

Butsky, Victor V., Legal Counsel; with Blake, Cassels and Graydon

Wyslobicky, Dennis A., Legal Counsel; with Blake, Cassels and Graydon

**Individual Presentation:**

Whyte, Dr. John, Dean, Faculty of Law, Queen's University

**From the Ministry of the Attorney General:**

Scott, Hon. Ian G., Attorney General (St. George-St. David L)









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